

2017-2018 Review of Local Government Act 1995

Citizen Submission - Phase 1

Submitted by:

a resident, ratepayer, elector, occupier, land owner, citizen, constituent, governee, member of the public, inhabitant and "a person" domicile in a local government district.

The McGowan Government is undertaking a review of the Act to modernise local governments and better position them to deliver services for the community.

The Government is to be congratulated for committing to change for improvement.

Without competitive continuous improvement, every enterprise deteriorates – firstly to the status-quo, then to stagnation, then to deterioration, then to irrelevance. In the case of local government that means an inability to provide the services for which it exists in a demanding political environment, likely to create elector backlash, causing outsourcing or amalgamation with successful enterprises.

Local government consumes community resources. Its propensity to regulate is an impediment to national progress. Its irrationality and inconsistent decision making often creates great concern, disappointment and angst in the community.

Delays caused by local government processes for development application approvals impose unfair cost burdens upon the community, particularly young families building their first home burdened with rent and interest payments whilst awaiting approvals.

The consistently poor rate of voting in local government elections suggests there is a disconnect between local governments and the communities they purport to serve.

This submission is contributed by a person governed by the above Act, being a citizen, elector, ratepayer and resident of the local government district of Armadale, governed by the City of Armadale Local Government – a large complex enterprise.

The object of this review is stated by the Minister “to create Agile • Smart • Inclusive Local Governments for the future”.

I share the Minister’s view that these objects are worthy of the effort required to fulfil them.

In our view, the public "Discussion Paper" displays a very high standard of presentation. It indicates considerable thought, research and analysis, which will undoubtedly create public confidence in the likelihood of achieving positive outcomes from this review process.

It is anticipated there will be strong opposition to change from the local government industry, which cherishes the *status-quo* - because they have learned to manage it - however, if the Government has the will then change is achievable.

EXECUTIVE SUMMARY:

This submission claims the current status of local government having autonomy from the Crown is a costly mistake which puts the traditional system of government in danger of fragmenting.

This submission presents overwhelming evidence and argument to show that excepting for the military in war, it is difficult to identify ANY public or private sector organisation that is required to perform such a diverse range of functions in its day to day operations as local government.

Given the broad range of discrete functions and activities local government is required to perform and chooses to perform, it is not possible for a local government to possess the range of expertise and experience essential to performing all statutory and further optional self-created functional responsibilities efficiently and effectively.

The result can only be mediocre performance and inevitable prioritising of functional responsibilities, lowering of performance standards, delayed and incomplete processes and projects, supported by an ever-increasing rates and charges burden to the resident and business operator as local government struggles to realise its visions for itself.

It also creates a bias towards populist projects designed to attract votes.

The Parliament's expectations are unrealistic and unachievable.

It is not possible for a "one size fits all" organisational model to work across the entire state of WA.

In the interests of protecting and preserving the democratic state, the powers of local government must not only be granted with great care, but restricted to persons demonstrating their capacity to wield those powers justly, with honesty and integrity and free from sectional interest or bias or covert ideologies.

It is essential the State Government retain the power to take over, censure, correct, suspend, dismiss and penalise local governments.

That cannot be in an autonomous system free from the fetters of the Governor and Executive Council control. Surveillance audits and regular monitoring are essential.

It is a fine line between communism/fascism and executive government – particularly when the players operate in an all-care and no-responsibility statutory environment and culture of political and social dominance.

The inevitable conclusion is a trend towards totalitarianism.

Councils are political entities *per-se*, but once elected Councillors want to be free from political scrutiny by their constituents. They do not like critique.

Public scrutiny, transparency and accountability are vital to preserving the democratic state.

In that regard dissidents are a vital part of democracy.

In 1996, The Parliament of Western Australia, Joint Standing Committee On Delegated Legislation Declared:

"The system of government in Western Australia is that of a parliamentary democracy based on the rule of law."

Source:

[http://www.parliament.wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/783AB65DEB9BC334482578320034D824/\\$file/slguide1.pdf](http://www.parliament.wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/783AB65DEB9BC334482578320034D824/$file/slguide1.pdf)

Note: This declaration coincided with the introduction of the Local Government Act 1995.

"The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it."

Lord Reid

Source:

[http://www.parliament.wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/783AB65DEB9BC334482578320034D824/\\$file/slguide1.pdf](http://www.parliament.wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/783AB65DEB9BC334482578320034D824/$file/slguide1.pdf)

Discretionary and/or retrospective law voids that right.

The interconnected matrix of Acts and Regulations and Local Laws which local government discretionally interprets and administers are presented in such manner that in many cases – particularly those which are applied discretionally or upon whim after the event – it is not possible for a citizen to be able to know in advance what legal consequences will flow from this form of governance.

The widespread use of "Disclaimers" feeds and supports uncertainty.

In particular, strategic plans, town plans, forward budgets, policies etc. are only as reliable as the paper they are written on in the "now", because each Council is refreshed every two years, so whatever is may not be.

Similarly, when a new CEO is appointed the old order is, by default, no longer valid as the new incumbent strives to gain respect and recognition for his or her governance and to satisfy the demands of Council.

GOLDEN RULES FOR COMMUNICATION UNDER THE RULE OF LAW:

- 1. If you want people to do what you want them to do then you must tell them what you want them to do so it is more likely they might do what you want them to do and get the result you want.**
 - 2. Use simple language that people might comprehend and understand.**
 - 3. Say what you mean and mean what you say.**
 - 4. Entrapment via ambiguity or ignorance of the law is an effective tool for regulators and prosecutors but is ineffective for preventing non-compliance or effecting behavioural change across a whole society.**
 - 5. Unless clear holistic objects and definitions are expressed, law is reduced to a set of unconnected discrete rules for subjective interpretation and application in implied discreet circumstances by persons whose purpose may be no more than an expression of their own personal social, religious or political ideologies.**
 - 6. The power of the State travels from the top downwards**
 - 7. Compliance is conditional upon awareness of requirements.**
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Note 1: Extracts from relevant Acts and Regulations are shown in full to assist readers unfamiliar with those requirements.

Note 2: This submission is based upon interpretation and application of the WA Constitution Act 1994, The Interpretation Act 1984, The Public Sector Management Act 1994, Local Government Act 1995, Criminal Code Compilation Act 1913, Litter Act 1979 and Land Administration Act 1895, and Local Laws, so in consequence is necessarily complex.

Note 3: It is relevant that every citizen, permanent resident, alien and visitor to a local government district is required to comply with all of these Acts and their subsidiary legislation, as well as a range of other laws applicable to life under the governance of local government as it is constituted from time to time and as discretionally interpreted and applied by local government from time to time.

Note 4: It is difficult not to conclude that this is a socialist, fascist system of governance under which compliance is non-negotiable and the status of the citizen is minimised by exclusion.

Note 5: Many local governments are following the leadership examples of the ancient Egyptian, Greek, Babylonian, Roman and European rulers, who left their mark by building tall or large building complexes with impressive facades as architectural symbols of might, power and dominance over their peoples. Throughout Australian history this class of structure has formerly been the domain of Commonwealth and State Parliaments and Law Courts, but local governments are seeking equality.

Their personas are easily understood by their conduct.

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1. THE STATE

From 1770 to 1901 Australia comprised a set of settlements, colonies and states under the direct rule of the Crown of England, each having a local Governor appointed by and acting on behalf of the Crown.

Initially governance was exclusively military however governance progressively moved over time towards a system of parliaments comprising elected representatives of the people.

In 1901 Australia became a Commonwealth of sovereign states however it remained under the rule of the Crown of England as a "Dominion" and under the jurisdiction of the law of England.

The Crown was represented jointly and severally in Australia by the Governor-General and the various State Governors, each having a direct link to the Crown.

In 1986 Australia gained independence and became a sovereign nation, with the passing of Australia Act by the UK Parliament - i.e. Australia was released from the bonds of England.

The sovereign "Queen of Australia" constitutionally replaced "Queen ELIZABETH THE SECOND, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Our other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.

Since 1986, Australia has comprised a Commonwealth of States and territories, ruled by the Queen of Australia under **the Rule of Law**.

The Governor-General is the Queen's national representative in Australia and bears the powers of the Crown. State Governors, although independently appointed by the Crown, became subordinate to the Governor-General, but continue as the Queen's representative in their respective State, generally continuing their previous roles under State law.

The function and powers of the Governor are defined in the Royal Letters Patent, issued 14 February 1986.

The conceptual model of the State may be likened to a *carriage wheel*, where the Crown is the hub, the States the spokes and the rim the National collective.

Power flows from the hub outwards.

Under "Royal Prerogative" the land, the sea and all that is over and under it was retained by the Crown on behalf of the national collective population – the "common" wealth.

The Crown is also a body corporate. The Crown may sue or be sued.

Commonwealth law became independent to English law, allowing the Australian courts to interpret law in the national interest, no longer constrained by a foreign power as previously.

Commonwealth law takes precedence over State law.

1.1 Western Australia

The State of Western Australia was established by the Constitution Act 1899 and Royal Letters Patent dated the 29th October, 1900.

Preamble

Whereas by the 32nd section of the Imperial Act passed in the session Holden in the 13th and 14th years of the Reign of Her present Majesty intituled "An Act for the better Government of Her Majesty's Australian Colonies", it was among other things enacted that, notwithstanding anything thereinbefore contained, it should be lawful for the Governor and Legislative Council of Western Australia, from time to time, by any Act or Acts, to alter the provisions or laws for the time being in force under the said Act or otherwise concerning the election of the elective members of such Legislative Council and the qualification of electors and elective members, or to establish in the said Colony, instead of the Legislative Council, a Council and a House of Representatives, **or other separate Legislative Houses, to consist of such members to be appointed or elected by such persons and in such manner as by such Act or Acts should be determined, and to vest in such Council and House of representatives, or other separate Legislative Houses, the powers and functions of the Legislative Council for which the same might be substituted;** and whereas it is expedient that the powers vested by the said Act in the said Governor and Legislative Council should now be exercised, and that a Legislative Council and a Legislative Assembly should be substituted for the present Legislative Council, with the powers and functions hereinafter contained:

Note: The Interpretation Act 1984 prescribes at S31 (1);

(1) *The preamble to a written law forms part of the written law and shall be construed as a part thereof intended to assist in explaining its purport and object.*

1.2 Office of Governor - S50.

- (1) *The Queen's representative in Western Australia is the Governor who shall hold office during Her Majesty's pleasure.*
- (3) *In this Act and in every other Act a reference to the Governor shall be taken —*
- (a) *to be a reference to the person appointed for the time being by the Queen by Commission under Her Majesty's Royal Sign Manual to the office of Governor of the State of Western Australia; and*
 - (b) *to include any other person appointed by dormant or other Commission under the Royal Sign Manual to administer the Government of the State of Western Australia; and*
 - (c) *to also include any other person exercising, by virtue of an appointment by the Governor in accordance with Letters Patent, any powers and authorities of the Governor.*

The Royal Letters Patent dated 14 February 1986 confirming the above by "direction and ordination" were issued 28 February 1986.

The Letters Patent further proclaim at III –

III. Powers and functions of Governor

The Governor shall have and may exercise all the powers and functions which belong to the office of Governor or are to be performed by the Governor whether conferred by these Our Letters Patent, a law in force in the State or otherwise, including the power to constitute and appoint such Ministers, Judges, Magistrates, justices of the Peace and other necessary officers as may be lawfully constituted or appointed by Us.

The Governor is Head of State of Western Australia.

However, the Local Government Act 1995 prescribes:-

1.6. Crown not generally bound

This Act does not bind the Crown except to the extent expressly stated in this Act.

"the extent expressly stated in this Act" is limited generally to matters affecting Crown lands.

Notwithstanding that provision, the prescribed process for creating local laws originates in a local government under a self-initiated and self-regulated automated process under executive powers directly granted by the Local Government Act and other applicable Acts.

These powers appear to make the Governor subject to the whims of local government

Given the default position is that conforming local laws are notionally approved by Parliament under that process, it is therefore unclear if the powers created by a Local Law:-

- (i) bind the Crown via legislated requirements prescribing mandatory approval of the Governor
- (ii) bind Executive Government of the Crown by subsidiary legislation – particularly open-ended Town Planning Schemes
- (iii) give local governments a status as agents of the Crown
- (iv) bind the State via local government's entitlement to access the State's judicial processes with standing as a *public authority*

1.3 The Parliament of Western Australia

The Constitution Act 1899 prescribes at S2 (2):-

The Parliament of Western Australia consists of the Queen and the Legislative Council and the Legislative Assembly.

The function of the Parliament is set out in S2 (1):

to make laws for the peace, order, and good Government of the Colony of Western Australia and its Dependencies.

1.4 Executive Government

Executive Government administers - i.e. 'executes' - the laws made by Parliament.

Executive Government is an essential partner to the Parliament because it provides the physical means required to govern the people of Western Australia.

Of vital significance is that pursuant to the WA Constitution Act 1899, Parliament can create any *governing body* or *instrument of governance* it wants.

By **Royal Letters of Patent**, Executive Government is under the jurisdiction of the Crown, administered by the Governor as Head of State and is a separate branch of government to Parliament.

The Governor is assisted in that task by an **Executive Council**, whose members normally comprise (but are not necessarily) **Ministers of the Crown**, each of whom is ordinarily an elected Member of Parliament – i.e. the Executive Council is elected indirectly by the people and is thereby, in its own right, an "*elected governing body*"

1.5 Management of Executive Government

The Crown primarily governs the state by means of its "Administration" – an arm of executive government, currently designed as prescribed in the **Public Sector Management Act 1984**: -

An Act to provide for the administration of the Public Sector of Western Australia and the management of the Public Service and of other public sector employment; to repeal the Public Service Act 1978; and to provide for related matters.,

supplemented by a set of ancillary "commissions" and statutory bodies – established by other various Acts - all in a complex matrix relationship.

The Public Sector Management Act 1994 prescribes:

S7. Public administration and management principles

The principles of public administration and management to be observed in and in relation to the Public Sector are that —

- (a) the Public Sector is to be administered in a manner which emphasises the importance of service to the community; and
- (b) the Public Sector is to be so structured and organised as to achieve and maintain operational responsiveness and flexibility, thus enabling it to adapt quickly and effectively to changes in government policies and priorities; and
- (c) public sector bodies are to be so structured and administered as to enable decisions to be made, and action taken, without excessive formality and with a minimum of delay; and
- (d) administrative responsibilities are to be clearly defined and authority is to be delegated sufficiently to ensure that those to whom responsibilities are assigned have adequate authority to deal expeditiously with questions that arise in the course of discharging those responsibilities; and
- (e) public sector bodies should have as their goal a continued improvement in the efficiency and effectiveness of their performance and should be administered with that goal always in view; and
- (f) resources are to be deployed so as to ensure their most efficient and effective use; and
- (g) proper standards of financial management and accounting are to be maintained at all times; and
- (h) proper standards are to be maintained at all times in the creation, management, maintenance and retention of records.

Notwithstanding the Public Sector Management Act 1994 refers to "local government" only at S102 and Sch. 1 to S108, the above requirements are not cross-referenced in the Local Government Act 1995, even though the PSMA preceded the LGA.

Generally speaking the Public Sector Management Act 1994 does not apply to Local Governments, which are classified as "independent" organisations.

Notwithstanding the Public Sector Management Act defines at S3(1):-

Public Sector means all —

- (a) the agencies; and
- (b) the ministerial offices; and
- (c) the non-SES organisations;

public sector body means an agency, ministerial office or non-SES organisation

non-SES organisation means an entity which consists of —

- (a) a body, whether corporate or unincorporate, or the holder of an office, post or position, being a body or office, post or position that is established or continued for a public purpose under a written law; and
- (b) persons employed by or for the purposes of that body or holder under that written law or another written law, and which neither is nor includes —
- (c) an SES organisation; or
- (d) an entity specified in column 2 of Schedule 1;

it becomes apparent that Local Governments are therefore Public Sector governing bodies being part of the State but not part of it.

However as agents of the State, Local Governments are in law "Public Authorities", a part of the State, servants of the Crown, Public Sector Executive Government and Commissions via various Acts and Regulations. In consequence they have the powers of the State.

Furthermore, noting the Interpretation Act 1984 defines *powers and functions* as one, persons employed by local governments and having direct or delegated powers are prescribed to be "Public Officers" by the Criminal Code Compilation Act 1913 at S1:-

The term **public officer** means any of the following —

- (ad) a person exercising authority under a written law;
- (b) a person authorised under a written law to execute or serve any process of a court or tribunal;
- (d) a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law;
- (e) any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not;

S3 clearly includes every Councillor and CEO and sets standards for conduct via its application.

S85. Falsification of records by public officer, applies directly to manipulation or falsification of official minutes by a CEO

But who has the legal capacity to prosecute ?

2. CONSTITUTION OF LOCAL GOVERNMENT

The State of Western Australia currently has 137 Local Governments, constituted under the Constitution Act 1899 and Local Government Act 1995 ("the Act").

The current system has not progressed past eighteenth century governance, where direct Executive Governance by the Governor has been replaced at District level by a committee of self-nominated elected persons and its Executive administration.

Nothing else has changed.

It is important for the Parliament to acknowledge and accept that every man, woman and child in Western Australia – domicile or visitor – is subject to the rule of local governments.

People can live under one local government, work under another and play under yet another throughout any given day.

The present situation is that the Local Government Act 1995 and the Planning and Development Act 2005 – the two primary legitimisers of local government powers - together with their subsidiary legislation, may be interpreted 137 different ways by several thousand Councillors and officers because these Acts provide discretionary powers in many societal functions, which affect individual lives and ways of life.

Town Planning Schemes and Local Laws are invariably a mish-mash of gobbledegook, lacking preciseness of language and definitions of terms used, enabling creative licence in their interpretation and application – often with limited or no avenues for practical or economic appeal.

The primary shortcoming in the current system of governance is that there is little or no obligation upon local governments to INFORM their communities of their policies or decisions and the consequences arising therefrom. Consequently people typically discover their obligations after the event – i.e. often only after a breach has occurred.

The State's population is constantly on the move, with people relocating from one local government district to another, hence a passive approach to communicating requirements is pathetic.

The primary purpose of a Local Government – i.e. **its reason for existence** - is expressed by the Act in the following terms:-

S3.1. General function

(1) The general function of a local government is to provide for the good government of persons in its district.

However that **purpose** is not expressed - albeit only as a "function" - until well into the Act at Page 39. There is little else expressed in the other 400 pages of Act to support that purpose.

It is sad that in a democratic society the Parliament sees government as simply a "function".

It is hard for a community to respect a *function*, which may explain why communities show little interest in their local governments.

The **scope** of its function(s) is not defined or expressed in law.

In fact, the principle of *non-feasance* means a local government, being a *public authority*, does not have to do anything at all – except "*govern*" – whatever that may mean.

Most of the Act is devoted to internal corporate processes, regulatory mechanisms and Ministerial interfaces, but little in relation to community rights, community interfaces and community interaction.

In any event, the general functions of a Local Government are extensively expanded by *mandatory* Executive functions prescribed by a wide range of other Acts and Subsidiary Legislation, including Regulations and Town Planning Schemes. These functions mostly bypass the elected Council, to be implemented directly by the CEO and Administration.

Hence much of what a Local Government does when *governing* is not under the direct control of its Council.

The vitally important terms "***govern, government, good government, governance, run, administer, execute, things, roles, issue, matter, policy, procedure, activity, affairs, consider, resolve, decide, decision, duty***" are not defined, hence they can be interpreted in whatever form each local government chooses.

It is reasonable to assume that "government" is more than just a simple "function". It may be a noun or a verb, each having a different context.

Furthermore the terms "*may*" and "*shall*" as defined in the Interpretation Act 1984 are used extensively generally throughout Acts and Regulations but are conspicuously absent throughout most of the LG Act.

This submission presents evidence to show that the system of ***elected local government*** in Western Australia as set out in the Constitution Act 1899 has not been implemented, being replaced by a system of executive government largely independent of those accountability processes applicable to all other areas of government of the State – such as those defined in the Public Sector Management Act 1994.

S3.4. Functions may be legislative or executive

*The general function of a local government **includes** legislative and executive functions.*

This section tells us that "*good government*" includes *legislative* and *executive* functions.

The Constitution requires "*an elected local governing body*" for each District within the State however a local government Council, although elected, of itself is not a "local government", has no powers other than to create policy and to legislate within limits defined by "written law". It has no mechanisms or resources within itself to govern.

S2.6. Local governments to be run by elected councils

S2.6 (1) The council —

- (a) governs the local government's affairs; and*
- (b) is responsible for the performance of the local government's functions.*

Consequently the unelected executive/administrative branch of local governments, who have the resources to govern and perform functions, is given the power to independently govern.

3.18. Performing executive functions

(1) *A local government is to **administer** its local laws and may do all other things that are necessary or convenient to be done for, or in connection with, performing its functions under this Act.*

This Section grants the Executive – i.e. the "Administration"- powers to do all other things that are "*convenient*" to be done....*in connection with*" – i.e. whatever it discretionally so chooses to do.

The Executive administration of a local government is not accountable to the public in any way.

It is accountable only to the Council, who must depend upon its Executive for its own functioning and political survival.

Consequently it is common to see Councils supporting their CEO's and executives, despite those functions consistently failing to comply with the expressed wishes of electors, failing to deliver services or performing poorly.

This submission shows how the common cross-linked definition of "*functions*" and "*powers*" in the Interpretation Act 1984 – i.e. they mean the same - have the effect that a CEO can inherent powers automatically by simply discretionally performing "*functions*", thereby providing opportunity for creative licence.

The Local Government Act 1995 prescribes a Council is given power **only** to govern within the scope of its own legislation – i.e. local laws and policies. On the other hand its Executive is given the power to govern the peoples of the District using powers derived from functions not only delegated by Council from the Local Government Act itself, but also further powers granted directly from other Acts and Regulations – thereby bypassing Council completely when administering those functions.

A local government is a body corporate with perpetual succession and a common seal and a natural person. It is the whole "local government" entity which governs – not its Council.

Although the Council of a local government is given the power to "govern" its own Executive, it is reasonable to assume this power relates to internal corporate governance and nothing more.

However Councils soon realised that after legislating Local laws and Policies they did not have much to do – particularly in static urban and rural Districts - so ventured into the day to day autocratic Executive functions where most of their trivial meeting business occurs. The most notable of these is rezoning and development under open-ended Town Planning Schemes, which provide endless opportunity for Councils to deliberate. This has the effect that responsibility, and therefore accountability, for Executive functions is passed back to Council, whose only real accountability is the biennial ballot box.

Councils have lost their way and abandoned their true purpose.

It is the case that only the Mayor or Shire President is authorised to deal directly with the local government administration on behalf of Council, resulting in the CEO being the only

conduit for communication between the two independent but inter-dependent entities. This system is reminiscent of the Eyre Telegraph Office on the SA border, where electronic messages were decoded then physically passed through a window to be re-transcribed then on-forwarded electronically. It offers CEO's opportunity to provide Council with the information he or she chooses for his or her purpose.

Furthermore the CEO prepares agendas, minutes and business papers, thereby completing the communication loop for the official historical record in law. Manipulation of Council is an art form for CEO's and is enshrined in law.

Notwithstanding provision for a mandatory *public question time* in meetings, there is no statutory right provision for Electors to question Councillors or Executives directly, providing opportunity for the Chairperson to insert him or herself into the communication process and invent responses designed to appease or fob-off to diffuse dissent.

It is also the case that a Chairperson has the absolute right to determine the procedures for elector interface with Council and the procedures for asking and responding to public questions. It is also the case that a Chairperson may discretionally ban any questioner from putting any question, dismissing any question or refusing to respond to any question.

Notwithstanding S85 of the Criminal Code Compilation Act 1913 - *Falsification of records by public officer*, applies directly to manipulation or falsification of official minutes by a Mayor and/or CEO, there is no right or process for an Elector to challenge lies and deception expressed by the Chair.

That is what is called "democracy, openness and transparency".

The Minister's Discussion Paper says:

Under the Act the council —

- *governs the local government's affairs; and*
- *is responsible for the performance of the local government's functions, which includes (although is not limited to):*
 - *overseeing the allocation of the local government's finances and resources; and*
 - *determining the local government's policies.*

The 2015 Public Accounts Committee Report No.12 – "Improving Local Government Accountability" noted:

In 2006, the Public Accounts Committee of the 37th Parliament tabled a report entitled Local Government Accountability in Western Australia (the 2006 PAC Report).

That report included a series of recommendations aimed at expanding the scope of the Auditor General's powers to include the audit of local governments with view to holding councils to a similar level of accountability as public sector agencies. Ultimately, the majority of the recommendations were not fully supported and, in the period since, the transparency around decision-making and quality of governance at the local government level has continued to be called into question.

In February 2015, the Corruption and Crime Commission (CCC) tabled its Report on

Misconduct Risk in Local Government Procurement, which echoed the sentiments of the 2006 PAC Report. The CCC repeated the call for the Auditor General to be given audit responsibility for local government, again with the view to raising local government accountability standards to be more in line with the public sector.

A lack of transparency on the non-compliance among local governments with regards to key statutory requirements of the Local Government Act 1995 (WA) and associated regulations.

A strong case exists to improve the current local government accountability framework. The focus of any change needs to be centred on providing the Auditor General with the authority to scrutinise local government performance.

*In addition **there must be improved transparency including easier access to key information for rate payers, the wider public, and the Parliament***

However, without ACCOUNTABILITY, "responsibility" is a meaningless concept.

It seems local governments have been set free from the control of the State Government – its master – and permitted to steer its own course free from conventional public sector "checks and balances", accountability and remedial processes.

Regardless of what a Council does – positively or negatively – the public pays, but Councillors can walk away with no fear of collective or personal accountability.

Every two years, Councils are refreshed with new blood but, despite the concept of "perpetual succession", are not responsible for the sins of their predecessors.

This submission demonstrates the organisational design of local government is enshrined in law to be dysfunctional.

Local governments have far more functions than resources to support or implement them.

The Local Government Act 1995 is so poorly expressed and set out that each of the 137 local governments may discretionally interpret and apply much of its provisions as they choose.

It creates a monopolistic executive bureaucracy, of which the Council is part, that serves itself to standards it sets by itself for itself for no identifiable community purpose other than being a discretional regulator and monopoly service provider.

The time has come for local government's open-ended autonomy to be restricted within reasonable practical functional limits and placed under the direct control of the Minister, who is responsible for governing all of the state – not just bits of it.

The Parliament must draw a line in the sand and declare the end of reckless and indifferent local government – enough is enough.

3. ROOT CAUSE OF DYSFUNCTION

The Local Government Act 1995 prescribes:

S3.1. General function

- (1) The general function of a local government is to provide for the good government of persons in its district.

S3.4. Functions may be legislative or executive

The general function of a local government **includes** legislative and executive functions.

Therefore "good government" includes both legislative and executive functions.

3.5. Legislative power of local governments

- (1) A local government may make local laws under this Act prescribing all matters that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for it to perform any of its functions under this Act.

3.18. Performing executive functions

- (1) A local government is to **administer** its **local laws** and may do all other things that are necessary or convenient to be done for, or in connection with, performing its functions under this Act.
- (3) A local government is to satisfy itself that services and facilities that it provides —
 - (c) are managed efficiently and effectively.

S2.6. Local governments to be run by elected councils

S2.6 (1) The council —

- (a) governs the local government's affairs; and
- (b) is responsible for the performance of the local government's functions.

Noting the terms "functions" and "powers" are intermixed, it may be seen that a Council of a local government is required to:

- make and administer local laws
- govern and manage the local government's affairs and functions
- ensure that services and facilities are performed efficiently and effectively

But how does it do this ?

It does this by "considering" and "approving" or "rejecting" or "deferring" reports and recommendations submitted to it from its executive administration.

IT DOES NOT DO THIS UNDER ITS OWN VOLITION.

In relation to greater community participation in the decisions and affairs of local governments; and greater accountability to their communities:-

S1.3. Content and intent

- (2) This Act is intended to result in —
 - (a) better decision-making by local governments; and
 - (b) greater community participation in the decisions and affairs of local governments; and**
 - (c) greater accountability of local governments to their communities; and**
 - (d) more efficient and effective local government.

Consequently and notwithstanding the requirements of;

S5.23. Meetings generally open to public

- (1) Subject to subsection (2), the following are to be open to members of the public —
 - (a) **all council meetings; and**
 - (b) all meetings of any** committee to which a local government power or duty has been delegated.

ALL Council business of any consequence is conducted covertly, behind closed doors and hidden from public scrutiny.

Great effort is expended to shut the public out from looking in the window of local government – much of this supported by the Act and Regulations.

Examination of Minutes of meetings shows that business does not originate in or by Council but by a mysterious process of smoke and mirrors.

Councils could argue that this is lawful because S5.23(2)(a) refers to;
(a) a matter affecting an employee or employees;

and since every employee is a part of the administration any comment in Council about their actions or inactions would breach this subsection. This concept is sometimes enshrined in Policies, Local laws and Codes of Conduct.

The public cannot see what their Council is doing and cannot be aware of matters until discussed in a Council meeting – which is often after it is all over and a covert decision made

This system encourages secrecy and back-door dealings with third-parties and with its executive officers. It is obvious from decisions made that prior consultation and discussion has occurred between various parties.

It is also obvious that if Councillors simply voted for or against business items in response to the wishes or preferences of their Electors, then factions and cabals could not survive in Council. That they exist is evidence of covert discussions taking place between Councillors prior to Council and/or Committee meetings.

It also removes the intended separation of Council and its administrative functions because Council is dependent upon its executive for itself to function

In other words, Council and its administration have become one and the same entity

Council is intended to be a politically elected entity independent to its executive administration – each having separate responsibilities, powers and functions for local governance - not merged into one and the same entity

RECOMMENDATIONS:

- 3.1 Prescribe a process which defines HOW Councils are to originate business items or matters for discussion in Council meetings**
- 3,1 Prescribe a process for creating and keeping records of such meetings**
- 3.3 Prescribe that ALL Council meetings – formal or informal and including in-house forums and workshops, must be open to the public**
- 3.3 Prescribe that ALL Committee meeting must be open to the public**
- 3.4 Consolidate Sections 1.3, 2.6, 3.1, 3.4, 3.5, 3.18 and 5.23 of the Local Government Act 1995 into one clear statement about why local governments exist, what they do and clearly prescribed public rights and limits of participation and access.**
- 3.5 In relation to the terms "powers' and "duties" as used in S5.23(1)(b) - Committee Meetings and having regard to the Interpretation Act 1984;**

48. Time for exercise of power or performance of duty

Where a written law confers a power or imposes a duty, the power may be exercised and the duty shall be performed from time to time as occasion requires.

49. Public officer's powers and duties may be exercised by acting officer etc.

Where a written law confers a power or imposes a duty on the holder of a public office as such, the power may be exercised and the duty shall be performed by the person for the time being lawfully holding, acting in, or performing the functions of the office.

53. Appointments may be by name or office

Where a written law confers a power or imposes a duty upon a person to appoint or designate a person to —

- (a) perform any function; or
- (b) be a member of any board, tribunal, commission, committee, council, or other similar body, whether corporate or unincorporate; or
- (c) be or do any other thing, that person may make the appointment or designation either by appointing or designating a person by name or by appointing or designating the holder of an office by the term designating his office; and any such appointment or designation of the holder of an office shall be construed as the appointment or designation of the person

from time to time holding, acting in, or lawfully performing the functions of the office.

Notwithstanding the Interpretation Act 1984 does not define "duty" it is clear from Sections 48, 49 and 53 that the term "duty" means "functions of the office".

That is a public officer has a "duty" to perform a statutory "function"

So given the Interpretation Act 1984 defines "function" and "duty" as having the same meaning in law it follows that by its very existence a Committee MUST have a duty and a function.

It also follows that a Councillor MUST have a duty to perform the functions of the office, which includes Committee participation as and when applicable.

It also follows that EVERY executive and every administrative function, whether statutory or discretionary, is a power in its own right and MUST be performed as a duty.

Therefore ALL committee meetings MUST be open to public scrutiny and Section S5.23: Meetings generally open to public - be amended accordingly

4. FORM AND STRUCTURE OF THE LOCAL GOVERNMENT ACT 1995 AND ITS SUBSIDIARY LEGISLATION

The current Act is written as a set of random thought processes with little regard for intelligent rational interpretation by the several thousands of persons employed in the local governments sector or the two million or so persons subject to its governance.

Its prescribed requirements are open to abuse in interpretation and should be set out more clearly in simple language with key terms defined.

The Local Government Act 1995 and its Regulations are written by lawyers for lawyers and create an industry as 137 different Councils and 137 different Executive Administrations, together with the many thousands of persons affected by or dependent upon local government decisions and actions, who seek advice as to what it all means in the real world.

The Act should present its purpose and scope as early as possible in the text. The aim expressed in the Constitution Act 1899 is *"better government"* but the present system delivers mediocrity.

In his forward to the Consultation paper, the Minister says:

"Where possible, I would like the detail relating to the powers and responsibilities for local government to be addressed in regulations rather than a prescriptive Act to ensure that the legislation is more flexible and adaptable to changing needs."

Examination of the Local Government Act 1960 and Local Government Act 1995, reveals much of the substance of those Acts relate to prescribing processes and procedures.

Consistent with the Minister's Discussion Paper there is great merit in transferring the processes and procedures as set out in the Act to subsidiary legislation – i.e. Regulations.

It is a simple matter to extract all processes and procedures from the Act and transfer them to the appropriate Regulations. This task is extremely easy.

However the historical record of successive Ministers is that Regulations adversely affecting citizen rights and interaction with local government have not received any attention since 1995 – particularly those relating to Elector Meetings.

RECOMMENDATIONS:

4.1 It may be seen also that the sections of the Act which should be joined together as a set – i.e. addressing common matters - are to be found in diverse places, ensuring difficulty in reading, and therefore understanding. They require re-alignment with their common purpose.

4.2 It is recommended that Part 3 Divisions 1 and 2 be moved to the beginning of the Act to assist reading and understanding.

4.3 Define Primary Powers and Functions

To assist understanding, the primary core powers and functions of a local government should be clearly expressed and defined

S3.4. Functions may be legislative or executive

The general function of a local government includes legislative and executive functions.

Division 2 — Legislative functions of local governments

Division 3 — Executive functions of local governments

Sections 3.4, 3.5 and 3.18 are crucial to the core purpose of the Act and should be highlighted near the start – perhaps as part of Section 1.3

These sections define the essence of local government as expressed in the Constitution Act 1899.

It is curious that the legislative power is considered a “*general function*” when the primary role of a local government is to perform direct or ancillary functions under State Laws under the authority of the Crown.

Given only a small portion of a Council's time is devoted to its legislative functions, it follows that most of its workload is performing executive functions.

However, since the scope of executive functions is huge (as listed above) but Councils have no physical resources to perform executive tasks, it follows they enjoin themselves with their executive to create work for themselves by inventing creative processes for executing corporate governance – prescribed by Section S2.7 (1)(a).

5. DEFINITIONS

The Local Government Act 1995 and the Planning and Development Act 2005 – the two primary legitimisers of local government powers - together with their subsidiary legislation, and may be interpreted 137 different ways by several thousand Councillors and officers because these Acts provide discretionary powers in many societal functions, which affect individual lives and ways of life.

Town Planning Schemes and Local Laws are invariably a mish-mash of gobbledegook, lacking preciseness of language and definitions of terms used, enabling creative licence in their interpretation and application – often with limited or no avenues for practical or economic appeal.

It is essential core definitions be included in all legislation – particularly those likely to be subject to a prosecution action.

The trial of CITY OF ARMADALE -v- MERRICK [2014] WASCA 125 devoted considerable Magistrate's Court, Supreme Court and Appeal Court time to determining the meaning of the term "litter", because it is not adequately defined in the Litter Act 1979.

The Appeals Court interpretation means "littering" has almost unlimited application and can occur on private land by anyone leaving something where it should not be, such as leaving a library book on a reading table and not returning it to the appointed receptacle – even if there is no instruction to so do.

The fact that litter is defined as *unwanted* material but the prosecuting local government authority *wanted* it was lost in translation from the outset.

RECOMMENDATIONS:

- 5.1 **Given the Letters Patent for the Governor prescribe "*administration*" of government, it is also essential that the terms "*executive government*" and "*administration*" be defined.**
- 5.2 **The vitally important terms "*govern, government, good government, governance, things, roles, run, issue, matter, policy, process, procedure, activity, affairs, consider, resolve, decide, decision, occupier, dwell, dwelling, place of worship, adverse reflection, speak adversely, vexatious*", MUST be defined, to prevent them being interpreted in whatever form each local government so chooses.**

6. HOUSE OF REVIEW

This submission recommends that in addition to the core function of governing itself and its own executive organisation – functions which include corporate governance policies, practices and procedures - Councils be given a function of being a **Review Tribunal**, or **House of Review**, having the power to direct its Executive to reconsider, change or replace its decisions or actions in response to its own initiative or requests or complaints from citizens affected by such decisions or actions – i.e. act as a *democratic government* instead of a mutually protective autocracy.

Conversely, to prevent joint or several corruption, bias or dubious conduct by Elected Members, the Executive would have the right to appeal to a higher authority above Council.

Progressively over time, such a function for Council would dissuade that class of person being narcissistic attention seekers, bullies and glory seekers from standing for election and encourage persons having no self-interest and genuinely interested in the wellbeing of their community and fellow citizens .

RECOMMENDATION:

- 6.1 The executive function of the Council should include ONLY essential executive functions so they may focus on strategic thinking, policy and future improvements to their community governance and facilities.**

7. DUTIES, POWERS AND FUNCTIONS

The Constitution Act 1899 prescribes that the legislature shall make laws for the "*peace, order, and good government*" of Western Australia. S52 prescribes:-

52. Elected local governing bodies

- (1) The Legislature shall maintain a system of local governing bodies elected and constituted in such manner as the Legislature may from time to time provide.*
(2) Each elected local governing body shall have such powers as the Legislature may from time to time provide being such powers as the Legislature considers necessary for the better government of the area in respect of which the body is constituted.

The Constitutional requirements for ***peace and order and better government*** have been lost in translation.

The powers, duties and functions of Council and its Executive need to be clearly defined so there can be no doubt.

Council should not be able to delegate its duties, powers and functions to its Executive – each is a separate organisational entity having a different purpose, differing responsibilities and accountabilities.

If Councils want to abrogate those then they should be replaced by a Commissioner – a more efficient and effective methodology.

RECOMMENDATIONS:

The CORE functions of local government MUST be defined in the Act:-

7.1 govern – itself (corporate governance)

- organisational design and development – design and construct an organisation to efficiently and effectively govern the peoples of its district
- organisational management – for effective performance and continuous improvement
- create permanent and accessible documented records of decisions and actions, their justifications and their costs

- statutory compliance – legislation, financial, codes, audits
- policies – each with supporting processes, procedures, practices and documentation
- local laws, directions, notices and orders - each with clear objects, definitions, supporting processes, procedures, practices and documentation
- establish clear boundaries re functional scope and responsibility for all officers
- establish clear lines of accountability for Council, Councillors and officers
- actively prevent corruption, bias, payback, victimisation
- prevent reckless expenditure, waste and inefficiency
- Council and sub-Committee Meetings to be conducted under mandatory legislated state-wide Uniform Standing Orders
- Record Minutes of Council Meetings in full, with verbatim details of debates and who voted for and against motions
- limited parliamentary privilege

7.2 govern – the district community

- protect and preserve the democratic system of government
- actively facilitate community interaction and participation in local government policy and decision making
- legislative compliance
- clear and timely public communication of policies, forward plans, budgets, financial reports etc. with public publication of supporting processes, procedures, practices
- clear public communication of local laws, directions, notices and orders - each with clear objects, definitions, supporting processes, procedures, practices and documentation
- limit Summary Prosecutions to important matters. Restrict authorisations for issue to a senior officer. Mandatory Council approval for all court prosecutions and defences and appeals.

7.3 delivery of services to the community

- the form and scope of goods and services should be restricted to those approved by the Minister – generically, and where essentially relevant, for each local government

8. REGULATION AND PROSECUTION FUNCTIONS

One of the primary functions of Executive Local Government is to regulate and prosecute breaches of the smorgasbord of Acts and Regulations under its jurisdiction – a function which offers a convenient means for creating work and a future for those involved.

Regulation

One example of Regulation is the Town Planning Scheme

Considerable local government energy and resources are devoted to administration of Town Planning Schemes, which are subsidiary legislation, and serve to regulate development.

There is considerable physical evidence demonstrated by "what is actually there now" to prove the result of town planning schemes is virtually little different to what would be there

without the degree of intense regulation facilitated by a formal town planning scheme, supported by significant application and licence fees and penalties for non-compliance.

Town Planning Schemes may be used to by transient Councils to regulate against business competition by blocking attempts to expand or supplement existing facilities.

An example is provided by;

Australian Real Estate Investment Pty Ltd v Western Australian Planning Commission; Australian Real Estate Investment Pty Ltd v City of Armadale [2004] WATPAT 51 (19 March 2004)

which blocked a proposed expansion of the Kelmscott CBD for the benefit of local users.

However at the same time the City of Armadale actively promoted the relocation of the defunct West Armadale shopping centre to Haynes, where it has been significantly expanded and continues to expand. The significant point is that Haynes is just two kilometres from the Armadale CBD – closer than Kelmscott CBD and proximity was a key element in the rejection of the Kelmscott proposal.

It is now evident that the low-cost Haynes development has caused serious harm to the high-class Armadale CBD business retail sector by drawing away significant custom.

More recently the City of Armadale strongly opposed, but failed to block, the "Spudshed" development in the Kelmscott CBD, with ongoing dispute to this day over opposing the provision of temporary parking facilities for customer convenience. Its justification is that it wants a "landmark" development on the virtually inaccessible site which has remained vacant for more than twenty years, but unless and until an investor commits to development the site will continue to remain vacant. That's progress and community benefit.

Prosecution

Local governments have a very broad range of Legislation and subsidiary legislation from which to draw powers to prosecute.

Internal organisational "Management by Objectives" encourages expansion of such activity.

Much of this activity is triggered by issue of a Summary Justice Infringement Notice, the non-payment of which creates a *criminal offence*, thereby enabling the Local Government to issue a summons to defendants to appear in a Magistrate's Court charged with a *criminal offence*.

The Summary Infringement may be of a minor nature or the result of bullying or simply a politically motivated pay-back to a dissenting citizen, or a revenge response to a citizen complaint, or just being plain "pig-headed" or nasty.

Most of this class of prosecution is concluded in the Magistrate's Court, the details of which are not normally publicised, however some make it to the Supreme Court,

Examples of this class of prosecution are seen at:

MESSAGES ON HOLD AUSTRALIA PTY LTD -v- CITY OF PERTH [2007] WASC 226

CITY OF ARMADALE -v- CHAPMAN [2012] WASC 423

CITY OF ARMADALE -v- HENDRY [2013] WASC 422

CITY OF ARMADALE -v- HENDRY [2014] WASCA 209

LIBERAL PARTY OF AUSTRALIA (WESTERN AUSTRALIAN DIVISION) INC -v- CITY OF ARMADALE [2013] WASC 27

MERRICK -v- CITY OF ARMADALE [2013] WASC 175

CITY OF ARMADALE -v- MERRICK [2014] WASCA 125

CITY OF ARMADALE -v- MERRICK [2014] WASCA 125 (S)

It is clear from the Merrick trials that the City of Armadale lawfully misused its "public authority" powers to apply the Litter Act 1979 for the purpose of protecting its money making business of recycling metals and had little to do with littering *per-se*.

The evidence presented to the Magistrate's Court suggests this prosecution was deliberate entrapment of an unwitting and uninformed victim because what he did was place junk in an area set aside for litter – i.e. the Armadale Tip – in good faith and in plain sight of staff who did not attempt to intervene or warn him not to do what he did - as prescribed in the City's relevant Local Law.

This man was on private freehold land, had paid his entry fee and tipping fee and was entirely dependent upon instructions from staff for compliance. They were not given. If harm was claimed this should have been a private civil prosecution.

Subsequent events show that despite expending a huge sum on legal costs and eventual victory upon appeal after several court hearings, the City made no effort to publically publicise its victorious prosecution thus resulting in no deterrent effect flow-on benefit, suggesting perhaps an ulterior motive against the individual concerned.

The practical effect of such prosecutions is to encourage people to avoid the tip and dump their rubbish in bushland – same risk of fine but cheaper if successful.

The consequences of the series of *Merrick* trials is that the Litter Act 1979 is open-ended and can apply to any place public or private and for any offence howsoever minor – such as failing to place a used tray or food wrapper in a bin in a restaurant, or failing to return a shopping trolley to the appointed place in a shopping centre car park.

K C NOMINEES PTY LTD -v-ARROWSMITH [2006]WASC100

KC NOMINEES PTY LTD AND CITY OF ARMADALE [2005] WASAT

This prosecution appears to have been about removing longstanding but deteriorated business premises which were located directly opposite a brand new showcase sports pavilion facility in the public park opposite which detracted from the glory of the new multi-million dollar vote-catching development. Such political motives are above the law.

On this occasion the City saw fit to publish a self-congratulatory report about this matter on its website, entitled " City Wins Protracted Legal Battle". The then Mayor Linton Reynolds

said in this report: *"the KC Nominee case had cost the City and thus ratepayers thousands of dollars"*, implying KC had initiated the prosecution.

The City did not however see fit to publicise the much more expensive Merrick cases.

This and many other examples demonstrate how the State can and does discretionally encroach on the lives of ordinary citizens as and when it so chooses without just cause and/or with dubious motives.

RECOMMENDATIONS:

- 8.1 To prevent abuse of said powers it is recommended that NO prosecution be permitted in a Court of Law unless and until full Council approves proceeding to that next stage. That principle includes actions defending appeals against summary infringements, issue of summons and defending appeals in higher courts.**
- 8,2 Excepting in essential circumstances, restrict authorisations for initial issue to a senior officer or the CEO.**
- 8.3 Amend the Litter Act 1979 to remove the carte blanc powers granted to local governments in Section 26 and similar cross-linked sections**

S26 Authorised officers, appointment and jurisdiction of etc.

- (1) For the purposes of this Act an authorised officer is —
 - (a) any member of the Police Force;
 - (b) any person appointed as such pursuant to subsection (2) within the area of jurisdiction entrusted to him by the appointment;
 - (c) within the district of a local government, any person who is —
 - (i) a member of the council of the local government; or
 - (ii) an employee of the local government; or
 - (iii) an honorary inspector appointed by the local government under section 27AA.

Councillors are legislators – not police officers and enforcers

To make "any employee" of a local government an "enforcer" and a "prosecutor" is also undemocratic, anti-social, against the principles of the Rule of Law and encourages bullying and victimisation.

Furthermore, there is no process or procedure set out for the issue of a Summary Infringement Notice or Summons by a Councillor or "any employee", or processes and procedures for pursuing appeals to a higher court.

Free-range prosecution is not a feature of modern Australian society. The Rule of Law must apply equally and fairly

The purpose of this recommendation is to ensure all Councillors are aware of the consequences of Court action, particularly the ultimate loss of reputation and significant financial cost to the Local Government if the case is appealed to a higher court and lost, or

the creation of a cost burden and a criminal conviction record upon a convicted person – with all its flow-on consequences.

To let loose an army of environmental zealots onto the public armed with such draconian powers is not what modern Australia stands for. It is a fact that at least one City of Armadale Councillor unlawfully entered private backyards to inspect for potential littering.

It is also relevant to restricting the activities of those "bully" or "sociopath" persona officers who get a thrill from the power bestowed by prosecution and crushing people.

9. PUBLIC STATEMENT TIME

To implement the democratic right of a Citizen to petition his or her government about any relevant issue or matter, there should be a Public Statement Time during each Council meeting – universally expressed in Regulations.

If Council cannot be bothered to listen to those it governs then it should not be there.

Councillors are not required to possess any particular attribute that sets them apart or above ordinary citizens – they are not the fount of all knowledge and wisdom so need all the help they can get.

To prevent abuse of the right, each speaker could be given a time limit in which to present their views or complaints etc., such time being expressed in Regulations

It is vital to democratic government that a Public Statement Time be of sufficient duration to enable adequate citizen feedback for Council to perform its functions efficiently and effectively consistent with the community it purports to represent.

Statements may be limited to a prescribed maximum duration – e.g. ten minutes per person.

If a meeting needs to be adjourned to create more time for statements then it should be adjourned. The question is whether Council time is more important than democracy and open and transparent government.

It is important to note there is **no** other process available for Electors to speak to Council as a body.(Councillors are not required to attend Elector Meetings).

RECOMMENDATIONS

9.1 Prescribe a mandatory Public Statement Time in Council and Committee meetings

9.2 Prescribe a maximum time per person for statements

10. PUBLIC QUESTION TIME

The present Act prescribes a Public Question Time of *"not less than 15 minutes"* duration.

Current law empowers the Chairperson to determine procedures for Public Question Time

This authority has resulted in persons being prevented from asking ANY questions at all, individual questions being dismissed, questions being referred to the Administration for a later response, responses not addressing the question, lies, evasive or misleading responses.

More importantly, the CEO of the Department of Local Government has advised this submitter in writing that:-

- **the term "procedures" includes "matters".**
- **a Chairperson of Council or Committee may ban any person from asking questions of a local government – i.e. it is the person who is banned.**

That power is absolute with no right of appeal – even to a Council, a Court or a Tribunal because that is the law,

That interpretation empowers the Chairperson to dismiss or reject any question about any matter, thereby avoiding the public transparency and accountability provisions of the Act.

It is incomprehensible that such an interpretation is the case because if it is then a Court could determine cases without hearing debate on "matters" before it, or the Parliament could pass laws without debate on matters before it.

That means a local government does not have to be accountable to any public enquiry – no matter how relevant or valid.

RECOMMENDATIONS:

10.1 To prevent suppression of this right, Regulations need to prescribe:-

- (1) Councils may request questions be submitted in writing in advance to assist preparation of responses but questions may be put orally to a meeting without having given prior notice. This requirement is essential to prevent political gagging of questions by means of process.**
- (2) Prior notice questions may take order of precedence over oral questions**
- (3) Issues or matters which arise from Agenda papers must be subject to scrutiny by oral questions from the floor because Agenda papers may not be available prior to 72 hours before a meeting – which may include a weekend**
- (4) Preambles to questions are essential to enable context to be expressed and must be permitted within a reasonable time period**
- (5) All questions *must* be accepted and responded to as best as is practicable. Any offensive content of questions may be deleted from Minutes.**
- (6) Minutes *MUST* record preambles, questions and responses accurately and in full (excepting for offensive words or expletives).**
- (7) Persons have a right – defined by the High Court of Australia – to question their political leaders and government**
- (8) Public Question Time should last as long as it is necessary to present and respond to all questions. If a meeting needs to be adjourned to create more time for questions it should be adjourned. The issue here is whether Council time is**

more important than democracy, open and transparent government and community interaction.

- (9) Provision should be prescribed to permit questions being directed to any Councillor or officer present. The practice of questions being responded to by the Chairperson facilitates false or misleading information being provided and recorded in Minutes as a permanent official record.**

It is vital to democratic government that a Public Question Time be of sufficient duration to enable adequate citizen feedback for Council to perform its functions efficiently and effectively consistent with the community it purports to represent.

Councillors are individually elected representatives and should be accountable for their personal roles in issues, matters and decisions.

11. COMMUNITY PARTICIPATION

The Local Government Act 1995 prescribes:

1.3. (2) This Act is intended to result in —

- (a) better decision-making by local governments; and
- (b) greater community participation in the decisions and affairs of local governments; and
- (c) greater accountability of local governments to their communities; and
- (d) more efficient and effective local government.

Taking (a) and (b) together, the INTENT of the Local Government Act 1995 is:-

“better decision-making by local governments by greater community participation in their decisions and affairs, resulting in *more efficient and effective local government and greater accountability of local governments to their communities*”

Looking closer we see that an object of the local government process is that the community is empowered by S1.3 to **PARTICIPATE** in the decisions and affairs of their local government

However there is nothing in the Local Government Act 1995 to grant the community powers by right to participate in the affairs of their local government nor participate in its decision making

In fact the opposite is the case, where local governments have devised a raft of policies, practices and procedures designed to keep the community OUT of their affairs

Standing Orders are a well-understood universal convention for conducting meetings.

“Standing Orders” and “Procedures for Public Question Time” and manipulation of Elector Meetings are but three examples.

Few Councils permit a “Public Statement Time” in their Council or Committee meetings. Otherwise, Standing Orders prevent the public from speaking to Council as a body.

In practice, “participation” means making written submissions when invited from time to time, or asking public questions to which the Council is not obligated to respond.

So unless and until the community (Electors, Residents and Ratepayers) are given access, the intent of S 1.3 remains a pipe-dream based upon pure spin.

RECOMMENDATIONS:

- 11.1 Prescribe a mandatory Public Statement Time in Council and Committee meetings**
- 11.2 Standing Orders MUST NOT be enshrined in a local law because they suppress openness and transparency via the overt threat of money penalty and a criminal conviction record.**
- 11.3 There must be no provision in Standing Orders to be "suspended". Suspension is a farce, open to manipulation for political or corrupt purpose.**

Either a law is a law or it is not. Discretionary law is bad law.

- 11.3 Prohibit the concept of "adverse reflection", which is outdated and has no place in robust debate. There is no recorded court judgement on this issue in the national case law database. It suppresses public participation because it is an open-ended concept open to abuse in interpretation and application. It enables rejection of legitimate enquiry on spurious grounds.**
- 11.4 Standing Orders MUST NOT be supported by money penalties. Breaches should be subject to the *Code of Conduct* breach regime.**
- 11.5 Regulations should prescribe Uniform Standing Orders for application universally to all local governments.**
- 11.6 Prosecution of the public MUST NOT be an option for inclusion in Standing Orders.**
- 11.7 The current Act provides the Chairperson may discretionally determine meeting procedures. If Universal Standing Orders are not discretionally applied to a meeting then it should be mandatory for the Chairperson to clearly define the applicable procedures *before* a meeting commences AND record in Minutes why the variance from standard practice.**

12. ELECTOR MEETINGS

Elector Meetings deserve a specific mention because they are a vital part of the process supporting the objects of the Local Government Act 1995 S1.3. (2)

- (b) greater community participation in the decisions and affairs of local governments; and*
- (b) greater accountability of local governments to their communities;*

It is longstanding WALGA policy to abolish Elector Meetings

This policy is supported by many Councils and their CEO's.

Elector meetings are a vital part of the democratic system of government.

Noting ***petitions*** to Council are discretionary at Council's pleasure, they are the **only** *statutory forum* wherein Electors may communicate face to face with their Council – if their Council attends.

Elector meetings normally occur once only annually, which provides the whole electorate with just one hour or so to communicate with Council.

Elector meetings have been manipulated and suppressed by Councils to prevent the public and Electors from looking in their window to see what is going on and questioning what they see – an effective discretionary process for suppression of openness and transparency.

Neither the Act nor Regulations prescribe procedures to be applied, hence the Chairperson may discretionally apply with absolute, non-challengeable autonomous powers, to manipulate process and procedure to advantage the local government at Elector expense.

It is disappointing that after 22 years of the Act's existence, no-one in government has seen fit to devise effective and fair procedures for Elector Meetings – even in Regulations.

Furthermore, it has been the practice for the Chairperson of *Special Elector Meetings*, to rule "*Out of Order*" - AFTER meeting commencement - elements of the Purpose of the Meeting as expressed on the statutory form of Notice. This is a disgraceful abuse of power designed to prevent open discussion or questions on issues of concern to Electors.

To prevent this practice it is essential Regulations prescribe that the purpose of the meeting is as expressed on the Form of Notice.

A local government should not have the power to change or block a meeting "purpose" as stated on the application form.

Elector Meetings are the only currently available means for Electors to question, present and discuss issues directly with Council in a less formal and less controlled environment to Council meetings.

Regrettably Councils have been reluctant meet Electors face to face because they may have to explain their personal positions on issues – something they do not need to do in a Council meeting, where their only obligation is to vote.

However Elector meetings have been manipulated by policy, process and procedure to diminish Elector rights and erode/void the purpose of the meetings.

It is clear Councillors are reluctant to openly admit to their positions on issues or matters and have devised a raft of strategies to avoid that exposure.

Each year at the City of Armadale the Chairperson, being the Mayor, reads a statement to those present which clearly warns that Local Law Standing Orders may be applied – a breach of which carries significant money penalties and a criminal conviction. This warning is recorded in the Minutes and is one technique used to warn attendees to that and future

meetings that they do so at their own risk. That strategy is well worn but has been very effective.

The application of Standing Orders in part or in full enables the Chair to discretionally determine the only general business for discussion is limited to questions and formal motions – i.e. no free discussion on issues of importance to the Electors present.

Another strategy is to impose a time limit on the meeting so as to prevent too many questions or issues being presented. Given there are 40,000 Electors, an hour or so once a year is not exactly generous or demanding on Councillors.

Another strategy is to structure “General Business” as a question and answer session. This technique consumes the available time with questions and responses, thereby leaving no time for motions and discussion on those, and maybe “decisions” arising from them.

Another strategy is to issue a "Disclaimer" which says that nothing said in the meeting by the Mayor, CEO, a Councillor or employee is binding on the local government, which has the effect that anyone can say anything with immunity and with no recourse by Electors.

Another intimidating strategy is to hold the meeting in the Council chambers, where Councillors have their backs to the Electors present – a statement of contempt.

Another intimidating strategy is for the full Council and executive to arrange themselves across the room before the Electors in a display of unity. Few people have the confidence to stand before such a formidable assembly.

In the case of Special Elector Meetings, which are the product of community angst about a particular issue or matter, another strategy is for the Chair to rule an item of business “out of order” if it is expressed on the Form as e.g. “any other relevant business”.

The technique here is to not advise this to the applicants until after the meeting commences, thereby preventing an alternative strategy being devised by Electors before the meeting –e.g. withdraw the form of application and resubmit in acceptable terms.

Another strategy is to classify the Minutes as “unconfirmed” until confirmed at the next Annual Meeting of Electors – a year further on. This way the Minutes are in limbo for a year, to be buried and forgotten.

Significantly, the LG Act and Administration Regulations require only that Council is advised of ONLY “decisions” made at such meetings. The system deems that if no decisions (motions resolved in the affirmative) were made then the meeting did not happen.

Contrary to the objects of the LG Act there is no requirement for Council to be advised of questions put and responded to, or matters discussed.

RECOMMENDATIONS

- 12.1 Prescribe processes and procedures for Elector Meetings in plain simple language such that ordinary citizens may understand their meaning and intent.**
- 12.2 Prescribe minimum advertising codes and standards for Elector Meetings so as to inform citizens and encourage community participation**

- 12.3 Prohibit Councillors and employees from participating in or voting as "Electors" at Elector Meetings to prevent their manipulation or dominance of meetings by weight of numbers**
- 12.4 Prescribe Councillors and employees who choose to attend Elector Meetings are present only as "observers" with no rights to participate other than to respond to questions put through the Chair**
- 12.5 The present Act prescribes the Mayor normally chairs Elector meetings.**

This has the effect that a person who holds a "political" office has absolute power of veto over Elector concerns and rights, resulting in currently constituted Elector Meetings being an illusionary sham.

To maintain the status of an "Elector Meeting" or "Meeting of Electors" the meeting should be chaired by an impartial person chosen by the meeting, or in the case of a Special Elector Meeting, those who petitioned the meeting.

13. CORPORATE BUSINESS ENTERPRISES

The modern local government is in every sense a business enterprise, selling services of various kinds.

In addition to the standard "Rates" general land and property tax, it recovers its costs by fees and charges for the various statutory and discretionary functions it provides.

Town Planning Schemes are a case in point where land development, land rezoning and building development provide lucrative sources of revenue.

However pursuant to the Local Government Act a local government is structured in a similar form to a *not for profit association* constituted under the Associations Incorporation Act 2015.

RECOMMENDATIONS

- 13.1 Given some local governments have revenues of more than 100 million dollars per annum, it is essential for good governance of the local government itself, thus to imbue community confidence, a local government should conduct itself in compliance with relevant Corporations Acts and the common law.**
- 13.2 It is essential that the executive management of the local government be structured for efficient and effective performance of the functions of the local government**

14. QUALIFICATION FOR ELECTION

The current trend to foreign powers securing supply of minerals, petroleum products and food supplies in a vertically integrated supply chain throughout Australia provides opportunity for such powers to plant servant and agents in local governments to assist their goals.

RECOMMENDATIONS:

14.1 Citizenship

Having regard to recent events in the Commonwealth Parliament regarding foreign citizenship and dual citizenship it is recommended that **BOTH:-**

Section 76A. *Who is qualified to be elected as MP of the Electoral Act 1907 and*

Section 4.48 -4.48. *Candidate, eligibility of the Local Government Act 1995*

be amended to include text modelled on the Commonwealth Constitution Act 1901

44 Disqualification

Any person who:

- (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or
- (ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or
- (iii) is an undischarged bankrupt or insolvent; or
- (iv) holds any office of profit under the Crown,
- (v) has any direct or indirect pecuniary interest in any agreement with a **Public Authority** of the Commonwealth or a State otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;

shall be incapable of being chosen or of sitting as a Councillor is a local government.

The High Court of Australia has clarified the law on this issue in several recent cases.

Furthermore, the Local Government Act 1995 should also be amended to include the core requirements of Section 76A. *Who is qualified to be elected as MP of the Electoral Act 1907*

76A. Who is qualified to be elected as MP

- (1) Unless this Act or another enactment provides otherwise, a person who —
 - (a) has reached the age of 18; and
 - (b) is not subject to any legal incapacity; and
 - (c) is an Australian citizen; and
 - (d) has resided in the State for one year; and
 - (e) is an elector entitled to vote at an election in a district, is qualified to be elected as a member of *a local government Council*.....

14.2 It should also be unlawful for a Councillor, officer, employee or contractor of a local government to participate in the affairs of another local government as a Councillor.

14.3 It should also be unlawful for a Public Officer to participate in the affairs of another local government as a Councillor.

Note the Public Sector Management Act 1995 prescribes at S102 (1) and (1A):

- (1) *Except with the written permission of his or her employing authority, which permission may at any time be withdrawn, an employee shall not —*
- (a) *accept or continue to hold an office, post or position under the Government or a paid office, post or position in or under any local government or regional local government or the council of a local government or regional local government or any other public body corporate; or*

Notwithstanding this section is explicit, it is the case that the current Local Government Act 1995 permits an employee or contractor of a local government to be a Councillor of another local government.

Thus the effect is to allow a person being employed in the Executive Government or administration of a local government to be also in a Legislature – i.e. the Council of another Local Government, thereby negating the principle of separation of legislative and executive powers.

In the case of the Public Sector Management Act 1994, all that is needed is the permission of a co-operative employing CEO (PSMA S5) to bridge the barrier between executive and legislative functions.

15. PRINCIPLES FOR CONTINUOUS IMPROVEMENT

This submission strongly supports the Minister's statement that it is time to modernise the Act to match public expectations of local government and the principles he has expressed.

The following principles underpin the review:

- **Transparent** – providing easy access to meaningful, timely and accurate information about local governments.
- **Participatory** – strengthening local democracy through increased community engagement.
- **Accountable** – holding local governments accountable by strengthening integrity and good governance.
- **Efficient** – providing a framework for local governments to be more efficient by removing impediments to good practice.
- **Modern** – embracing contemporary models for governance and public sector management.
- **Enabled** – local governments will be empowered to deliver for communities as autonomous bodies with powers and responsibilities specified in legislation.

We do not believe it possible to resolve all issues relating to the above principles and objectives in a one-off re-alignment of the Local Government Act, other relevant inter-related Acts and supportive subsidiary legislation because:-

- (a) existing interpretations and applications have been in place for a very long time and will be difficult to wean out of the system. Old habits die hard.
- (b) one-size fits all legislation is not appropriate and cannot be effective because of the size and scope disparities between the smallest and largest local government entities, and the skills and experience of the officers who manage them.

- (c) changing the purpose, function, role and methodology of Councils may require protracted negotiations with the participants. Previous governments have discovered "rule by decree" does not work if not accepted.
- (d) to preserve the status-quo and protect their hard-won powers, local governments will find ways to get around amended laws – that is predictable human nature.

RECOMMENDATION:

15.1 A permanent task-force/project team should be established within the Department of Local Government, having the objective of *continuous improvement* in the local government sector.

The task of reform and re-alignment may take many years.

16. AS/NZS/ISO9001 MANAGEMENT STANDARD FOR INTERNAL ORGANISATIONAL MANAGEMENT

The Local Government Act 1995 prescribes:

3.18. Performing executive functions

**(3) *A local government is to satisfy itself that services and facilities that it provides —
(c) are managed efficiently and effectively.***

A Council or Committee has no arms or legs – merely secretarial support, hence must rely upon others to implement its policies and decisions.

Given Council is directly responsible for the *management* of its local government but has no resources within itself, it must rely upon its Executive officers to implement its decisions and to provide feedback information via reports and audits as to when and how those actions have been implemented.

AS/NZS/ISO9001 standard: Management Systems, provides a means of developing confidence in the Executive's capabilities, efficiency, effectiveness and commitment in supporting its Council.

This standard is supported by more than one million organisations globally.

AS/NZS/ISO9001 standard: Management Systems, provides a means of developing an efficient and effective organization by means of clearly defined policies, processes, practices, procedures and planned activities

Without such an ongoing and transparent monitoring and review mechanism, Council only knows what it is told by others.

Given the law prohibits Councillors from talking to Officers, the only way Councillors can determine what has happening is to wait until it has happened.

To ensure efficient and effective management, AS/NZS/ISO9001 standard should be applied to all aspects of activities - i.e. organisational wide.

Local governments are process driven entities so implementation of this standard is not complex.

This standard is concerned with the management of organisations and provides a simple framework for achieving organisational control and effectiveness. It also establishes a platform for planned systematic continuous improvement.

It does not prevent discretionary decision making but does enable those decisions to be made in a disciplined controlled environment consistent within organisational policies, objectives, norms and performance standards.

The creation of documented processes and controlled records of process outcomes is essential to reliable organisational performance and traceability of decisions and actions.

ISO9001 may be applied to management of the organisation and/or processes and/or products and/or service outcomes.

It is essential that Council, who is responsible in law for the management of the local government, is included within the scope of an ISO9001 Management System.

Independent third-party certification and regular compliance auditing is a desirable option for this standard, which is widely used throughout the world.

Independent third-party certification ensures independent verification of compliance, and is a cost-effective method for Council to monitor and supervise its administration, to devise and implement strategies for improvement, and to ensure compliance with Section 3.18 (3)(c) of the Local Government Act .

RECOMMENDATIONS:

16,1 Prescribe metropolitan local governments MUST attain and maintain independent third-party certification to AS/NZS/ISO Standard 9001.

16.2 Prescribe local governments may only purchase goods and services which cost more than a prescribed minimum cost from organisations demonstrating independent third-party certification to AS/NZS/ISO Standard 9001.

17. FOCUS

The focus of local governments should be to perform their statutory function – i.e. ***to provide for the good government of persons in its district.***

That is not a difficult task to manage and perform.

RECOMMENDATIONS:

- 17.1 The core focus of local governments should be to regulate social activity within its district in a form which will promote a stable society, wellbeing and economic development.
- 17.2 The provision of services should be limited to essential services – all other services should be left to the private sector to provide – not as sub-contractors to the local government but as independent service providers.
- 17.3 Local government revenue should be limited to rates, fees and charges with pork-barrelling, carpet-bagging state Government and Lotteries Commission grants banned, excepting for essential infrastructure.

The Local Government Reform Steering Committee Report – May 2010 noted:

Currently 28% of local governments are dependent on grants for 40% or more of their recurrent revenue.

- 17.4 Local Governments must learn to live within their means or hand the task over to a different authority.

18. ELECTED LOCAL GOVERNING BODIES

Another branch of government is prescribed in the WA Constitution Act 1899, being "***elected local governing bodies***" – popularly described as "**Local Councils**".

The current Constitution Act 1899 prescribes the following core elements relevant to Local Government:

Local Parliaments - S52. *Elected local governing bodies*

- (1) *The Legislature shall maintain a system of **local governing bodies** elected and constituted in such manner as the Legislature may from time to time provide.*
- (2) *Each elected local governing body shall have such powers as the Legislature may from time to time provide being such powers as the Legislature considers necessary for the better government of the area in respect of which the body is constituted.*

The most important principle extracted pursuant to the above is that an *elected Council of a Local Government* is a Legislature possessing those powers which the Parliament considers necessary for it to perform its functions

Consequently the primary purpose and function of a Council of a local government is to **legislate** – as an element of "government".

It follows that pursuant to the Constitution Act 1899 and Local Government Act 1995, a Council of a Local Government is a single-house elected local governing body, being an "area" Parliament of Western Australia consisting of the Queen and the Council, the powers and functions of which are necessary for the better government of the area in respect of which the body is constituted.

By virtue of the Local Government Act 1995, the WA Parliament has determined that a local government is an *elected local governing body* legislature supported by an

administration (executive government) – an all in one entity called a "*local government*".

However in contrast to the above, the Local Government Act 1995 prescribes at S2.6.
Local governments to be run by elected councils

(1) Each **local government** is to have an elected council as **its** governing body.

The use of the term "its" clearly defines that the legislative powers of a Council are limited to govern its executive - ONLY

The prescribed powers as defined in S52(2) - *Each elected local governing body shall have such powers as the Legislature may from time to time provide* – is of vital significance, because the Preamble declares in part:-

"to establish in the said Colony, instead of the Legislative Council, a Council and a House of Representatives, or other separate Legislative Houses, to consist of such members to be appointed or elected by such persons and in such manner as by such Act or Acts should be determined, and to vest in such Council and House of representatives, or other separate Legislative Houses, the powers and functions of the Legislative Council for which the same might be substituted"

To discover what those powers and functions might be requires reference to the Local Government Act 1995 and other Acts of State Parliament.

Another important distinction is that in both the WA Constitution Act 1899 and Local Government Act 1995 there is an undefined difference between a "legislature" and a "governing body".

In the Westminster system of government an *elected* independent **legislature** creates law whereas **executive government** is administered under a separate stream of executive government administered directly under the Crown via HM Ministers – who are by custom elected members of the Parliament.

This system is generally explained by the Public Sector Management Act 1994.

The Local Government Act 1995 prescribes:

1.3. Content and intent

(1) *This Act provides for a system of local government by —*

- (a) *providing for the constitution of **elected local governments** in the State; and*
- (b) *describing the functions of local governments; and*
- (c) *providing for the conduct of elections and other polls; and*
- (d) *providing a framework for the administration and financial management of local governments and for the scrutiny of their affairs.*

Parliament has thereby re-interpreted the constitutional term "elected local governing body" from meaning an "elected legislature" to meaning a functional body corporate entitled a "local government", which includes an elected legislature – i.e. a "Council" - as an integral part of itself.

The Local Government Act 1995 at S1.4: *Terms Used*, defines *local government* means a *local government established under this Act*

The best interpretation seems to be that a "local government" is a form of words meaning an "elected governing body" – i.e. a body which "governs".

The legislative powers of that *elected local body* are prescribed by The Local Government Act 1995 Division 2 — Legislative functions of local governments

The Constitution Act 1899 at S52 uses the term “elected” twice – a critical element in interpreting and applying the Interpretation Act 1984 to S52 and the consequences of that.

The process used to *elect* “local governing bodies” is defined in the Local Government Act 1995 as follows:-

S2.6. Local governments to be run by elected councils

- (1) *Each local government is to have an elected council as its **governing body**.*
- (2) *The offices on the council of the local government of a city or town are those of the mayor, the deputy mayor and the councillors.*

S1.4 Terms used

council means the council of a local government;

councillor means a person who holds the office of councillor on a council (including a person who holds another office under section 2.17(2)(a) or (b) as well as the office of councillor);

S2.17. Members of council

- (1) *If the method of filling the office of mayor or president is election by electors, the council is to consist of —*
 - (a) *the mayor or president; and*
 - (b) *not less than 5 nor more than 14 councillors one of whom is to hold the office of deputy mayor or deputy president in conjunction with his or her office as a councillor.*

S4.1 Terms used

*In this Part **election** means —*

- (a) *an election of a mayor or president by electors; or*
- (b) *an election of a councillor or councillors whether in a district or in a ward;*

Hence pursuant to the Constitution Act 1899 and Local Government Act 1995 an “elected local governing body” is a body of Councillors – i.e. a “Council” comprising not less than six and not more than fifteen members.

Noting the use of the term “its” at S2.6(1) of the Local Government Act 1995, S2.5, 2.6 and 2.7 prescribe that Council governs the local government only – i.e. “corporate governance” – that’s all.

2.6. Local governments to be run by elected councils

- (1) *Each local government is to have an elected council as its governing body.*

2.7. Role of council

- (1) *The council —*
 - (a) *governs the local government’s affairs; and*
 - (b) *is responsible for the performance of the local government’s functions.*

CONSEQUENTLY, OF ITSELF, A COUNCIL IS NOT A LOCAL GOVERNMENT.

That is not consistent with the Constitution Act 1899 S52(2) which prescribes:-

*Each elected local governing body shall have such powers as the Legislature may from time to time provide being such powers as the Legislature considers necessary **for the better government of the area in respect of which the body is constituted.***

The Constitution prescribes the *elected* Council is the governing body of the district – not just governance of the local government itself.

This shortcoming in the Local Government Act is a critical overarching fundamental principle issue for the Parliament to resolve, as will be shown hereunder.

The key to the dilemma is S3.1

3.1. General function

- (1) *The general function of a local government is to provide for the good government of persons in its district.***
- (2) *The scope of the general function of a local government is to be construed in the context of its other functions under this Act or any other written law and any constraints imposed by this Act or any other written law on the performance of its functions.***
- (3) *A liberal approach is to be taken to the construction of the scope of the general function of a local government.***

This set of unconnected Sections tells us that a Council of Local Government acting as a "legislature", has the "general" function to make laws for the peace, order, and good government" of itself and its executive and of the persons in its district – objects prescribed in the Constitution Act 1899 at S2.

Its *specific* function is not revealed.

However Council does have "roles". These are set out in S2.7

2.7. Role of council

- (1) The council —**
 - (a) governs the local government's affairs; and**
 - (b) is responsible for the performance of the local government's functions.**
- (2) Without limiting subsection (1), the council is to —**
 - (a) oversee the allocation of the local government's finances and resources; and**
 - (b) determine the local government's policies.**

That the sole purpose of creating district local governments "*is to provide for the good government of persons in its district*" seems to have been lost to the lawmakers in 1995.

Note pursuant to S2.7 to 2.9, Council, Councillors, Mayors and Deputy Mayors are given "roles".

The term "role" is not defined hence it is assumed to mean "function", however since law is law, whatever terminology is used must have the power of law to be valid.

Consequently the convoluted language and disconnected prescribed requirements as set out in the Local Government Act 1995 create an environment where more than 1500 Councillors and their several thousand staff have to try to interpret these laws as best they can in order to fulfil their intended purpose as a governing entity.

19. STATUTORY FORM OF COUNCILS

Each local government Council is a *legislature* established by Parliament under the WA Constitution.

Each Council is deemed an *elected local governing body*, having powers of a legislature as defined by State Parliament.

Said powers are generally limited to Local laws and Town Planning Schemes.

However the chain of command from the Crown is hazy.

Whereas the Parliament of Western Australia consists of the Queen and the Legislative Council and the Legislative Assembly, Her Majesty is nowhere to be found in local government.

It is rare to find any reference to the Crown or display of Her Majesty's photograph in a local government office.

The Local Government Act 1995 prescribes; *1.6. Crown not generally bound*
This Act does not bind the Crown except to the extent expressly stated in this Act.

However it is clear from a range of other sections that a local government is subordinate to, and subject to, the Crown, But how ?

One reference is that relating to the creation and assent of Local Laws, classed by Parliament as "subsidiary legislation".

3.5. Legislative power of local governments

(1) A local government may make local laws under this Act prescribing all matters that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for it to perform any of its functions under this Act.

3.12 (5) After making the local law, the local government is to publish it in the Gazette and give a copy of it to the Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister.

3.17. Governor may amend or repeal local laws

(1) The Governor may make local laws to amend the text of, or repeal, a local law.

3.17 (3) The Minister is to give a local government notice in writing of any local law that the Governor makes to amend the text of, or repeal, any of the local government's local laws.

Suggests the Minister is subordinate to and under the direction of the Governor, which sits well with the Constitution,

However the general status of local government is made more unclear by Section 3.4.

The general function of a local government includes legislative and executive functions.

Reference to this Submission below re "Functions" shows how the division between Council and its Executive is also hazy.

However Regulation 8 of the Public Service Regulations 1988 prescribes:

8. Public comment

An officer shall not —

(a) publicly comment, either orally or in writing, on any administrative action, or upon the administration of any Department or organization; or

(b) use for any purpose, other than for the discharge of official duties as an officer, information gained by or conveyed to that officer through employment in the Public Service.

Gets curiouuser and curiouuser.

20. PURPOSE, OR REASON FOR EXISTENCE OF LOCAL GOVERNMENT

The Local Government Act 1995 prescribes:

3.1. General function

*(1) The general function of a local government is to provide for the **good government** of persons in its district.*

Given "better" is better than "good", this specifies a lesser standard than that prescribed in the Constitution Act 1899 at S52(2)

*....for the **better government** of the area in respect of which the body is constituted.*

21. GOOD GOVERNMENT

The Interpretation Act 1984 defines at S5:-

"government" means the Government of the State

"State" means a State of the Commonwealth

"local government" means a local government established under the Local Government Act 1995

"power" includes any privilege, authority, or discretion

"function" includes powers, duties, responsibilities, authorities, and jurisdictions;

The purpose of "government" as envisaged in the Constitution Act 1899 – i.e. to **govern a population** – in this case a "community" within a "district" - is referenced in the Local Government Act 1995 in S3.1

In the Local Government Act 1995, the term "local **government** " is defined to mean:

1.4 Terms Used

local government means a local government established under this Act

Even with reference to the Interpretation Act 1984 this is a definition having no definition – i.e. a tautology.

But the legislature has not attempted to explain what “government” is, how it may be defined or implemented, what government is intended to achieve or where its limits of activities lie.

Of vital importance to this review, the Local Government Act 1995 has incorrectly substituted throughout from Section 1.3 on, the term “local governing body” – constitutionally meaning “the Council” - with the term “local government” – a body corporate and natural person, ensuring the entire Act becomes a riddle to challenge even the most intellectual of minds.

22. STRUCTURE AND FUNCTIONS OF ELECTED LOCAL GOVERNING BODIES

In relation to S52 (1) the “**system** of local governing bodies elected and constituted in such manner as the Legislature may from time to time provide”

the legislature has enacted and defined “**the system**” by the concurrent Local Government Act 1960 and Local Government Act 1995, and subsidiary legislation thereto, such as Regulations, Local Laws, Town Planning Schemes, Directions, Notices and Orders as issued from time to time.

The Local Government Act 1995 prescribes:

1.3. Content and intent

- (1) *This Act provides for a system of local government by —*
 - (a) *providing for the constitution of **elected** local governments in the State; and*
 - (b) *describing the functions of local governments; and*
 - (c) *providing for the conduct of elections and other polls; and*
 - (d) *providing a framework for the administration and financial management of local governments and for the scrutiny of their affairs.*
- (2) *This Act is intended to result in —*
 - (a) *better decision-making by local governments; and*
 - (b) *greater community participation in the decisions and affairs of local governments; and*
 - (c) *greater accountability of local governments to their communities; and*
 - (d) *more efficient and effective local government.*

The Interpretation Act 1984 prescribes:-

18. Purpose or object of written law, use of in interpretation

In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

29. Sections to be substantive enactments

Every section of an Act takes effect as a substantive enactment without introductory words.

The above objects and descriptors are explicit and self-explanatory.

To be achievable they need to be supported by statute law to legitimise the powers, policies, practices and procedures of each local government and their will to comply.

23. SCOPE OF LOCAL GOVERNMENT

3.1. General function

*(2) The general function of a local government is to provide for the **good government** of persons in its district.*

*(2) The **scope** of the general function of a local government is to be construed in the context of its other functions under this Act **or any other written law** and any constraints imposed by this Act or any other written law on the performance of its functions.*

(3) A liberal approach is to be taken to the construction of the scope of the general function of a local government.

3.2. Relationship to State Government

*The **scope** of the general function of a local government in relation to its district is not limited by reason only that the Government of the State performs or may perform functions of a like nature.*

3.4. Functions may be legislative or executive

The general function of a local government includes legislative and executive functions.

*In other words, the **Local Government Act 1995** regards the **ENTIRE** body corporate being the “local government” as the constitutionally lawful “local governing body”.*

The present Local Government Act 1995 thereby empowers and legitimises in law that a local government – either Council or its officers, can interpret “government” to be anything it wants to be, and do, more or less, anything that it wants to do.

This interpretation is further supported by:

3.5. Legislative power of local governments

(1) A local government may make local laws under this Act prescribing all matters that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for it to perform any of its functions under this Act.

(3) The power conferred on a local government by subsection (1) is in addition to any power to make local laws conferred on it by any other Act.

3.18. Performing executive functions

(1) A local government is to administer its local laws and may do all other things that are necessary or convenient to be done for, or in connection with, performing its functions under this Act.

(2) In performing its executive functions, a local government may provide services and facilities.

Note the use of the term “**all**” in S3.5 (1) and 3.18 (1).

In relation to **legislative** functions, the Interpretation Act 1984 prescribes at S5:-

“subsidiary legislation” means any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, local or region planning scheme, resolution, or other instrument, made under any written law and having legislative effect

“prescribed” means —

- (a) prescribed by or under the written law in which the word occurs; and*
- (b) in a case where reference is made to anything prescribed by a written law other than the law in which the word occurs, includes anything prescribed by subsidiary legislation made under that other written law*

See also the Interpretation Act 1984 S43 to 47 inclusive

The information provided in the following section of this submission demonstrates that the statutory scope of “government” means a very broad range of regulatory powers and functions over most aspects of peoples’ lives.

Executive government is not only alive and well, but the Nanny State is thriving.

Please see reference document:

https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9596/96rp28

24. FUNCTIONS

The Interpretation Act 1984 defines at S5:-

“Function” includes powers, duties, responsibilities, authorities, and jurisdictions;

The Local Government Act 1995 defines the functions of local government in this way:

3.1. General function

- (1) The general function of a local government is to provide for the **good government** of persons in its district.*

3.4. Functions may be legislative or executive

The general function of a local government includes legislative and executive functions.

3.18. Performing executive functions

- (1) A local governmentmay do **all**things that are necessary or convenient to be done for, or in connection with, performing its functions under this Act.*
- (2) In performing its executive functions, a local government may provide services and facilities.*

Note the use of the term “**all**” in 3.18 (1).

Note the use of the term “**may**” in 3.18(2)

In other words a local government can lawfully do anything it wants - or nothing at all.

Not even the Commonwealth Government has those all or nothing power options.

24.1: Typical Functions

Typical activities performed in the normal course of *government*, include being a legislator, registrar for various registrations, licensor, freehold landowner, building owner and manager, landlord, tenant, business owner and operator, member of a business consortium, operate not for profit organisations, aged-care facility owner/operator, investor, tax collector, prosecutor, law enforcer and benevolent society.

“**Functions**” of Local Governments also generically include:

24.2 Community Service Functions

- provide and maintain social activities such as conducting markets, festivals and celebrations including fireworks displays, and supporting not for profit organisations
- provide and maintain sporting facilities like recreational centres (indoor basketball courts), bowling greens, tennis courts, swimming pools (sometimes heated), race courses, walk and bridle trails etc., subsidising sporting clubs
- provide and maintain public golf courses and race courses
- provide and maintain markets and livestock sale yards
- provide and maintain libraries
- provide and maintain performing arts centres and cinemas
- provide and maintain senior citizen centres, seniors programmes and services
- provide and maintain youth centres, youth programmes and services
- provide and maintain disability services
- provide and maintain a range of reserves, parks, gardens, marinas, bmx tracks, skateboard parks, coastal reserves and beachfronts for leisure and visual amenity
- provide and maintain a range of tourist facilities such as caravan parks, camping areas, roadside rest areas and information centres
- provide and maintain public toilet facilities
- sponsor arts and crafts
- sponsor awards
- act as "managing authority" for Crown lands
- remove protestors from public places

- construct and maintain roads, footpaths, pedestrian refuges, bridges, parking facilities, signage, drainage, bus shelters, streetscapes, tree lopping and firebreaks
- construct and maintain cycleways
- traffic management, turning lanes, line marking, traffic signals, roundabouts
- assign street names, street signs, street numbers
- enforce local parking laws in private shopping centres and car parks
- construct and maintain airports
- construct and maintain wharves, jetties, marinas and moorings
- maintain rivers, creeks, lakes, waterways,
- construct and maintain stormwater drainage, banks, levees and flood mitigation
- support bushfire brigades with funding, equipment, facilities and manpower, provide fire warning services, implement the Bushfires Act
- provide emergency services, post-emergency support and relief
- clean up debris and rubble from natural disasters, storms, winds and floods
- clean up and remove debris from road accidents and fallen trees
- provide security services for LG assets and public events
- enforce environmental management standards and implement environmental improvement projects, land care, creek care, river care and graffiti removal
- enforce local laws, remove illegal signage,
- provide garbage and waste disposal (greenwaste, toxic waste, general waste, industrial waste, putrescent waste, electronic waste), household junk collection and recycling services, collection and disposal of dead animals from public places and beachfronts.
- operate revenue creating recycling businesses
- implement the Litter Act, collect and dispose of litter and abandoned vehicles
- provide and operate animal pounds, monitor and enforce animal welfare standards, animal registrations, domestic animal regulatory standards
- provide and maintain town water supplies, dams, water stands and sewerage
- monitor and enforce health standards
- construct, operate and maintain cemeteries

- monitor and enforce private swimming pool safety standards
- provide motor vehicle licencing services
- construct and maintain historical monuments, war memorials and historical museums
- register and maintain heritage listings
- determine and enforce town planning schemes, land use zonings, development approvals, building standards and permissible land and building uses
- administer cadastral mapping, lot identification, land valuations
- provide communications services for internal operations and external interfaces, including radio, telecommunications, internet and email
- provide community grants
- give effect to all the functions prescribed in Part 3 Division 3, and Schedules 3.1, 3.2, and 9.1 of the Local Government Act 1995
- perform the functions of a “Public Authority”
- carry out civic and ceremonial duties
- anything else the local government sets its mind to do

24.3 Corporate Governance and Management Functions - Council

- Council governance of its Executive Administration
- policy formulation, publication and dissemination
- review and approve Executive recommendations, decisions and actions
- review and approve budgets and expenditures
- review and approve investments
- review and approve independent audit reports
- review and approve organisational performance
- employment of the CEO and senior officers

24.4 Administrative Functions

- provide secretarial support services to Council, agendas, minutes and reports
- provide staff and facilities and support services for community interaction with the Council and administration

- provide staff and facilities and support services to enable local government administration and operations
- provide and maintain information technology services, data bases, websites
- provide and archiving facilities for local government records and research programmes
- revenue collection of rates, taxes, charges, fees, levies, land sales, asset sales, interest
- financial management, investments, securities, credit management, audits
- internal legal services
- provide media liaison and advertising
- conduct district wide elections for Councillors
- discretionally conduct district wide elections for Mayor
- participate in ALGA, WALGA, professional organisations, seminars and workshops

Another approach to identifying the **functions** of local government was provided by the Local Government Advisory Board in March 2006, in its review of *LOCAL GOVERNMENT STRUCTURAL AND ELECTORAL REFORM IN WA*

APPENDIX 5

LIST OF LOCAL GOVERNMENT SERVICES AND FUNCTIONS

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(Includes services internal to organisation and external to community.)

Accommodation and Central Services

Administration

Aged and Disabled Services

Airport Management

Animal Control

Architectural Design

Audit Services

Beaches and Foreshore Enhancement

Bridge Construction and Maintenance

Building Surveying and Inspection

Bus Shelters

Bush Fire Control

Caravan Parks and Camping Grounds

Children's Services

Civic Functions

Community Arts

Community Development Planning

Community Grants and Assistance

Community Housing

Community Information

Community Legal Advisory Services

Corporate Services

Council Governance
Crossover Construction
Customer Services
Depot Operations (Technical Services)
Development
Development Control
Economic Development
Emergency Services Management
Environmental Monitoring
Extractive Management
Festivals Off-Street Parking
Financial Services and Payroll
Fire Hazards Management
Flora and Fauna Conservation
Food Monitoring
Food Premises Licensing
Footpaths, Kerbs and Guttering
Foreshore Protection and Restoration
Freedom of Information
Furniture
Health and Environmental Services
Health Education
Health Professionals
Health Regulation
Heritage and Conservation Services
Human Resources
Immunisations
Information Technology Services
Insurance
Jetties, Groynes, Boat Ramps and Boat
Landscape Design
Legal Services
Library and Information Services
Local Laws
Locality Marketing
Maintenance
Neighbourhood Centres
Noise Control
Nurseries
Occupational, Health and Safety
On-Street Parking
Parking Control
Parks and Community Parks and Gardens
Parking Research and Planning
Pens Depot Operations
Performance Management
Pest Control
Playgrounds
Plumbing Approval and Inspection
Policy Planning
Pollution Control
Property Management
Public Conveniences
Public Relations

Purchasing and Supply
Ranger Services
Records Management
Recreation Areas
Recreation Programmes
Recycling Service
Refuse Collection
Refuse Disposal
Road Construction and Reconstruction
Road Maintenance
Road Reserve Maintenance
Sanitary Services
Security Patrol Service
Sewage Treatment
Signs
Sporting Facilities
Staff Housing
Storm Water Drainage
Street Bins
Street Cleaning
Street Lighting
Streetscape Beautification and
Supporting Local Doctors and other
Surf Life Saving and Beach Patrols
Swimming Pool Inspections
Swimming Pools
Telecentre Support
Tourism Development
Tourist Information and Visitor Care
Town Planning
Training
Traffic Management
Transportation
Transport Planning and Design
Tree Maintenance
Urban Design
Water Quality Control
Women's Services
Workshops (Road Plant)
Youth Services

Source: Based on Advancing Local Government in Western Australia, Structural Reform Advisory Committee (1996); Appendix 1.

Excepting the military in war, it is difficult to identify ANY public or private sector organisation that is required to perform such a diverse range of functions in its day to day operations as local government.

Given this broad range of functions and activities it is not possible for a local government to possess the range of expertise and experience essential to performing all statutory and further optional self-created functional responsibilities efficiently and effectively, resulting in mediocre performance and inevitable prioritising of

functional responsibilities, lowering of performance standards, delayed and incompleting processes and projects, supported by an ever-increasing rates and charges burden to the resident and business operator.

It also creates a bias towards populist projects designed to attract votes.

The Parliament's expectations are unrealistic and unachievable.

It is not possible for a "one size fits all" organisational model to work across the entire state of WA.

Small local governments are clearly at a disadvantage whereas large, high-revenue local governments can piggy-back off this statutory framework and organisational design – legitimised in law - to make themselves even bigger.

Local governments which are based in major non-metropolitan cities and towns have the added challenge of servicing both urban and rural communities and their differing social attitudes and needs

It follows the objects of S1.3 (2) (d) of the Local Government Act 1995 – i.e. *more efficient and effective local government* - cannot be fulfilled by the existing structures.

It is also not possible to attain uniformity in approach and effect across 137 different Councils, each having their own independent concept of society, what it needs and how it should be governed and serviced, and each free to interpret the Local Government and other Acts and Regulations as they see fit.

The Local Government Reform Steering Committee Report – May 2010 noted:

The Department of Local Government, through its oversight of local government compliance, is required to manage the operational issues arising from these capacity constraints.

The Department's governance branch works to ensure local governments meet community expectations in transparency and accountability. Each year it receives hundreds of complaints and allegations about local government operations and procedures. Over 1000 complaints have been received in the last three years. While a percentage of these complaints are of a vexatious nature, these complaints and issues are echoed in the concerns raised by external stakeholders, development industry and the business sector generally, about fragmented and inconsistent approaches to decision making and planning processes"

"Currently 28% of local governments are dependent on grants for 40% or more of their recurrent revenue."

RECOMMENDATION:

Given a series of a number of official enquiries and reviews have occurred over a very long period with little real change, it is unlikely this review will produce substantial change for improvement.

However the present system is on a path of unsustainability towards inevitable implosion. Hence immediate intervention is essential.

It is recommended that a three tier system of local government be developed for the state of Western Australia to reflect the organisational capacity and capability for local governments to do what they are there to do.

Tier one: Metropolitan local governments

Tier two: Large regional local governments having similar population and revenue characteristics as to metropolitan local governments

Tier three: Small rural local governments

Each tier would have prescribed generic functional responsibilities and accountabilities commensurate with their physical, financial and intellectual (skills and knowledge) resources

Each tier would have prescribed generic limits to their activities to prevent open-ended government

Each tier would have prescribed generic limits to their borrowings and debt to prevent binding their community to endless or unsustainable debt

Each tier would have prescribed minimum performance standards, enforceable by the Minister or Department, with enforceable penalties and/or corrective action

25: SCOPE OF FUNCTIONS

Of vital significance is S3.2 of the Local Government Act 1995 which defines:

3.2. Relationship to State Government

*The scope of the general function of a local government in relation to its district **is not limited** by reason only that the Government of the State performs or may perform functions of a like nature*

This section grants local governments unlimited functional scope – without reference to a higher authority.

That is bad law - legitimising lawful dictatorial and authoritarian powers.

Having regard to S5 of the Interpretation Act 1984:-

***“Function”** includes powers, duties, responsibilities, authorities, and jurisdictions;*

a definition which means **"includes but not limited to"**

it follows a local government has extremely broad powers to regulate the lives of its citizens.

It follows also that to give itself a power to do any "thing", - i.e. perform a function, all a local government has to do is to do it – because function and power are one and the same thing in law.

Specifically, because the Local Government Act 1995 and the many other Acts empower the Executive arm of a local government "to do", it follows that an executive/administration can "do" whatever it likes with "lawful authority".

Furthermore, the Local Government (Uniform Local Provisions) Regulations 1996 prescribe:-

R4 lawful authority, in relation to the doing of a thing, means —

- (a) the authority under a provision of a written law to do the thing; or*
- (b) an authorisation, approval, licence, permit or other right, granted by the local government or any other person, under another written law, to do the thing; or*
- (c) if neither paragraph (a) nor (b) applies, the written permission of the local government to do the thing;*

Given EVERY local government is required to perform most the above functions, it follows that few, if any, can perform to the standard of "general competence" described in the Minister's Discussion Paper.

"While the term is not used within the Act, local governments in Western Australia operate under the principle of 'general competence'. This means that local governments are autonomous bodies established to provide for the good government of persons in their district"

In the interests of protecting and preserving the democratic state, these powers must not only be granted with great care, but restricted to persons demonstrating their capacity to wield those powers justly, with honesty and integrity and free from sectional interest or bias.

It is essential the State Government retain the power to take over, censure, correct, suspend, dismiss and penalise local governments.

That cannot be in an autonomous system free from the fetters of the Governor and Executive Council control.

It is a fine line between communism/fascism and executive government – particularly when the players operate in an all-care and no-responsibility statutory environment and culture of political and social dominance.

The inevitable conclusion is a trend towards totalitarianism.

History shows that inevitably results in civil insurrection or civil-war.

One example of the creeping encroachment into the lives of people is the ubiquitous DAP (Development Assessment Panel).

Notionally independent, these unaccountable entities comprise independent specialists supplemented by a sprinkling of local government representatives, who review and deliberate upon development applications previously processed by a local government.

The applicant is not a participant and cannot speak to the application unless invited.

However the local government representatives in the DAP are described in law as "independent" persons but may be expected to naturally support their previous decisions,

so the effect is that applications will invariably be considered in much the same manner as previously.

The powers of unelected executive government DAPs are broad and enshrined in law.

An example of how this works is shown in this extract from a development application for a new small medical centre business :-

*"The applicant and landowner are advised that it is a statutory requirement to comply with all conditions of this approval, and that not complying with any condition is therefore illegal. Failure to comply with any condition of this approval or the approved plans constitutes an offence under the Planning Development Act 2005. **The City can issue a Planning Infringement Notice of \$500 (without notice) and/or commence legal action with higher penalties up to \$200,000 for each offence and a daily penalty of \$25,000 per day for the continuation of that offence.** It is the responsibility of the applicant and/or landowner to inform Council in writing when they consider the development to be complete and all conditions of this approval have been satisfied."*

That threat includes the conditions:-

A landscape plan shall be submitted to and approved by the City (Executive Director Development Services). The landscape plan shall include:

- a. Plant species (predominantly West Australian natives);*
- b. Numbers, location, container size;*
- c. Method of irrigation of the landscaped areas;*
- d. Landscaping and treatment of adjoining verge areas;*
- e. Low maintenance trees (minimum 45 litre size container) within the street verge.*
- f. Landscaping strips between the parking area and the street boundaries of the site as shown on the development plans;*
- g. The provision of shade trees within the car park at the rates of at least 1 tree per 10 metre interval along any line of car parking;*
- h. The provision of a shade tree in proximity to the upper level building entry;*
- i. Lighting to pathways, car parking and entry points.*

All landscaping shall be installed as near as practicable to occupancy of the development in accordance with the landscape plan and maintained as per the approved plan thereafter.

In this open ended condition we have the local government deciding what species of shrubs and trees can be lawfully planted on the site, in what numbers and in what size.

The presumption is that the local government knows best.

This is all notwithstanding the application shows the majority of the site will be covered in concrete buildings and concrete car park.

This conspicuous site was previously owned by the local government for about forty years, during which period remained in an unsightly dilapidated state with uncontrolled weed growth and rubble (litter).

This example again shows one law for local governments and another for the governed.

*"The developer is reminded of the requirement under the provisions of the Environmental Protection Act that all construction work (which includes earthworks and similar) be managed with due regard for noise control. **Works generating noise, and rock breaking in particular, are not permitted:-***

- a. Outside the hours of 7.00am to 7.00pm; or*
- b. On a Sunday or Public Holiday"*

This development requires the use of heavy vehicles and earthmoving machinery which, of necessity, generate "noise".

The point is that the terms "noise" and "noise control" are not defined, giving the local government open-ended authorities to impose further conditions or close down the works at will.

If all of the above was not enough, further to the above development approval process the applicant must also start from the beginning and apply for a building licence, which generates opportunity for another round of creative discretionary approvals.

The costs incurred for appealing these decisions is great and not for the faint hearted.

This is the system described as "open and transparent".

It is also one way of defining "government".

RECOMMENDATION:

Restating the above recommendation,

- 25.1 Each tier would have prescribed generic functional responsibilities and accountabilities commensurate with their physical, financial and intellectual (skills and knowledge) resources.**
- 25.2 Each tier would have prescribed generic limits to their activities to prevent open-ended government**
- 25.3 Each tier would have prescribed generic limits to their borrowings and debt to prevent binding their community to endless or unsustainable debt**
- 25.4 Each tier would have prescribed generic limits to their investments, loans, securities etc to minimise risk**
- 25.5 Shareholdings should be prohibited to prevent risk. Local governments are not business focused organisations and lack the skills required to manage investments.**

26. GOVERNANCE AND MANAGEMENT

The Local Government Act 1995 provides that the "Council" – a notional entity comprising a standing committee of *elected* "ordinary" or "average" person self-nominated community representatives who claim to represent community attitudes, wants and needs - is

responsible for “**governing**” – i.e. “managing” all of these functions for “*more efficient and effective local government*”.

However the LG Act does not require a Council to possess **any** management skills or “arms and legs” – i.e. physical resources - so pursuant to S5.2 of the Local Government Act 1995, must delegate the task of “governance” to its administration staff, managed by the CEO.

3.4. Functions may be legislative or executive

The general function of a local government includes legislative and executive functions.

Notwithstanding other provisions in the Act re delegation of powers and functions, for practical purposes Sections 3.4, 3.5 and 3.18 together clearly empower the executive of a local government with ALL the powers of a local government.

Local Governments also inherit powers and functions directly from other Acts of Parliament.

These many and varied functions do not require the consent of a Council for execution or administration by the executive branch of a local government.

Furthermore the LG Act does not require Councils to possess any intellectual resources – other than to “consider” and make “decisions”.

There is no requirement for a Councillor to be of sound mind.

Of vital relevance, a Council is a **political** entity comprised of professional politicians, whereas the CEO is (in theory) an apolitical administrator supported by an employee workforce.

In law the Council is in charge but in practice the Council and CEO are, and must remain organisational partners.

However S5.36 defines a different organisational design.

5.36. Local government employees

(1) A local government is to employ —

(a) a person to be the CEO of the local government; and

*(b) such other persons as the **council** believes are necessary to enable the functions of the local government and the functions of the council to be performed.*

S5.36 clearly identifies that the functions of the local government and the functions of the council are *separate* and *independent* functions

Notwithstanding 5.36(1) is explicit in prescribing it is the *Council* who determines the human resources for itself and its CEO, S5.36 (2) and (3) separate responsibility for (1) and (2) into Council and CEO, negating 5.36 (1)(2)

However S5.37 (2) restores all power to Council.

A master/servant relationship can neither function nor succeed in this environment - the roles are inter-dependent. Both Council and CEO are servants and agents of the local government as equal partners, with more or less equal powers – because their functions are identical.

In relation to “accountability” the CEO and executive officers can be dismissed by Councils but dismissing Councillors has been a very difficult challenge.

It is also expensive because of contractual arrangements

Accountability of local governments is also a myth.

Importantly, it is also not possible for an elected Council to be accountable for its actions or inactions, errors, omissions, negligence, irresponsibility, irrationality or stupidity, unless Councillors can be prosecuted or sued jointly and severally.

Non-feasance is not only endemic in local government but remains lawful.

Misfeasance and malfeasance are regular events but are mostly quashed by the organisation “closing ranks” into self-protect mode and/or lack of evidence.

In any event, notwithstanding S2.5(6), S9.56 of the LGA protects Councillors and employees from liability for their actions by giving them the legal status of “protected persons”.

THIS IS AN ULTIMATE “ALL-CARE, NO RESPONSIBILITY” ARRANGEMENT DESIGNED TO FAIL.

RECOMMENDATION:

- 26.1 Grant Councils the functional responsibility and accountability they must have as the "elected governing body of a district".**
- 26.2 Limit the powers of a Council to governing its administration and governing the district – i.e. regulating social activity for the benefit of the whole community**

To have any effect at all these must each be separately defined in law

- 26.3 Define the interface between Council and its CEO and how that is intended to operate in all of the various circumstances likely to arise between the boundaries of subservience and dominance – either way in the master/servant relationship**

27. ROLE OF THE CEO

The functions of the CEO are prescribed by the Local Government Act 1995

5.41. Functions of CEO

The CEO's functions are to —

- (a) advise the council in relation to the functions of a local government under this Act and other written laws; and*
- (b) ensure that advice and information is available to the council so that informed decisions can be made; and*
- (c) cause council decisions to be implemented; and*
- (d) manage the day to day operations of the local government; and*

- (e) *liaise with the mayor or president on the local government's affairs and the performance of the local government's functions; and*
- (f) *speak on behalf of the local government if the mayor or president agrees; and*
- (g) *be responsible for the employment, management supervision, direction and dismissal of other employees (subject to section 5.37(2) in relation to senior employees); and*
- (h) *ensure that records and documents of the local government are properly kept for the purposes of this Act and any other written law; and*
- (i) *perform any other function specified or delegated by the local government or imposed under this Act or any other written law as a function to be performed by the CEO.*

However the **Public Sector Management Act 1984** defines the functions of a CEO in the following terms:

29. Functions of CEOs and chief employees

- (1) *Subject to this Act and to any other written law relating to his or her department or organisation, **the functions of a chief executive officer or chief employee are to manage that department or organisation**, and in particular —*
 - (a) *to provide leadership, strategic direction and a focus on results for that department or organisation; and*
 - (b) ***to provide policy advice to the responsible authority of that department or organisation**; and*
 - (c) *to plan for and undertake financial, information and other management in relation to that department or organisation and to monitor the administrative and financial performance of that department or organisation; and*
 - (d) *to ensure the appropriate deployment and redeployment of resources within that department or organisation; and*
 - (e) *to ensure the proper organisation of that department or organisation, including the devising of organisational structures and arrangements; and*
 - (f) *to ensure the appropriate division of responsibilities between, and the assignment of functions to, the employees employed in that department or organisation; and*
 - (g) *to manage and direct employees employed in that department or organisation and, without limiting the generality of this paragraph, to be responsible for the recruitment, selection, appointment, deployment and termination of employment of those employees; and Public Sector Management Act 1994*
 - (h) *to classify, and determine the remuneration of, employees in that department or organisation and their offices, posts or positions, and to vary any such classification or remuneration, in accordance with —*
 - (i) *the requirements of any binding award, order or industrial agreement under the Industrial Relations Act 1979 employer-employee agreement under Part VID of the Industrial Relations Act 1979; and*
 - (ii) *the relevant Commissioner's instructions, if any; and*
 - (i) *to evaluate the performances of employees employed in that department or organisation; and*
 - (ja) *where appropriate, to take improvement action in respect of employees employed in that department or organisation; and*
 - (j) *subject to the Equal Opportunity Act 1984, to devise and implement initiatives to ensure that employees in that department or organisation have equal opportunities in relation to their employment in accordance with the principles of merit and equity; and*

- (k) *to establish and implement necessary management training programmes and staff training, education and development programmes; and*
- (l) *subject to Part 7 and the Industrial Relations Act 1979, to resolve or redress the grievances of employees in that department or organisation; and*
- (m) *subject to the Occupational Safety and Health Act 1984, to implement any health and safety standards and programmes adopted with respect to employment in the Public Sector; and*
- (n) *subject to the State Records Act 2000, to ensure that the department or organisation keeps proper records; and Public Sector Management Act 1994*
- (o) *to perform such other functions as are conferred or imposed on the chief executive officer or chief employee under this Act or any other Act.*

Note: "functions" are defined by the Interpretation Act 1984 as being;

"function" includes powers, duties, responsibilities, authorities, and jurisdictions

That definition means **"includes but not limited to"**

Of critical importance is S29 (2) of the Public Sector Management Act 1984:-

29 (2) A chief executive officer or chief employee has power to do all things that are necessary or convenient to be done for or in connection with the performance of his or her functions.

This subsection covers both powers and functions in the same statement, supporting the interpretation that in the case of local government the CEO may do anything he or she wants to do to "govern" – a very open-ended commission by Parliament.

The key elements for **CEO** function as defined by the **Public Sector Management Act 1984** are to:

- **manage that department or organisation**
- **provide policy advice to the responsible authority of that department or organisation**
- **to perform such other functions as are conferred or imposed on the chief executive officer under this Act or any other Act.**

This organisational structure is explicit and creates a master/servant relationship between the Minister and his or her support organisation – a very different scenario to that of the Local Government Act 1995.

RECOMMENDATION:

27.1 It would seem that a reasonable solution to the uncertain arrangement in local government would be to define the role of CEO as being *"as defined in this Act and the Public Sector Management Act 1984"*.

The "higher authority" being the Council of the local government.

28. POWERS OF LOCAL GOVERNING BODIES

Notwithstanding S 1.4 of the Local Government Act 1995 defines:

council means the council of a local government;

local government means a local government established under this Act;

In relation to the WA Constitution S52 (2) *“Each **elected** local governing body shall have such powers as the Legislature may from time to time provide”*,

S1.4 is clearly inconsistent with S1.3 (1)(a) insofar as the term “elected governing body” (i.e. a “Council”) has been misapplied to mean “elected local government” – despite a local government, being a body corporate, is not elected and is subject to the supervision of a *non-persona* entity elected Council.

Also the LG Act at **S 1.3; Content and intent**, prescribes:

(1) *This Act provides for a system of local government by —*

(a) *providing for the constitution of **elected** local governments in the State*

But a local government is not elected – only its Council is elected.

In relation to S52 (2) *“Each **elected** local governing body shall have such powers as the Legislature may from time to time provide”*

the Legislature has chosen over time to define said powers in not only the Local Government Act 1960 and Local Government Act 1995, but also a plethora of other Acts of Parliament which grant unfettered powers to local governments and their employees, being “Public Authorities” and Public Officers” respectively.

In relation to S52 (2) *“being such powers as the Legislature considers necessary for the better government of the area in respect of which the body is constituted”*

said powers have been poorly defined and wrongly allocated.

In relation to S52 of the WA Constitution Act;

*52.(1)The Legislature shall maintain a system of **local governing bodies ELECTED** and constituted in such manner as the Legislature may from time to time provide.*

*(2)Each **ELECTED local governing body SHALL** have such powers as the Legislature may from time to time provide being such powers as the Legislature considers necessary for the better government of the area in respect of which **the body** is constituted.*

notwithstanding that S52 of the WA Constitution Act 1899 **specifically** and exclusively applies to “**elected governing bodies**” it is the case that granting of delegated powers via application of S 5.42 to 5.46 of the Local Government Act 1995, the **unelected** body corporate, managed by the CEO, (all “employees”) holds and executes those powers to act **independently** of the elected council and without reference to either it or an individual Councillor – the latter being prohibited by the Local Government (Rules of Conduct) Regulations 2007.

The WA Constitution clearly defines it is the elected Council who holds the power granted by the Parliament and no-one else.

IT IS THIS STATUTORY DUPLICATION AND/OR TRANSFER OF POWERS BETWEEN CEO AND COUNCIL THAT CAUSES MANY OF THE PROBLEMS EXPERIENCED BY THE LOCAL GOVERNMENT INDUSTRY

It does not clearly define who is in charge.

It does not define the separation of powers between the elected Council and its executive administration

That uncertainty causes much disagreement and angst among the players.

S5.43 further prescribes: “(i) **such other powers or duties as may be prescribed**” – one presumes by subsidiary legislation, directions, notices and orders

There is no provision in the Act for a Council to cancel or claw-back delegated powers excepting by the process defined in S 5.45 - *Other matters relevant to delegations under this Division*

(1) Without limiting the application of sections 58 and 59 of the Interpretation Act 1984—

- (a) a delegation made under this Division has effect for the period of time specified in the delegation or where no period has been specified, indefinitely; and*
- (b) any decision to amend or revoke a delegation by **a local government** under this Division is to be by an absolute majority.*

Note: The term “local government” means a “local government established under this Act” and being a body corporate with perpetual succession and a common seal (S2.5(2), is not a physical person and is therefore physically incapable of making a decision.

S9.49(4) provides:

(4) A local government may, by resolution, authorise the chief executive officer, another employee or an agent of the local government to sign documents on behalf of the local government, either generally or subject to conditions or restrictions specified in the authorisation.

Hence, once again the term “local government” refers to the “decision making body”, thereby in this application being contrary to the WA Constitution

However pursuant to S9.49A. the common seal may be affixed by the CEO at his own discretion.

Consequently an elected Council has no power to give effect to S5.45 (1) (b) hence any powers delegated without limitation of time are, pursuant to S5.45 (1) (a), “indefinite”.

RECOMMENDATIONS:

28.1 Limit the powers and functions of Council that may be delegated to the CEO

28.2 Limit the powers and functions of Council that may be delegated by the CEO to subordinates

28.3 Prohibit the powers and functions of a local government being delegated to third-party servants, agents and contractors

29. PURPOSE, STRUCTURE AND FUNCTIONS OF LOCAL GOVERNMENTS

Pursuant to S 52 of the WA Constitution Act 1899 , the purpose, structure and functions of Councils are set out in the Local Government Act 1995 at:-

2.5. Local governments created as bodies corporate

- (1) *When an area of the State becomes a district, a local government is established for the district.*
- (2) ***The local government is a body corporate with perpetual succession and a common seal.***
- (3) *The local government has the legal capacity of a natural person.*
- (4) *The corporate name of the local government is the combination of the district's designation and name.*
- (5) *If the district's name incorporates its designation, the designation is not repeated in the corporate name of the local government.*
- (6) *Proceedings may be taken by or against the local government in its corporate name.*

Hence an **unelected** "local government" body corporate, staffed by employees, has displaced the "elected governing body" as prescribed by the Constitution.

Therefore a "local government" being a body corporate, is unconstitutional.

2.6:- Local governments to be run by elected councils

- (1) *Each local government is to have an elected council as its governing body.*

2.7. Role of council

- (1) *The council —*
 - (a) *governs **the local government's affairs**; and*
 - (b) *is responsible for the performance of the local government's functions.*
- (2) *Without limiting subsection (1), the council is to —*
 - (a) *oversee the allocation of the local government's finances and resources; and*
 - (c) *determine the local government's policies.*

5.2. Administration of local governments

The council of a local government is to ensure that there is an appropriate structure for administering the local government.

It is clear then that the powers of an elected council are limited to those prescribed by S 2.7 and 5.2, namely the governance of "the local government" itself - BUT NOT GOVERNMENT OF THE POPULATION OF A DISTRICT

Given S 2.7 (2) explicitly assigns responsibility for corporate governance to the Council, but Local Government (Rules of Conduct) Regulations 2007 prohibit Councillors from interacting with or instructing staff, the Council has neither the skills nor experience nor resources or legal capacity within itself to perform that task.

It must therefore delegate that functional responsibility to the CEO.

Consequently an elected Council is able to lawfully operate in an “all care and no responsibility” mode.

GOVERNMENT OF THE POPULATION OF A DISTRICT is therefore executed by the unelected CEO.

In any event a Council meets only periodically, hence the CEO must “govern” in their absence – otherwise there would be no-one home.

RECOMMENDATIONS:

- 29.1 To remove doubt, make it abundantly clear in the Act that a CEO is the "acting governor" of the district between Council meetings and acts in accordance with the LGA, Council's policies and local laws – and any other written law.**
- 29.2 Make it abundantly clear in the Act that local governments are run by their unelected CEO within the constraints and powers established by the LGA, Council- and any other written law**
- 29.3 Make it abundantly clear in the Act that when a CEO "speaks for the local government" he or she is autonomous and binds the local government in law. The term "speak" means in written as well as oral form.**

30. POWERS OF ELECTED COUNCILS

Notwithstanding S2.6 (1), and 2.7 of the Local Government Act 1995, the **powers** of the local governing body are granted by the Local Government Act directly to the CEO.

5.41. Functions of CEO

The CEO's functions are to —

- (a) advise the council in relation to the functions of a local government under this Act and other written laws; and*
- (b) ensure that advice and information is available to the council so that informed decisions can be made; and*
- (c) cause council decisions to be implemented; and*
- (d) manage the day to day operations of the local government; and*
- (e) liaise with the mayor or president on the local government's affairs and the performance of the local government's functions; and*
- (f) speak on behalf of the local government if the mayor or president agrees; and*
- (g) be responsible for the employment, management supervision, direction and dismissal of other employees (subject to section 5.37(2) in relation to senior employees); and*
- (h) ensure that records and documents of the local government are properly kept for the purposes of this Act and any other written law; and*
- (i) perform any other function specified or delegated by the local government or imposed under this Act or any other written law as a function to be performed by the CEO.*

5.42 to 5.46. Delegation of some powers and duties to CEO

This set of sections enables an elected Council to transfer much of its duties, functions and powers to its CEO to perform on its behalf.

Over time the arrangement is likely to become permanent, resulting in the elected members being muzzled, controlled or manipulated by their CEO

Noting the CEO prepares meeting agendas – i.e. the business of a meeting, and records Minutes, the CEO is in a powerful position to manipulate the business of a Council, to present only that information which the CEO considers the Council should know, and create a record of proceedings which is consistent with those goals.

5.41. The CEO's functions are to —

- (i) *perform any other function specified or delegated by the local government or imposed under this Act or any other written law as a function to be performed by the CEO.*

Having regard to S3.4 and 3.18, the effect of this subsection is to **directly** grant the CEO powers “*under this Act or any other written law as a function to be performed by the CEO.*”

Taking all the above together a situation emerges where the CEO is *ipso-facto* “the local government” and the elected Council has been reduced by the legislature to a “review and approve” committee.

Notwithstanding S3.12, it is clear the powers of an elected Council are limited to those prescribed by S 2.7 and 5.2, namely the governance of the local government BUT NOT GOVERNMENT OF THE POPULATION OF A DISTRICT – that is the function of the CEO and administration

That is not consistent with the objects and processes of democratic government.

It will also not be an acceptable working relationship to those elected members who primarily seek office and serve in pursuit of status, glory, praise, respect and accolades from the community and believe they are in charge and running the local government.

RECOMMENDATIONS:

30.1 Clarify the roles of the Council and CEO either as joint equal or proportional partners in governance or as a master/servant

30.2 Clarify the relationship between the CEO and the Community

31. ORGANISATIONAL STRUCTURE

The problems of dysfunctionality and inefficiency in local government have their source in the organisational structure as designed by the legislature.

The legislature is not required to have skills or expertise in organisational structure and process design.

It is written "a camel is a horse designed by a committee".

A solution lies in looking at the issue from a real-world perspective.

- **The community WANTS local government – as evidenced by its rejection of recognition of local government in the Commonwealth Constitution in two separate referenda.**
- **The community WANTS elected representatives**
- **The community *prefers* the WARD system** - notwithstanding it is flawed, undemocratic, unrepresentative, subject to electoral manipulation and Ward Councillors are required to consider and vote on all business before Council – i.e. Ward Councillors make decisions on behalf of and for the whole of District community.

The object then is to create an elected governing body which, to prevent megalomania, has minimal influence over the local government's functions and community governance

On the other hand, Executive Government is monopolistic, dictatorial, socialist, autocratic, self-serving, possesses discretionary lawful powers and is unaccountable to the community it serves, so must be controlled and contained.

The modified "Westminster" system of government as practised in WA is based upon:-

- **The Crown**, represented in WA by the Governor and advised by an Executive Council being Ministers of the Crown
- **The Parliament**, who legislates to make law
- **The Judiciary**, who interpret the law
- **Executive Government** or the Public Service, who execute and administer the Government's policies and programmes under the direction of the Crown
- **Local Government**, which performs functions delegated by the Executive Government and is therefore subordinate to the Crown

Local Government DOES NOT have the authority of the Crown but does have powers defined and granted by various legislation.

The Local Government Act 1995 prescribes at 1.6. *Crown not generally bound*

This Act does not bind the Crown except to the extent expressly stated in this Act.

This submission claims the current status of local government having autonomy from the Crown is a costly mistake which puts the traditional system of government in danger of fragmenting.

Recent events with the City of Perth over several years demonstrate how ineffective the so-called "checks and balances" are in the system.

Having attained autonomy and allowed the local government industry to become accustomed to that arrangement over a twenty-two year period, the only simple way to politically claw back the supervisory and corrective powers of the Crown is to reduce the

scope of local government activity, or reduce their financial capacity to do what they want unfettered by constraint.

This could be achieved by diminishing or abolishing State grants for non-essential services and by limiting Lotteries Commission grants to local government.

This would create a situation of local government activity being limited to what they can afford.

Local governments would then likely increase lobbying for Commonwealth grants but that is a suicidal pathway for them as they would become pawns in a bigger game and puppets of federal politics and the Commonwealth bureaucracy.

RECOMMENDATIONS:

- 31.1 Clearly define the organisation structure for local governments
i.e. who does what, how, when, where and why**
- 31.2 Define functional responsibilities and limits of powers for all officers in their official job descriptions.**
- 31.3 Provide education and training to all officers in all areas of functional responsibility and powers under their jurisdiction**
- 31.4 Minimise internal organisational matrix relationships so as to define clear lines of authority and accountability**

32. FUNCTION OF COUNCIL

RECOMMENDATIONS:

32.1 Define "elected local government body"

A solution lies in the role or function of the “ **Council**” being defined as an “**elected local government body** (pursuant to the WA Constitution) whose **function** is to:-

- **Govern the District** in compliance with Acts, subsidiary legislation and Government policies, by efficient and effective application of the resources available to the local government body corporate
- **Corporate governance** consistent with the standards prescribed by statutory corporations law
- **Review and Approve all functions of government** (as defined) as administered and executed by the CEO and next tier executive officers.
- **Review and Approve** corporate policies, strategic plans, business plans, disposal of assets, town planning scheme zonings and land uses

- **Review and Approve** management systems and their supporting policies, practices and procedures
- **Review and Approve** public policy
- **Review and Approve** financial management performance, investments and business operations
- **Review and Approve** statutory annual reports to government
- **Legislate** subsidiary legislation (as defined) subject to prescribed processes and approvals
- **Represent the Community** to the Executive (wants, needs, concerns, suggestions and recommendations) and ensure responses – i.e. act as the Community's agent
- **Represent the Crown** where directed by legislation
- **Receive and Consider** submissions from the public submitted directly to the collective Council about any local government policy, decision, function or matter and cause the executive to respond as directed by Council – including corrective action
- **Receive and Consider** submissions from individual Councillors arising from their own initiative or from the electorate (residents, ratepayers, electors or the public)
- **Liaise** with external entities and officials

Council is supported by their respective officers, who have – or should have - the expertise to enquire and research to support informed decisions and do the real work relating to governance in the areas of administration, operations and regulation.

The elected Council may retain most of its current functions (“responsibilities”), excepting “management” and with the limitation that its role is clearly defined.

Council would review and approve or reject business presented to it as at present but, in addition, formally monitor, supervise and audit the administration and have a capacity to direct it where a breach of law or process has occurred.

Council’s responsibilities would be limited to jointly and severally performing its functions as defined but not bearing responsibility for the local government as a whole - which currently is a fictional ideal.

Noting the CEO already has delegated authorities similar to those of Council, under the proposed model the CEO would present only those business items to Council which are above a predetermined minimum threshold or standard for submission for approval, or subject to an appeal to Council for a review of an executive decision.

In that sense Council could act as an appeals tribunal, applying community values and standards to assess executive decisions.

In this recommendation the term "Review and Approve" also means to "*consider, debate, change, refer back for further investigation and resubmission, set aside, reject, cancel*",

There is risk with such a model because the CEO would have greater autonomy to independently administer the local government, however providing the Council can regulate, suspend or dismiss the CEO using a prescribed safety net process, risk would be minimal.

There could also be provision for the Council to question the CEO - in Council - about any matter relating to the local government – currently a prohibited activity.

In that way the Council could represent the community interest.

32.2 Independent Council Secretariat

It is recommended that in the case of metropolitan local governments, the system be changed to one where the Council is provided with its own secretariat, independent to the administration and CEO's personal secretariat and corporate governance unit.

The present system requires the CEO to provide a secretariat to the Council. This arrangement allows the CEO to manipulate business and the content of agendas and minutes.

Council should be in direct control of agendas and minutes and be responsible for their content.

In such a system, the CEO would be responsible for providing timely and accurate reports to Council for its deliberation as business items and become its servant, rather than its master.

To maintain performance and integrity standards, Council would have to perform or face censure or dismissal by the Minister.

The Council secretariat would still need to fall under the CEO's jurisdiction for employment but would remain functionally independent.

If the CEO believed business was being manipulated by Council or individual Councillors, the CEO would be required to lodge formal complaint to full Council under the Code of Conduct provisions.

Such a system would reverse the existing roles of Council and CEO insofar as the CEO would be the watcher, but since the CEO is a professional function any dissonance created would be constructive and positive for government.

32.3 Committees

It is essential to improving the system that the interspersed committee system be abolished.

Committees comprising Councillors, the CEO and officers which are interspersed between the Executive and Council in the course of ordinary business, are an amalgam of vested interests transversing organisational functional boundaries having differing values, objectives and competing agendas. Accountability is impossible. Bias is ever present.

There will undoubtedly be more detail to work through but the present system is not working and needs to improve.

This proposal would involve minimal change.

32.4 Prescribe a process for Community complaints and recommendations

Council could also apply its resources more effectively by being required in law to consider and assess community questions, complaints and recommendations formally submitted in writing by a prescribed process to the CEO or individual Councillors, with powers to enforce responses and/or actions from the administration via some form of formal document or order, to which the administration must comply.

Such a process would force Councils to consider and respond to complaints and recommendations from residents and electors.

This Council function would help to fulfil the objects of S2 of the LGA

33. FREEDOM, DEMOCRACY AND THE RULE OF LAW

The principles of freedom, democracy and the Rule of Law have long been internationally recognised and codified in law throughout the world as fundamental core pre-requisites for any society. It is universally agreed that without such principles a society will disintegrate from within.

“The Rule of Law requires that all people, including the head of state and the executive government, are subject to the law, and that independent judges are the arbiters of law. By this means, governments are accountable for their actions.”

The Ninth Manning Clark Lecture Presented at the National Library of Australia by Julian Burnside, Canberra, 10 March 2007. Source: <http://www.safecom.org.au/burnside6.htm>

“The term ‘democracy’ has its origins in the Greek language. It combines two shorter words: ‘demos’ meaning whole citizen living within a particular city-state and ‘kratos’ meaning power or rule.

It is generally agreed that liberal democracies are based on four main principles:

- A belief in the individual: since the individual is believed to be both moral and rational;
- A belief in reason and progress: based on the belief that growth and development is the natural condition of mankind and politics the art of compromise;
- A belief in a society that is consensual: based on a desire for order and co-operation - not disorder and conflict;
- A belief in shared power: based on a suspicion of concentrated power (whether by individuals, groups or governments).”

34. VEXATIOUS CONDUCT

Local governments are paranoid about opposition to their policies and practices by the public – i.e. the people they purport to serve with due diligence.

In response to this review, the WA Local Government Association published a policy discussion paper for comment by all member local governments, shown below:-

It is recommended that a statutory provision be considered, permitting a Local Government to declare a person a vexatious or frivolous complainant. Section 5.110(3a) of the Act was recently introduced in relation to the Local Government Standards Panel ruling on vexatious and frivolous Rules of Conduct Regulations breach allegations:

"...a standards panel can at any stage of its proceedings refuse to deal with a complaint if the standards panel is satisfied that the complaint is frivolous, trivial, vexatious, misconceived or without substance."

Given the extensive cost and diversion of administrative resources currently associated with vexatious and frivolous complainants across the Local Government sector, it is recommended that a more general mechanism, based on the principles associated with the introduction of Section 5.110(3A), be investigated.

Amendments to the legislation would need to cover the following points to implement the proposed arrangements:

- Create a head of power to determine whether a community member is vexatious (potentially establish a new body through legislation and give it this power of determination);
- Define vexatious behaviour broadly to include the extent and nature of communication between the alleged vexatious person and the Local Government (using words such as 'unreasonable', 'persistent', 'extensive', 'malicious' and 'abusive');
- Outline the restrictions to statutory rights which can be imposed on a person if he or she is declared by the independent body to be vexatious;
- Establish a process, if necessary, to enable a Local Government to present its case for the alleged vexatious person to defend himself/herself;
- Determine what appeal rights are necessary.

This ideological policy demonstrates that WALGA Member local governments are not content with the processes provided by the Vexatious Proceedings Restriction Act 2002, which defines "vexatious" as;

vexatious proceedings means proceedings —

- (a) which are an abuse of the process of a court or a tribunal; or

- (b) instituted to harass or annoy, to cause delay or detriment, or for any other wrongful purpose; or
- (c) instituted or pursued without reasonable ground; or
- (d) conducted in a manner so as to harass or annoy, cause delay or detriment, or achieve any other wrongful purpose.

How can asking questions of a Council be an "abuse" ?

How can asking questions be a "wrongful purpose" ?

It is acknowledged that Public Questions are an "annoyance" to local governments, but is that a reasonable ground to ban them or the questioner ?

"...accountability can only be exacted where those whose responsibility it is to call government to account are themselves possessed of, or are able to obtain, the information necessary to make considered judgements.

Information is the key to accountability."

Source: Western Australia, Royal Commission into Commercial Activities of Government 24 and Other Matters, Report, Perth, 1992, Part II, para 2.4.2

A dumbed-down, docile, compliant public – shut out from the right to enquire - is the goal of this policy.

The Western Australia Surveillance Devices Act 1998 defines "the public interest" in the following terms at Section 24:

"public interest includes the interests of national security, public safety, the economic well-being of Australia, the protection of public health and morals and the protection of the rights and freedoms of citizens."

The Council of a local government is a POLITICAL entity and each individual Councillor holds a POLITICAL OFFICE.

The United Nations Universal Declaration of Human Rights (UDHR)
(adopted 10 December 1948) prescribes at Article 2:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Source:

<http://www.un.org/en/universal-declaration-human-rights/>

https://en.wikipedia.org/wiki/Universal_Declaration_of_Human_Rights

The Western Australia Equal Opportunity Act 1984 gives effect to the above UN charter at Section 53:

53. Discrimination on ground of religious or POLITICAL conviction

(1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of religious or political conviction if, on the ground of —

(a) the religious or political conviction of the aggrieved person; or

(b) a characteristic that appertains generally to persons of the religious or political conviction of the aggrieved person; or

(c) a characteristic that is generally imputed to persons of the religious or political conviction of the aggrieved person,

the discriminator treats the aggrieved person **less favourably** than in the same circumstances or in circumstances that are not materially different, the discriminator treats or would treat a person of a different religious or **political conviction**."

The High Court of Australia says:

"3. The fact that governmental "services" are expressly included amongst those to which Parliament has extended the application of the Act sufficiently indicates the legislative purpose of providing protection against unlawful discrimination in the provision of services of that nature. It suggests recognition of the particular dangers of discrimination which might, in any case, invalidate the relevant governmental decisions because of the inclusion of a ground or reason irrelevant to the lawful exercise of the power.

Case reports and common experience suggest that local government activities can be a means of discrimination precisely because of the way in which councillors (as in this case) reflect the stereotyping prejudices of the community by whom they are elected.

It must be inferred from the express extension of the Act to "services of the kind provided by ... a local government body" that Parliament set its face against such discrimination.

There are strong reasons of principle why a higher and not a lesser, standard should be expected of such bodies in the performance of functions that may be characterised as the provision of governmental "services".

IW v City of Perth [1997] HCA 30; 191 CLR 1; (1997)94 LGERA 224; (1997) 146 ALR 696; (1997) 71 ALJR 943 (31 July 1997)

PARLIAMENT OF WESTERN AUSTRALIA JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Terms of Reference:

It is the function of the Committee to consider and report on any regulation that:

- (a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;
- (b) unduly trespasses on established rights, freedoms or liberties;**
- (c) contains matter which ought properly to be dealt with by an Act of Parliament;
- (d) unduly makes rights dependent upon administrative, and not judicial, decisions.

If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.

Source:

[http://www.parliament.wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/783AB65DEB9BC334482578320034D824/\\$file/slguide1.pdf](http://www.parliament.wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/783AB65DEB9BC334482578320034D824/$file/slguide1.pdf)

The Commonwealth Crimes Act 1914 No. 12, 1914

Part II—Offences against the Government

24F Certain acts done in good faith not unlawful

(1) Nothing in the preceding provisions of this Part makes it unlawful for a person:

- (a) to endeavour in good faith to show that the Sovereign, the Governor-General, the Governor of a State, the Administrator of a Territory, or the advisers of any of them, or the persons responsible for the government of another country, has or have been, or is or are, mistaken in any of his, her or their counsels, policies or actions;
- (b) to point out in good faith errors or defects in the government, the constitution, the legislation or the administration of justice of or in the Commonwealth, a State, a Territory or another country, with a view to the reformation of those errors or defects;**
- (c) to excite in good faith another person to attempt to procure by lawful means the alteration of any matter established by law in the Commonwealth, a State, a Territory or another country;
- (d) to point out in good faith, in order to bring about their removal, any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different classes of persons; or
- (e) to do anything in good faith in connection with an industrial dispute or an industrial matter.

The Western Australia Criminal Code 1913 prescribes:

45. Acts excepted from s. 44

" It is lawful for any person —

- (a) To endeavour in good faith to show that the Sovereign has been mistaken in any of Her counsels; or
- (b) To point out in good faith errors or defects in the Government or Constitution of the United Kingdom, or of the Commonwealth of Australia, or of Western Australia as by law established, or in legislation, or in the administration of justice, with a view to the reformation of such errors or defects; or
- (c) To excite in good faith Her Majesty's subjects to attempt to procure by lawful means the alteration of any matter in the State as by law established; or
- (d) To point out in good faith in order to their removal any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of Her Majesty's subjects".

Chapter X — Offences against political liberty

75. Interfering with political liberty

Any person who by violence, or by threats or **intimidation of any kind**, hinders or **interferes with the free exercise of any political right by another person**, is guilty of a crime, and is liable to imprisonment for 3 years.

Summary conviction penalty: imprisonment for 12 months and a fine of \$12 000.

Local governments are masters of intimidation by the discretionary application of discretionary powers.

The *modus-operandi* is "if you do not do what we say and how we want it done then you cannot do it at all".

THE HIGH COURT OF AUSTRALIA set the standard for freedom of speech in the following judgement:

"The Australian Constitution limits the power of parliaments to impose burdens on freedom of communication on government and political matters.

No Australian parliament can validly enact a law which effectively burdens freedom of communication about those matters - unless the law is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government in Australia.

Freedom of speech is a common law freedom. It embraces freedom of communication concerning government and political matters.

The common law has always attached a high value to the freedom and

particularly in relation to the expression of concerns about government or political matters [114].

Lord Coleridge CJ in 1891 described what he called the right of free speech as "one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done".

Source: High Court of Australia: Monis v The Queen [2013] HCA 4 (27 February 2013)

35. TERM OF OFFICE FOR COUNCILLORS, MAYOR AND DEPUTY MAYOR

It appears to be the case that the longer a councillor remains in office the more likely he or she becomes better skilled to manipulate the system and take advantage of its weaknesses and lack of effective "checks and balances".

In all structured organisations there is the formal system of hierarchy and formal systems of communication

There is also the informal system of communication via friendships, respect and networks.

These operate outside the normal systems, bypassing normal checks and balances, because they are more efficient and often ignore formal approval processes.

In some circumstances actions may be taken in anticipation of approval after the event, relying upon friendships and personal trust.

The more complex an organisation the more informal communication manifests.

Leadership depends wholly upon the two key elements of "**status**" and "**esteem**". Status is bestowed by an office but esteem must be earned.

"Respect" is also an element, but a person may respect an office but not the incumbent of the office, thus respect may increase or diminish esteem.

An office may be respected but its incumbent may be despised.

If a Mayor or Councillor holds office for an extended period and successfully relate to their fellow Councillors and support staff, they develop esteem.

The greater the esteem the greater the likelihood the use of informal networks, bypassing checks and balances, unlawful or unethical or corrupt conduct, and abuse of discretionary power.

The counter to this is to limit the term of office of Councillors, Mayor and Deputy Mayor to a fixed one-off term.

To my mind this term would be no longer than 8 years – i.e. two consecutive four year terms as a Councillor and four consecutive two year terms as Mayor or Deputy Mayor.

The glory, power and influence of office will always ensure a suitable supply of candidates for Mayor and Deputy Mayor.

RECOMMENDATIONS:

- 36.1 Limit the term of a Councillor to two consecutive four year terms**
- 36.2 Limit the term of a Mayor or Deputy Mayor to two consecutive two year terms**
- 36.3 Disqualify a person holding the office of Councillor, Mayor or Deputy Mayor for a minimum period of eight years after conclusion of his or her most recent period of office**
- 36.3 In the case of small districts where insufficient Councillors stand for election, if the shortfall in elected Councillors is small either;**
- **reduce the number of Councillors required by Ministerial Order before the election date, or**
 - **instal suitably experienced persons appointed by the Minister to fill the quota, or**
 - **cancel the election and appoint a Commissioner.**
- 36.4 Prescribe that a Mayor or Shire President and their deputies MUST be elected by the people within the whole District.**

Historic electoral result evidence shows that under the Ward system, unsuccessful candidates may often receive more votes than those successful in other Wards.

In the absence of formal Mayoral elections, at the time of an election it is not a requirement that prospective Mayoral candidates reveal their intentions, so Electors have no idea who Council may choose to be their next Mayor.

Electoral results show that if a Mayor or Shire President is the only candidate they are then automatically elected unopposed with not a single vote having been cast.

That individual can then present as the only candidate for election by Council.

This results in the Mayor or Shire President being appointed without a single vote having been cast. The old boy network and nepotism have no place in modern society.

If the Ward system is to stay then electoral change is essential.