

**SUBMISSION TO THE
DEPARTMENT OF LOCAL GOVERNMENT,
SPORT AND CULTURAL INDUSTRIES**

**LOCAL GOVERNMENT ACT 1995 REVIEW –
PHASE 1 CONSULTATION PAPER**

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1.0 Introduction

1.1 Introduction

This paper is the Public Sector Commission's submission to the Phase 1 consultation paper on the review of the *Local Government Act 1995* released by the Hon. David Templeman, Minister for Local Government on 8 November 2017. Phase 1 of the review considers the following matters:

- meeting community expectations of standards and performance
- transparency
- making more information available online
- red tape reduction.

1.2 Background of the Public Sector Commission

On 30 September 2008 the Premier announced the establishment of the Public Sector Commission (PSC) as an important first step in enhancing the independence, professionalism and integrity of Western Australia's public service, operating independently of the Department of the Premier and Cabinet. The role of the Chief Executive Officer (CEO) of that department, with the title of Public Sector Commissioner (Commissioner), was to:

- provide leadership to the public sector
- build the capacity of the public sector
- evaluate the performance of the public sector
- develop public sector management policies and practices
- drive public sector reform
- advance the diversity and accountability agenda.

By way of delegation, the Commissioner commenced performing all functions then administered by the Premier as Minister for Public Sector Management (except those relating to the employment of ministerial officers and exercising special inquiry powers). These included:

- overall public sector operational efficiency
- CEO employment (including disciplinary matters)
- SES management (including performance management)
- public service classification and appointment processes
- redeployment and voluntary severance arrangements
- remuneration setting for government boards and committees.

In addition, the Commissioner for Public Sector Standards continued in its independent role in the selection of public sector CEOs, and in establishing and monitoring compliance with public sector codes and standards of behaviour.

In 2009, the Government announced the merging of the roles of the Commissioner and the Commissioner for Public Sector Standards in order to remove an overlap of responsibility and legislative changes (Public Sector Reform Bill 2009) were introduced in Parliament to give this effect. The *Public Sector Reform Act 2010* (Reform Act) represented major reform of the public sector.

Since 2010, there have been a number of other legislative changes which have impacted on the functions of the PSC including:

- Changes to the *Corruption, Crime and Misconduct Act 2003* which came into effect in 2015 and resulted in the transfer of the oversight of minor misconduct and misconduct prevention and education roles from the Corruption and Crime Commission (CCC) to the PSC.
- The *Integrity (Lobbyists) Act 2016*, which formalised the arrangements for the Commissioner to administer the *Integrity (Lobbyists) Act 2016*, the Register of Lobbyists, and *Commissioner's Instruction No. 16 – Government contact with registrants and lobbyists*.

1.3 Role of the Public Sector Commission and Commissioner

The office has responsibility for arrangements under the:

- *Public Sector Management Act 1994* (PSM Act)
- *Public Interest Disclosure Act 2003* (PID Act)
- *Corruption, Crime and Misconduct Act 2003* (CCM Act)
- *Integrity (Lobbyists) Act 2016* (IL Act).

Additionally, the Office of the Director of Equal Opportunity in Public Employment (DEOPE) resides within the PSC and administers Part IX of the *Equal Opportunity Act 1984* (EO Act).

The Public Sector Commissioner:

- is the employer of public sector CEOs
- is responsible for the administration of the Senior Executive Service and the broader Public Service
- administers the redeployment and redundancy framework for the public sector
- has a primary role in the setting of remuneration for public sector boards and committees
- works closely with the Director of Equal Opportunity in Public Employment on workforce, diversity and equal opportunity in public employment.

- can be directed by the Premier to undertake the following activities:
 - conduct special inquiries
 - review the function, management or operations of a public sector body
 - machinery of government changes – when government bodies are created, abolished, split or combined.
- Under section 22 of the PSM Act, the Commissioner must act independently and operates free from any ministerial direction, other than in a very limited field of activities.

1.4 Public Sector Commission intersection with the local government sector

The PSC's role in relation to Local Government is at 3 levels:

1. Part IX of the *Equal Opportunity Act 1984* which requires public authorities to prepare and implement an Equal Employment Opportunity management plan and is performed by the Director of Equal Opportunity in Public Employment, a statutory officer within the PSC.
2. The *Public Interest Disclosure Act 2003* which outlines the Commissioner's role in monitoring compliance with the PID Act and to assist the public sector to comply with the PID Act.
3. The *Corruption, Crime and Misconduct Act 2003* which outlines the PSC's functions in relation to the oversight of minor misconduct by employees and misconduct prevention and education (both employees and elected officials).

Additionally, the Salaries and Allowances Tribunal which determines remuneration for local government elected members and CEOs in accordance with the *Salaries and Allowances Act 1975*, is also an affiliated body of the PSC as determined by the Treasurer in accordance with section 60(1)(b) of the *Financial Management Act 2006*.

2.0 Public Sector Commission comments on consultation paper

The PSC has elected to comment on the following sections of the consultation paper:

- Training
- The behaviour of elected members
- Local government administration
- Making it easier to move between state and local government
- Gifts.

For ease of reference, this submission provides information in the order of the consultation paper's contents.

While the comments contained in the PSC's submission relate to specific sections of the consultation paper, the PSC would also like to comment on the overall architecture and operation of the legislation going forward. The PSC encourages an approach to the legislation that favours principle over prescription and endeavours to be enabling rather than constraining. For example, by structuring the legislation in a way that enables the provision of Standards, Circulars and Instructions, the *Public Sector Management Act 1994* is considered flexible and adaptable over time. The PSC encourages adopting a similar approach to the revised Local Government Act.

2.1 Training

2.1.1 Competencies required to be an elected member

The PSC considers the current qualifications to nominate for elected member office as outlined in the Councillor position description (Appendix A) to be relevant and appropriate. While there is a need for elected members to have a broad level of understanding and some generic competencies, it is reasonable to consider that there will be specific additional skill sets that will be sought by specific local governments. This is because not all local governments offer the same services, or engage with the same stakeholders. However, such additional skill sets should not be prescribed pre-qualifications for elected members.

In addition to these competencies, elected members are also required to make decisions which have an ethical component. The conduct of elected members, their capacity to recognise and manage perceived, potential and actual conflicts of interest and their perceived ability to make decisions free from influence, affects the level of trust the public has in the integrity of the local government sector.

2.1.2 Mandatory training

The PSC considers that mandatory training would not diminish the democratic process, rather, it would build the capacity of elected members to better achieve outcomes for the community. Collectively, elected members have the ultimate decision making authority

and as such need to have the individual and collective skills to make decisions and take responsibility for decisions made on their behalf, in delivering goods and services to their communities and stakeholders.

The PSC considers that there is an opportunity for local governments to undertake and report mandatory training undertaken by their elected members. Other bodies such as the Department of Local Government, Sport and Cultural Industries (DLGSCI), the PSC, the WA Local Government Association (WALGA), Local Government Professionals Australia WA (LG Professionals) and private sector providers could also provide advice and assistance where required. Should a member be elected to a different council, it is considered that they would be required to undertake the training required by that local government.

The PSC is aware that in South Australia all local government elected members are required to attend mandatory training within 12 months of being elected, based on 4 modules:

- Introduction to local government
- Legal requirements
- Council and committee meetings
- Financial management and reporting.

In the State public sector, it is mandatory for all employees, including staff in ministerial offices, to complete accountable and ethical decision making (AEDM) training in accordance with *Commissioner's Instruction No.8 – Codes of conduct and integrity training*. Emphasising a connection between the Code of Conduct and ethical training is paramount to embedding integrity into day-to-day decision making. Ethics and integrity training tailored to the particular demands of the local government could be considered as a relevant module for elected members to undertake as mandatory training.

In relation to training for candidates, the PSC considers that sufficient information should be made available to allow candidates to understand the role of an elected member without requiring them to undertake mandatory preliminary training. To this end it is noted that many local governments already conduct information sessions for prospective candidates in conjunction with the Western Australian Electoral Commission and WALGA. In addition the DLGSCI produced a suite of Local Government Elections Fact Sheets for candidates in the lead up to the 2017 Elections.

PSC recommendations

- No changes be made to the current qualifications to nominate for elected member office.
- Local governments to undertake and report on mandatory training undertaken by their elected members (which would include coverage of ethics and integrity), with

other bodies providing advice and assistance where required. Mandatory training might be confined to new members in the first instance.

- Sufficient information be made available to candidates to allow them to understand the role of an elected member without requiring them to undertake mandatory preliminary training.

2.2 The behaviour of elected members

2.2.1 Codes of conduct and regulation of conduct

As not all local governments offer the same services, or interact with the same stakeholders, it is reasonable to consider that specific standards of behaviour and conduct may vary between local governments. While it is acknowledged a uniform code would reduce the burden on local governments by making codes easier to draft, the PSC considers that codes of conduct should allow for tailoring to mitigate the specific integrity risks of a particular local government.

The PSC's *Developing a code of conduct – guide for Local Government* acknowledges the Local Government (Rules of Conduct) Regulations 2007 as providing a useful basis for a code of conduct. The guide provides steps to enable a local government to consider their risks and to develop a code of conduct to reflect that.

Given that provisions and mechanisms for dealing with a breach of conduct differ between elected members and employees, the PSC considers that it may be suitable to have separate codes of conduct. This is consistent with the model applied in the State public sector where boards and committees are required to adhere to a separate code of conduct to that of their agency. It is considered that separate codes of conduct would enhance clarity around expectations of conduct and behaviour. To ensure codes of conduct remain relevant, contemporary, and reflect the expectations of the local government and the community, the PSC considers that arrangements should also provide for the regular review of codes of conduct.

It is also reasonable to consider there will be minimum standards of conduct and integrity that will be applicable across all local governments. It is the PSC's view that the legislation could set out these principle-based minimum standards of conduct and integrity to be complied with by elected members, committee members and employees. It is considered this would provide for some consistency and uniformity across the sector while still affording some discretion to local governments to tailor their individual codes of conduct.

This approach is similar to the model adopted in the State public sector where under the PSM Act, the Commissioner establishes a Code of Ethics, and in accordance with the *Commissioner's Instruction No. 8 – Codes of conduct and integrity training*, authorities must develop and implement a code of conduct consistent with the principles of the Code of Ethics.

Under the model suggested, the body which creates the code of conduct is empowered to enforce the provisions. It is the PSC's view that the CEO should not only develop, but also be able to enforce the code of conduct as it applies to employees, contractors and others under their control, with the council enforcing the code of conduct as it applies to the CEO, and the council itself. However such processes must embrace procedural fairness and natural justice.

The PSC's *Developing a code of conduct – guide for Local Government* states:

"A message or introduction from the chief executive officer and mayor or president would act as an endorsement of your code and communicate its importance as a governance tool that conveys integrity expectations. The message should encourage all members and employees to read and be familiar with their accountabilities under the code, and make use of the resources provided with it, if any."

Another approach that could be considered is the adoption of all types of codes of conduct as local law, to ensure community consultation and parliamentary oversight for statutory compliance and reasonableness. This would allow the application of limited penalties and sanctions.

Existing mechanisms to report and deal with unacceptable conduct and integrity include:

- Local Government Standards Panel (for minor breaches of the *Local Government (Rules of Conduct) Regulations 2007* by elected members)
- Public Sector Commission (for minor misconduct of employees)
- Corruption and Crime Commission (for serious misconduct of elected members/employees).
- State Administrative Tribunal (for certain types of misconduct by elected members)
- WA Police (for criminal offences).

It is the view of the PSC that the existing mechanisms available to the CEO in relation to the application of a code of conduct for employees are sufficient. In relation to the conduct of elected members, there is an opportunity to introduce some limited provisions for Councils or the DGLSCI to deal with conduct that fails to meet the threshold for consideration by the Local Government Standards Panel.

In relation to reporting serious misconduct of elected members, the experience of the PSC in exercising its minor misconduct function has revealed that CEOs feel highly vulnerable in circumstances where notification of serious misconduct under the CCM Act requires them to notify the CCC in relation to elected members and the mayor (their employer).

2.2.2 Elected member interests

The PSC considers that decisions made by councils should be made free from influence of elected members' personally held interests, whether financial or non-financial. In the case of elected members being or intending to become a member of a not-for-profit organisation, it is the PSC's view that circumstances may arise where an elected members' personally held interests could have the potential to, or be perceived to, influence their decisions. For example, where the not-for-profit organisation may be awarded grants, or where they may be assessed for compliance with local laws, the views and decisions of elected members may be called into question if relevant interests are not declared and managed appropriately.

Elected members have an obligation not to use their position or authority for personal gain or to cause detriment to others. It is considered there is a general ethical obligation for public officers (including elected members and local government employees) to avoid circumstances where their decisions could be influenced, or be perceived by the public as being influenced. A community's perception of how a local government makes their decisions can impact on its trust in the local government, and the wider sector.

An impartiality interest refers to an interest that could, or could reasonably be perceived to, adversely affect the impartiality of the person having the interest and includes an interest arising from kinship, friendship or membership of an association. While current impartiality provisions are seen to work reasonably well, the PSC considers that there is an opportunity to enhance their robustness. The PSC considers that impartiality interests could be handled in the same manner as financial interests in that:

- the interest must be disclosed, in advance and in writing
- the elected member must leave the room when the matter is discussed and is unable to vote on the matter unless permitted to do so by the meeting (in very limited circumstances) or the Minister.

Where an elected member holds an office in a community organisation active in the local government district, or has nominated for such an office, the PSC considers these interests should be handled in a similar manner.

However, some discretion must be applied where many or all of the elected members hold interests pertaining to a particular decision. In cases such as these, and where it is in the public interest for a decision to be made, appropriate principle based decision making must be applied.

PSC recommendations

- The legislation to set out the principle-based minimum standards of conduct and integrity to be complied with by elected members, committee members and employees, and to inform local government codes of conduct. Codes of conduct to allow for tailoring to mitigate the specific integrity risks of a particular local government.
- Separate codes of conduct to be developed for elected members and employees to enhance clarity and reflect the different mechanisms to deal with breaches of the code of conduct.
- Arrangements for the regular review of codes of conduct to ensure codes of conduct remain relevant, contemporary and reflect the expectations of the local government and the community.
- The CEO to develop and enforce the code of conduct as it applies to employees, contractors and others under their control. The CEO to adhere to the code of

conduct, with the Council responsible for enforcing the code of conduct as it applies to the CEO and themselves.

- Introduce some limited provisions for Councils or the DLGSCI to deal with conduct that fails to meet the threshold for consideration by the Local Government Standards Panel.
- Impartiality interests to be handled in the same manner as financial interests.

2.3 Local government administration

2.3.1 Recruitment and selection of local government CEOs

The PSC recognises the significant diversity of local governments in size (both population and area), location, community and infrastructure needs. In this manner, the PSC recognises that each local government requires the key attributes common to all CEOs, but also one that suits the local government at that time. The PSC also recognises that local government councils are the employer of the CEO but, like many public sector boards, Councils may require guidance by those with expertise relevant to attracting a field of suitable candidates and ensuring a fair and equitable recruitment process.

The PSC notes that currently the DLGSCI, LG Professionals and WALGA are actively involved in supporting best practice in CEO recruitment and it is recognised that these agencies hold significant expertise in this area. The DLGSCI have produced a comprehensive guide for local government titled, *Local Government Operational Guidelines Number 10: Appointing a CEO* and as a newly formed agency have an opportunity to further grow their involvement in actively supporting Local Government.

While the PSC has considerable experience in the administration of recruitment processes for offices of CEOs of WA Government agencies, it has had very limited involvement in the recruitment of Local Government CEOs as there is no legislative mandate that prescribes it. Given the Public Sector Commissioner is the employing authority of State Government CEOs under the PSM Act and as the PSM Act requires each Government agency (a Department or Senior Executive Service organisation) to have a CEO, the PSC is actively involved in the recruitment of these CEOs.

An overview of the standard elements of the PSC recruitment process is outlined at Appendix B, including the legislative requirements of the PSM Act. This overview identifies general principles, applicable across all PSM Act CEO positions, however each process is also tailored to the specific position and associated requirements. The PSC model forms a basis to approach Public Sector CEO recruitment. Given the diversity amongst Public Sector CEO roles, the PSC adopts a bespoke approach to the recruitment of CEOs. Factors such as geographical location, remuneration and highly specific expertise requirements impact on the breadth and depth of the applicant field necessitating a bespoke approach.

In relation to *Option 1 – Local governments to engage the services of the PSC to provide support and guidance to council during the selection of a CEO*, there are a number of considerations involved in expanding the remit of the PSC into this arena including:

- the limited legislative mandate for the PSC to be involved in local government processes with the exception of PSC's role in the oversight of minor misconduct of local government employees, including the CEO
- the potential to diminish the authority of the Council as the employer

- resource implications (both human and financial) given the number of local governments and the frequency of recruitment processes
- the actions and requirements to appoint a CEO under the *Local Government Act 1995* are significantly different to those prescribed under the PSM Act and may not necessarily support the wholesale application of the PSC model.

However, in terms of providing support in an advisory capacity, the PSC has a range of publically available information, including the *CEO Success Profile*, which local government and other agencies are able to access. This information could be used to inform guidance and best practice packages specifically for local government.

While the PSC model has largely resulted in a diverse field of high quality applicants, the PSC has not been immune from broader impacts affecting the attraction of candidates. The experience of the PSC is that it is more difficult to attract a field of applicants with the depth and breadth of relevant qualities to some positions as a consequence of location (regional and remote), perceived low remuneration and high cost of living and highly specialist fields requiring a narrow expertise. The involvement of the PSC in local government CEO processes will not mitigate the broader impacts of the contextual environment.

The sharing of recruitment pools, particularly in the regions, could be considered as a strategy for attracting a wider pool of candidates for CEO positions. This could include advertising a recruitment pool for a number of CEO positions in a particular region, or asking candidates if they would like their application considered for other CEO positions.

In regards to remuneration negotiations, for the purposes of the *Salary and Allowances Act 1975* (SAT Act), at this time remuneration includes salary, allowances, fees, emoluments, and benefits (whether money or not). In determining the salary for CEOs, the Salary and Allowances Tribunal considers the entire remuneration package that the officer will receive and the location in which they are based. While the Commissioner is the Statutory Adviser for public sector CEOs under the SAT Act, the PSC has a relatively constrained position when it comes to the contract negotiations for CEOs employed under the PSM Act.

2.3.2 Performance review of local government CEOs

The PSC notes that Option 1 of the consultation paper suggests that the role of the PSC could be expanded to participate in local government CEO performance reviews.

The PSC considers that DLGSCI, as the Department principally assisting the Minister for Local Government is best placed to assist in local government CEO performance reviews, with the PSC providing advice and support to the DLGSCI where required on issues relevant to its role and jurisdiction.

Consideration of the PSC involvement includes:

- the limited legislative mandate for the PSC to be involved in local government processes with the exception of the PSC's role in the oversight of minor misconduct of local government employees, including the CEO
- the potential to diminish the authority of the Council as the employer
- resource implications (both human and financial) given the number of local governments.

As not all local governments offer the same services, or interact with the same stakeholders, it is reasonable to consider that performance criteria for CEOs will vary between local governments. The PSC considers that performance agreements should allow tailoring to address specific performance requirements of the CEO.

To inform the Council's assessment, it may be useful to provide the option for Councils to access data including community feedback and metrics relevant to their own priorities. At the very least a CEO's performance should be aligned to the ongoing review and implementation of the various plans that constitute the Strategic Planning Framework, and the annual budget.

In the State public sector, the PSC supports the identification and assessment of key priorities, targets, and assessments that should be agreed to by the CEO and responsible authorities. A performance agreement template is prepared by the PSC each year for Departments, SES organisations and State Training Providers (STPs). The template can be modified to best suit each CEO's needs, however, sector-wide initiatives are mandatory. Local Governments and other agencies are able to access this template via the PSC website.

In the State public sector, the performance agreement period currently runs according to the financial calendar (1 July – 30 June), with the exception of STPs, which run on a calendar year (1 January – 31 December). Performance assessments are conducted annually at the conclusion of the performance period. Appendix C outlines the performance agreement process undertaken by the PSC on an annual basis.

While the PSC considers that ongoing and clear communication about performance expectations and feedback is vital to maintaining optimal performance, the PSC considers performance review on an annual basis (at a minimum), is appropriate given the Budget cycle and the need for remuneration review.

Before progressing any further reform of the framework, the PSC is cognizant of the recommendations arising from the Service Priority Review that relate to the CEO performance agreement process, including the incorporation of shared KPIs and associated performance-based pay. While it is anticipated the PSC's attention and resources will focus on implementing these changes, this could assist local government in practice improvement.

2.3.3 Public expectations of staff performance

The principles under section 5.40. of the *Local Government Act 1995*, guide local governments in respect to the employment of their employees. These principles are considered similar to the human resource management principles set out in section 8 of the *Public Sector Management Act 1994*. The PSC considers that these principles are sufficiently robust to guide better practice in recruitment.

The consultation paper refers to *Commissioner's Instruction No 2 – Filling a Public Sector Vacancy* which sets out the requirements public sector agencies must adhere to when filling a vacancy in the WA public sector. A recent review of the recruitment performance of state government agencies, conducted by Ernst and Young on behalf of the PSC, found two themes that may warrant consideration in determining whether greater oversight is required in local government selection and recruitment:

1. Risk aversion: mitigating the risk of a breach of the Employment Standard is driving behaviours and processes, sometimes at the expense of good outcomes. The state government's human resource management standards regime has not been shown to lead to many breaches, or change in recruitment practice.
2. Silo effect: the sector would benefit from better knowledge sharing to avoid duplication and promote better sector-wide outcomes.

The PSC considers local government may benefit from enhanced knowledge and information sharing across local governments as a mechanism for improving the robustness of local government selection and recruitment practices. Best practice advice and assistance, and greater effort in knowledge sharing between local governments may be an effective approach to improving the robustness of recruitment and selection practices, rather than implementing an additional layer of oversight. The PSC recognises the important role played by professional associations and considers that the DLGSCI is also well placed to provide this type of support.

In regards to the oversight function, Part 8 of the *Local Government Act 1995* provides a basis for scrutinising the affairs of local governments and the holding of inquiries into performance and operations. This appears to provide extensive powers that are commensurate to those available to the Public Sector Commissioner for reviewing performance and operations of public sector bodies.

In relation to adopting particular criteria to exclude a person from holding a local government role, the PSC notes that it is likely the selection criteria for one type of position/role/function will vary significantly from the selection criteria of another role, and so too will the criteria used to exclude candidates. For example, criteria for a grader driver will differ to that for a CEO.

The following PSC reports may provide further guidance in relation to this:

- *More than a matter of trust – an examination of integrity checking controls in recruitment and employee induction processes*

- *Integrity checking in misconduct oversight areas – evaluation report.*

While the PSC considers that integrity controls can reduce the risk of fraudulent and corrupt behaviour, it also acknowledges that implementing sector-wide or organisation-wide recruitment exclusions can potentially impact on the pool of talent that applies for local government positions (for example, excluding all candidates with criminal convictions). Instead, the onus should be on candidates to disclose, and for the local government to decide whether that disclosure would impact on the candidate undertaking the role in which they applied. This could extend to candidates who have previously been employed in another local government and who have been found to have engaged in misconduct or disciplinary processes. In these cases, there is risk of reputational damage for local governments where candidates are appointed even though their previous misconduct history is disclosed.

PSC recommendations

- The DLGSCI, as the department principally assisting the Minister for Local Government to assist in the recruitment, selection and performance reviews of local government CEOs, with the PSC providing advice and support to the DLGSCI where required on issues relevant to its role and jurisdiction.
- CEO performance agreements to allow tailoring to address specific performance requirements of the CEO.
- Maintain provisions requiring CEO performance reviews to be undertaken on an annual basis (at a minimum).
- Explore options for knowledge sharing between local governments and best practice advice and assistance from the DLGSCI as an effective approach to improving the robustness of recruitment and selection practices, rather than implementing an additional layer of oversight.
- Onus should be on candidates to disclose, and for the local government to decide whether that disclosure would impact on the candidate undertaking the role in which they applied.

2.4 State and local government mobility

Recommendation 12 of *Working together, One Public Sector delivering for WA - the Service Priority Review Report* recognises the need for mobility to realise a contemporary workforce that is capable and flexible. This need was voiced by stakeholders who noted that existing frameworks impede the positive outcomes of more motivated and engaged employees that may be achieved through greater ease in mobility.

The practice of moving and transferring between the state government and the local government sector, as summarised by the discussion paper appears to be ad hoc and based on custom and practice, and historical agreement, rather than any established policy or process prescribed by legislation. Current provisions relating to mobility include:

- Section 66 of the PSM Act enables public service officers to be seconded to employers outside the public sector, where an employing authority considers it to be in the public interest to do so and the officer consents. State public service officers can therefore be seconded to local governments, regional local governments and their respective councils under this provision.
- State public service currently recognises the prior service of an officer who, immediately prior to being employed in the WA public service, was employed in the service of the Commonwealth of Australia, any other State Government and the Australian Defence Force for long service purposes, as specified by the *Circular to Departments and Authorities – Recognition of Prior Service for the Purposes of Calculating Long Service Leave*.

The PSC notes the current Review of the State industrial relations system will consider whether local government employers and employees in WA should be regulated by the State industrial relations system. Of the total 148 local government employers in WA, 131 operate under the Federal industrial relations system and 17 are governed by the State system. A majority of local governments also have enterprise agreements in force.¹

The PSC considers there are potential benefits associated with improving mobility between state and local governments. Greater ease of mobility could potentially strengthen the PSC's integrity promotion and misconduct prevention work, through the embedding of its employees through secondment or transfer opportunities. This experience would also provide the PSC with a better understanding of the local government context and different integrity risks.

Alleviating structural barriers by enabling State and local government employees to carry over any recognition of service and leave between State and local government should be a consideration. The PSC considers that any measures (legislative or otherwise) to facilitate such recognition should however be considered alongside a range of actions aimed at greater cross-sector interaction and collaboration, and should ensure that the

¹ WALGA interim submission to the Review of the State Industrial Relations System, 2017.

benefits and entitlements employees receive during a placement are no less than what they receive in their substantive role. Initiatives such as cross-sector exchange programs may achieve the benefits sought without requiring legislative change.

The lack of guidance on the recognition of employee entitlements between the sectors is only one facet of the problem around mobility. The PSC considers that cultural and logistical barriers also need to be addressed to encourage existing employees to seek out experiences and opportunities in other sectors. Whether legislative and policy change would be more effective than the bespoke operation of custom and practice on a case by case basis will depend on the current rate of movement between the sectors.

Cross sector exchange and mobility opportunities can also provide a greater appreciation of the distinctive operating environments of each sector and the unique way each contributes to the community. This potential benefit has the ability to breakdown the perception-based and cultural barriers that limit mobility in the first place. Research recognises this transfer and movement of general and specialised knowledge and diverse perspectives within and between sectors and industries is a significant benefit of mobility, described as 'knowledge diffusion'.²

PSC recommendations

- Consider initiatives that promote cross-sector collaboration to improve mobility.
- Consider alleviating structural barriers to enable State and local government employees to carry over any recognition of service and leave between State and local government. However, any measure to facilitate such recognition should ensure that the benefits and entitlements employees receive during a placement are no less than what they receive in their substantive role.
- Consider cultural and logistical barriers that also need to be addressed to encourage existing employees to seek out experiences and opportunities in other sectors.

² A. Mitchell Franco and D. Filson, Spin-outs: knowledge diffusion through employee mobility. The Rand Journal of Economics;2006;37(4); p. 841.

2.5 Gifts

In consideration of the proposed framework, the PSC agrees there is merit in each local government setting its own guidelines for the receipt of gifts by elected members and employees, and that these guidelines reflect the specific integrity risks of the local government. The Integrity Coordinating Group's *Gifts, benefits and hospitality: A guide to good practice* includes information and tips for developing effective policy.

The PSC considers that the proposed framework for disclosing gifts does not take into account a business case or cultural requirement for accepting gifts, it focuses only on the dollar value. It is the view of the PSC that the intent of the person or organisation offering the gift is equally, if not more significant than the monetary value of the gift. The PSC considers that individuals should exercise judgement when deciding whether to accept or decline a gift based on accountable decision making principles. The Integrity Coordinating Group's *Gifts, benefits and hospitality: A guide to good practice* includes information on deciding whether to accept or decline a gift. Further, to enhance transparency and accountability, it is suggested that gift disclosures include what is proposed to be done with the gift.

The PSC is also concerned that the inclusion of sponsored travel under the same framework as 'gifts' could potentially lead to some integrity risks being overlooked. For example, a conflict of interest may arise where the public officer in receipt of the sponsored travel may also be a decision maker (or provide advice where delegated authority is in place) in a matter that the business or organisation may have before the Council.

By using a dollar amount as the decision making 'trigger' point, the framework does not prompt the public officer to consider the integrity risks or conflicts of interest the acceptance of the gift could give rise to. At the same time, the PSC contends that there is nothing significant which would differentiate a gift worth \$499, which would be permitted, from one worth \$500, which would be prohibited. While understanding the \$500 threshold is intended to benchmark with other jurisdictions, the PSC notes that this amount could be viewed excessive.

As above, the intent of the person or organisation offering the gift can often pose a greater integrity risk than the value of the gift itself. Further, the PSC considers that specifying a dollar value may encourage a practice of undervaluing a gift to fit the policy.

Community attitudes around some job groups accepting gifts should also be considered. For example, officers who exercise delegated authorities or make decisions around procurement, tenders and/or high value contracts could be perceived as being vulnerable to or influenced by accepting gifts. Implementing mechanisms to manage these perceived integrity risks should be considered.

The PSC considers that the receipt of cash and/or vouchers should be prohibited due to perceptions of criminal conduct under the *Criminal Code* s.82 - Bribery of a public officer. Further, tickets to events sponsored by local governments are not to be considered as

'free tickets'. Rather, being part of a sponsorship arrangement, they are to be handled the same as any purchase made with public funds. The PSC's reports *Acquisition and use of hospitality resources by Healthway – Investigation report* and *Ticket use for sponsored or financially supported events* provide some recommendations around ticket use that could be considered.

The PSC recognises that gifts with no connection to the business activities of the Local Government (i.e. the donor has no business before Council and is not likely to in the foreseeable future) could be exempt from disclosure. For example, gifts of a personal nature or for personal consumption (e.g. wedding gifts, birthday gifts etc.). However, reasonable judgement should be exercised in determining whether a gift should be disclosed and where there may be doubt, the PSC suggests disclosure.

A gift received from a person/organisation, who is a constituent or has business before the Council, or is likely to in the foreseeable future, establishes an actual, potential and/or perceived conflict of interest for the public officer with respect to impartial execution of functions, whether given as a personal gift or a corporate gift. The PSC considers that a personal gift from an individual not in any way connected to the role of the public officer and where there is no (or negligible) prospect of any future connection, should not require declaration because there is no risk of a future or perceived conflict of interest.

Where a gift is received in the context of cultural protocol or related to gifts of historical significance to the local government community, it is reasonable to consider that there may not be a requirement for a declaration of a 'gift' to an individual. Rather, the PSC considers that these would be received by a relevant officer on behalf of the authority as donations or bequests and retained by the local government.

PSC recommendations

- Individuals to exercise judgement when deciding whether to accept or decline a gift based on accountable decision making principles. The intent of the person or organisation offering the gift is often more significant than the monetary value.
- The inclusion of sponsored travel under the same framework as 'gifts' could potentially lead to certain integrity risks being overlooked.
- Prohibition of the receipt of cash and/or vouchers due to perceptions of criminal conduct under the *Criminal Code* s.82 - Bribery of a public officer.
- Tickets to events sponsored by a local government should be handled in the same manner as any purchase made with public funds.
- Gifts with no connection to the business activities of the local government to be exempt from disclosure. This includes personal gifts from individuals not in any way connected to the role of the public officer and where there is no (or negligible) prospect of any future connection.

3.0 Appendices

APPENDIX A – COUNCILLOR POSITION DESCRIPTION

Councillor position description

Role as prescribed by the <i>Local Government Act 1995</i>	<ul style="list-style-type: none"> • represent the interests of electors, ratepayers and residents of the district • provide leadership and guidance to the community district • facilitate communication between the community and the council • participate in the local government decision making process at council and committee meetings • perform such other functions as are given to councillor by the <i>Local Government Act 1995</i> or any other written law
Accountabilities, as prescribed by the <i>Local Government Act 1995</i>	<ul style="list-style-type: none"> • an understanding of the role and structure of local government as prescribed by the <i>Local Government Act 1995</i> • an understanding of the quasi-judicial town planning role of local government, as prescribed by the <i>Planning and Development Act 2005</i> • an understanding of Integrated Strategic Planning – the strategic plans for the future of local government, the processes involved and the strategic role of a councillor • an understanding of the process of managing the Chief Executive Officer's performance • ability to read and understand financial statements and reports • a basic understanding of legal processes
Governance and ethical standards	<ul style="list-style-type: none"> • an understanding of the 'separation of powers' between councillors and the administration (the difference between governing and managing) • an understanding of meeting process, including Standing Orders • an appreciation for policy development processes • an awareness of risk management strategies • an understanding of the accountability framework prescribed by the <i>Local Government Act 1995</i> and the <i>Corruption and Crime Act 2003</i>, and other legislation
Values, characteristics and commitment to the role	<ul style="list-style-type: none"> • the ability to communicate, debate and actively participate in meetings; ability to enhance discussion and assist discussions to reach closure; ability to disagree, without being disagreeable • the ability to develop and maintain effective working relationships and to manage interpersonal conflicts • ability to exercise independent judgements

APPENDIX B – OVERVIEW OF PSC RECRUITMENT PROCESS FOR CEOS

Requirements under the PSM Act

The Public Sector Commissioner is currently the employer of 46 CEOs and pursuant to s. 45 of the PSM Act is responsible for their employment arrangements and any disciplinary actions required if they are found to be in breach of the accountability framework. If a vacancy or impending vacancy in the office of CEO exists, and the Commissioner chooses not to fill it via other options available under the PSM Act, section 45(3) of the PSM Act requires the Commissioner to undertake to fill the vacancy or impending vacancy.

The PSM Act requires the Commissioner to:

- Invite the Premier, and if the Premier is not the responsible authority or Minister, the responsible Minister and the responsible authority to inform the Commissioner of any matters that they wish the Commissioner to take into account in recommending a person for appointment.
- Notify (advertise) the vacancy in such manner the Commissioner thinks sufficient to enable suitably qualified persons to apply for the vacant office.
- Examine the applicants.

As per the PSM Act where an office of CEO is vacant or a vacancy is impending, the Commissioner will consult with the responsible Minister regarding the initiation of a recruitment and selection process. Following support from the relevant Minister, the PSC will commence a formal recruitment and selection process.

A number of components constitute the recruitment process and these are identified below and expanded upon in the following sections. Following support to commence the process the PSC will undertake the following:

- Issue a Request for Quote to engage an executive recruitment consultant
- Prepare a Role Description form and advertisement in consultation with relevant parties
- Identify potential selection panel members and convene the panel to examine applicant's claims
- Provide ongoing support and monitoring and advice to the selection panel

Request for Quote

The PSC almost always engages the services of a specialist recruitment agency to assist in the administration of the recruitment process. Specialist recruitment agencies add significant value to the process through their in-depth knowledge of the local, domestic and international job market across specific industries. Where an executive search has been identified as necessary, recruitment consultant's networking capacity and ability to identify and engage with passive job seekers can assist in attracting a

broader field of applicants. The engagement of recruitment consultants is subject to a targeted competitive request for tender process.

The costs of the recruitment consultant, in addition to any other costs associated with the recruitment process are billed back to the relevant agency.

Role description and advertisement

The PSC will prepare a draft Role Description and the advertisement for the vacant office. The Role Description and the advertisement are sent to the relevant Minister and other relevant authority (where applicable) to ensure the priorities of the role are appropriately captured. This provides the Minister/relevant authority with the opportunity to advise of matters they wish to be taken into consideration in the process and the documentation amended to reflect these. It is critical that the skills, expertise and qualifications considered necessary to successfully discharge the responsibilities of the CEO of the particular agency have been crystallised in order to include in the recruitment documentation and for the panel to examine the applicants with reference to these qualities.

Vacant CEO offices are usually advertised at a minimum on the WA Government Jobs Board and in the weekend *West Australian*. Additionally it may be advertised in the Friday edition of the *Australian Financial Review* and industry publications.

Selection Panel

A selection panel is convened to assist the Commissioner in examining the applicants, usually via a formal interview. In appointing a selection panel, care is taken to ensure diversity of experiences across panel members with a representative gender balance to support the evaluation of applicant claims. Research is undertaken to identify government, industry and community members with relevant knowledge and expertise as potential members prior to consultation with the responsible Minister and responsible authority. Selection panels generally comprise a mix of the following:

- A current public sector CEO/Director General; and
- The relevant Board Chair (where applicable)
- An expert in the field/industry representative; or
- An external peer from another jurisdiction, or
- Any other representative deemed appropriate.

Prior to commencing the selection process, the Commissioner briefs the selection panel. Care is also taken to ensure sufficient independence, impartiality and confidentiality, and that any perceived or actual conflicts of interest are disclosed and managed.

The selection panel will provide a report to the Commissioner regarding each applicant's suitability for appointment to assist him in his deliberations and ultimately in making a recommendation to the Governor for appointment. Prior to the Commissioner making

any recommendation regarding an applicant's suitability for appointment referee checks, qualification verification and any other integrity checks deemed necessary will be undertaken either by the recruitment consultant or PSC staff.

Recommendation

In making a recommendation regarding a person suitable for appointment the Commissioner may under the PSM Act, seek advice from such sources as the Commissioner considers relevant and/or invite other persons as the commissioner thinks fit to assist him to decide on a person suitable for appointment

The Commissioner considers all relevant assessment material and information obtained throughout the consultation process and takes into account the factors contained in section 45(13) of the PSM Act, regarding the need for appointment of a person who:

- is able to discharge specific responsibilities placed on the CEO;
- will imbue the employees of his or her agency with a spirit of service to the community;
- will promote effectiveness and efficiency in his or her agency;
- will be a responsible manager of his or her agency; and
- will maintain appropriate standards of conduct and integrity among the employees of his or her agency.

It is usual process for the Commissioner to consult with the responsible Minister and responsible authority on persons(s) considered suitable for appointment to the position. This is considered critical as the relationship between the CEO and the Minister and responsible authority (where relevant) is critical for the effectiveness of the agency.

Appointment

The appointment of a CEO is made by the Governor and section 45(8) of the Act stipulates that in order to effect an appointment the Commissioner must recommend to the Governor that the nominated applicant be appointed to the CEO office. Following Cabinet endorsement and prior to a recommendation to the Governor, a contract of employment is agreed between the Commissioner and the proposed CEO. This can be for a term not exceeding five years in accordance with s.45 (1) of the Act. In order to effect an appointment the Commissioner must recommend to the Governor that the nominated candidate is appointed to the CEO office (Section 45(8)). The appointment is required to be approved by the Governor in Executive Council (S.45(1)).

Responsibility for the determination of the office holder's salary is the responsibility of SAT. Remuneration is salary, allowances, fees, emoluments and benefits (money or not). In negotiating with the proposed candidate, SAT provide the PSC with advice of where the office is situated in the salary band and as part of contract negotiations, PSC can negotiate within that range. The PSC can submit for information for the SAT to consider but do not have any decision making role in relation to terms and conditions that can be considered remuneration.

APPENDIX C – CEO PERFORMANCE AGREEMENT FRAMEWORK

Background

The Public Sector Commissioner (Commissioner) administers the CEO performance agreement framework for 47 public sector CEOs. The purpose of the framework is to support high level leadership and accountability across the public sector by:

- documenting high level outcomes being sought by responsible authorities with respect to Government priorities, policies and key reform themes
- promoting a shared understanding between responsible authorities, a CEO and the Commissioner (as employer) about whole of sector outcomes expected to be achieved over a specified period.

While the CEO performance agreement assists CEOs and responsible authorities with clarifying and understanding expectations, it does not replace regular ongoing meetings and communication.

Legislative framework

Section 47 of the Public Sector Management Act 1994 (PSM Act) requires that all CEOs appointed under s. 45 of the PSM Act must enter into a performance agreement with the Commissioner and each responsible authority upon appointment, and at any time when required to do so. CEO performance agreements set out the performance criteria to be met by CEOs relating to agency performance and sector-wide initiatives.

A performance agreement does not take effect until the responsible Minister(s) for the agency has approved and signed the agreement (s. 47(2) of the PSM Act). CEO performance agreements are not legally enforceable (s. 47(3) of the PSM Act), and can be updated or amended at any time on the agreement of all parties to the agreement.

The responsible authority is responsible for assessing the extent to which a CEO has met the performance criteria set out in the performance agreement at the conclusion of each performance agreement period (s. 47(4) of the PSM Act). The PSM Act does not dictate the length of the performance agreement period.

Commissioner's Instruction *Approved Procedure 8 – Timing and Assessment of CEO Performance Agreement* (AP8) is the supporting framework for s. 47.

Responsible authority

The responsible authority may be a board(s) or Minister(s). A CEO may have more than one responsible authority, including a board and Minister, or multiple boards and/or multiple Ministers (e.g. the CEO of WorkCover WA is accountable to the Board Chair and Minister for Commerce and Industrial relations).

Timing

The performance agreement period currently runs according to the financial calendar (1 July – 30 June), with the exception of State Training Providers (STPs), which run on a calendar year (1 January – 31 December). As noted above, performance assessments are conducted annually at the conclusion of the performance period.

Acting CEOs

In accordance with AP8, officers directed to act as a CEO under s. 51 of the PSM Act should review the existing CEO performance agreement with each responsible authority and, if appropriate, amend as required. Where a performance agreement does not exist a new agreement must be established.

Performance agreement process

Preparation

A performance agreement template is prepared each year for Departments, SES organisations and State Training Providers, and are made available on the PSC website. The template can be modified to best suit each CEO's needs, however, sector-wide initiatives are mandatory, but can be added to.

CEOs should meet with each responsible authority to discuss expectations and priorities as part of the drafting process. Performance objectives should be SMART (specific, measurable, achievable, relevant and timely), and targets should be directed towards higher order outcomes, but may be formulated to reflect short term progress towards medium or longer term goals.

Approval by responsible authority

The completed agreement is submitted to the Board Chair(s) for approval and signature (if applicable), prior to submission to the responsible Minister(s).

Submission to the Commissioner

Once signed by all responsible authorities, the agreement is submitted to the Commissioner for noting. As part of this process, the PSC ensures the framework is complied with. The submission deadline is usually 30 September each year (or 1 March for STPs). Following consideration and noting by the Commissioner, the PSC returns the original signed agreement to the CEO.

Performance assessment process

At the conclusion of the performance period, each responsible authority will evaluate the extent to which the agreed initiatives and targets outlined in the agreement have been achieved. The evaluation may draw on:

- the observations and experience of each responsible authority
- self-assessment by the CEO
- relevant information collected by the PSC.

CEOs should meet with each of their responsible authorities to assess the achievement of their expectations and priorities. The CEO and each responsible authority should sign off the assessment prior to submission to the Commissioner. The submission deadline is usually 31 October each year (or 1 March for STPs). Following consideration and noting by the Commissioner, the PSC returns the signed agreement to the CEO.

Reviewing the framework

A review of the framework commenced in April 2015, and a number of design principles and key considerations for a new framework and online platform were identified. Development of a bespoke CEO performance agreement electronic system was considered, but initial costing advice suggested that a bespoke system is expensive in consideration of the volume of agreements that would be managed on it. Further, consultation with the Government Chief Information Officer revealed a strong preference for Government to use 'software as a service' models and for configuring off-the-shelf platforms in preference to building specialised systems.

In 2016, further analysis of the framework focussed on making the CEO performance agreement and assessment process easier and more meaningful for CEOs, ministers and boards. The PSC explored the feasibility of using existing 'off-the-shelf' online platforms to support the CEO performance agreement and assessment process in a cost effective manner. Following documentation of the PSC's business needs, a number of 'off-the-shelf' products were evaluated and five were identified as suitable.

However, in recognition of Machinery of Government changes, the Service Priority Review (SPR), and the Government's exploration of performance pay models, the framework has not yet been developed further. Given the dynamic and challenging environment in which CEOs are currently operating, a simplified CEO performance agreement and assessment process was implemented for the 2017/18 cycle.

The PSC is awaiting Government direction of the SPR before progressing any further reform of the framework, which will also be guided by the PSC's recently released CEO Success Profile.