



edotasmânia

using the law to protect the natural and built environment

131 Macquarie Street
Hobart TAS 7000

tel: (03) 6223 2770
email: edotas@edotas.org.au

1 March 2019

Local Government Legislation Review Project Team
Local Government Division
Department of Premier and Cabinet
GPO Box 123
Hobart TAS 7001

By email: LGAReview@dpac.tas.gov.au

Dear Madam / Sir

Submission on Review of Tasmania's Local Government Legislation Framework: Discussion Paper

EDO Tasmania is a community legal centre specialising in environmental and planning law. We regularly advise community members concerned about issues arising at a local government level and have a strong interest in ensuring that Tasmania has a system of local government that supports a socially, economically and environmentally sustainable future.

EDO Tasmania welcomes the Government's Review of Tasmania's Local Government Legislation Framework. We are pleased to provide our attached submission on the Discussion Paper themes relating to Council Governance and Powers, Democracy and Engagement, and Performance Transparency and Accountability.

We provide a summary of our recommendations below.

Key Recommendations

- Significant local government decisions, plans and strategies should:
 - take account of sustainability and long-term considerations including the target, objects and proposed principles of an amended *Climate Change (State Actions) Act 2008*
 - align with the United Nations Sustainable Development Goals
 - be informed by meaningful community consultation
- The Tasmanian Government should ensure it undertakes meaningful consultation on the development of State Planning Policies and other planning directives, and respect local government decisions to appropriately manage proposed development
- State of the Environment reporting should recommence to enable local governments to evaluate whether they are achieving their strategic and Resource Management and Planning System objectives
- Only persons enrolled on the State and Federal electoral roles for a municipal area should be entitled to vote in local government elections
- Local government electoral laws should:
 - impose caps on donations to local government candidates, ban donations by developers, and require real time donation reporting by candidates and councillors
 - expand the definition of "interest" to include non-pecuniary beneficial interests

- impose strong penalties for non-compliance and be effectively enforced
- A State department or agency should be appointed with the duty of investigating local governments for non-compliance with their duties under s 63A of LUPAA or 20A of EMPCA
- The Tasmanian Ombudsman should be adequately resourced to investigate local government complaints
- A centralised local government website should be developed which allows users to:
 - find their council
 - compare their council's performance, including environmental performance, to that of other similar councils
 - find extensive information on what councils do, and how they work and where to go to make a complaint
 - access development application and development permit documents.

Thank you for the opportunity to comment on the Review of Tasmania's Local Government Legislation Framework: Discussion Paper. If you wish to discuss anything we have raised in this submission, please do not hesitate to contact our office on (03) 6223 2770.

Yours sincerely,

Environmental Defenders Office (Tas) Inc

Per:



Claire Bookless
Principal Lawyer

Submission on Review of Local Government Legislative Framework

Need for reform

Local governments in Tasmania are increasingly responsible for the delivery of public services (such as roads, public transport, childcare, public recreational facilities and areas) and the implementation of land use, public health and safety and environmental regulations. Local governments therefore play a vital role in the everyday lives of Tasmanians.

As Tasmania grows, increasing pressure will be placed on local governments to maintain and improve the Tasmanian quality of life. There is also likely to be some evolution in the community expectations about the services that ought to be provided by local governments. It is important that local governments have the power and resources to efficiently and effectively respond to these demands.

Local governments are established under Tasmania's Constitution but their powers and functions are currently primarily prescribed in the *Local Government Act 1993* (Tas).¹ It is essential that this Act and related legislation provides an appropriate basis for the myriad of roles that local governments perform both now and into the future. The following submission makes recommendations to improve the current local government legislative framework.

Council Governance and Powers

Governance

There is no one definition of good governance. Invariably, it is defined by reference to a set of principles. According to the Tasmanian Government *Good Governance Guide for Local Government in Tasmania* (the **Guide**), good governance is:

- Accountable
- Transparent
- Law abiding
- Responsive
- Equitable
- Participatory and inclusive
- Effective and efficient
- Consensus oriented.²

We submit that good governance is also sustainable and takes account of long-term considerations, such as the needs of future generations.³ This is reflective of best practice trends in corporate governance.⁴

¹ We note local governments perform important roles under many other Acts, including, but not limited to, the *Land Use Planning and Approvals Act 1993* and the *Environmental Management and Pollution Control Act 1994*

² We understand that these principles have been adapted from the Victorian Local Governance Association *Good Governance Guide* and in turn, from the United Nations, see [UNESCAP \(2009\) What is Good Governance](#).

³ This is one of the 12 principles enshrined in the [Strategy on Innovation and Good Governance at local level, endorsed by a decision of the Committee of Ministers of the Council of Europe in 2008](#). This principle is also reflected as the United Nations Development Program good governance principle of "Strategic vision", see the UNDP (1997) *Governance for sustainable human development: A UNDP policy document*.

⁴ On 27 February 2019, the Australian Stock Exchange issued guidance to listed companies to ensure they are reporting on their material exposure to environmental (including climate change) or social risks and how they are managing or intending to manage those risks: ASX Corporate Governance Council (2019) [Corporate Governance Principles and Recommendations \(the Fourth Edition\)](#)

As local governments are one of the major providers of community infrastructure and are responsible for preparing strategies and plans with long-term consequences, it is essential that in making decisions, they ensure that they are not transferring environmental, social or economic costs to future generations, particularly in light of the risks posed by climate change.

While it may not be possible to prescribe all the features of good governance in legislation, aspects of the principles of good governance highlighted in the Guide are already implemented through various provisions in local government legislative framework. Notably even the good governance principle of sustainability has been acknowledged as a key Resource Management and Planning Systems objective for laws including the *Land Use Planning and Approvals Act 1993 (LUPAA)* and the *Environmental Management and Pollution Control Act 1994 (EMPCA)*.

We further note with approval that the *Local Government (Content of Plans and Strategies) Order 2014* requires that Council's assets management policies to provide for:

- the promotion of sustainability and community resilience
- planning for climate change adaptation and mitigation
- the adoption of whole of life costing.

However, we consider that more could be done to mandate consideration of sustainability and long-term issues, especially the risks posed by climate change, in all aspects of local government decision-making.

In our [submission](#) on the *Amending the Climate Change (State Actions) Act 2008: Discussion Paper*, we observed:

The most critical failure of existing laws is the failure to implement a consistent, integrated framework for consideration of climate change issues in government decision-making. Unless the objectives and principles of the *Climate Change (State Actions) Act 2008* are reflected in other relevant resource management legislation, the capacity to effect meaningful emissions reduction and adaptation strategies will continue to be hampered.

We strongly advocate for changes to the *Climate Change (State Actions) Act 2008* requiring Tasmanian Government agencies, including local governments, to consider the target, objects and proposed principles of the *Climate Change (State Actions) Act 2008* (as amended) in relation to relevant decisions, including but not limited to:

- decisions relating to Statewide Planning Provisions, Local Provisions Schedules, Regional Land Use Strategies and the assessment of development applications under LUPAA
- the determination of "environmental harm" and "environmental nuisance" under EMPCA
- the creation of by-laws under the *Local Government Act 1993*.

We also recommend that the *Local Government Act 1993* be amended to require strategic, financial management, and asset management plans to consider:

- the target, objects and proposed principles of the *Climate Change (State Actions) Act 2008*
- sustainability
- intergenerational equity.

Local governments should also be encouraged to align all significant plans and strategies with the United Nations Sustainable Development Goals. This will assist them to integrate sustainability across all their activities and decision-making.

SUSTAINABLE DEVELOPMENT GOALS AND LOCAL GOVERNMENT

In 2015 Australia adopted the [2030 Agenda for Sustainable Development](#) and its 17 Sustainable Development Goals (SDGs). Many of the SDGs are directly relevant to and seek to further the principles of good governance outlined in the Guide.

Local governments are some of the best placed organisations to take steps to implement the SDGs. For this reason, it is no surprise that the adoption of the SDGs by Australian local governments has already commenced.

For example, the West Australian Eastern Metropolitan Regional Council has integrated the SDGs into its [Regional Environment Strategy 2016 - 2020](#) and identified the seven of the SDGs that are most relevant to the environment in its region. This Strategy recognises that:

Environmental programs and services are no longer separate from other strategies, programs and projects, they are foundational and integral. Environmental management is only one part of an interlinked and cross-dependent set of activities between environmental, social, governance and economic strategy. It is important that environmental considerations are understood and integrated into other aspects of regional growth. In particular, there is a greater need for environmental management and sustainability to be embraced within planning and land use frameworks, economic development, infrastructure management and to consider community concerns and health impacts. A holistic approach to reaching future goals is required, particularly given the diversity of the region, its assets and development pathways.

The [City of Melbourne](#) has also mapped its strategies and plans against the SDGs, resulting in a recommendation to align future strategy development with the goals to guide a more integrated approach to the city's work.

The Review of Tasmania's Local Government Legislation Framework provides the perfect opportunity to identify opportunities for local governments in Tasmania to work towards the implementation of these worthy goals.

Strategic decisions and consultation

As the tier of government closest to the people, local governments are best placed to engage in meaningful public consultation about their strategic direction and significant decisions. We recommend that any reform to the local government legislation framework ensures that local governments are required to undertake community consultation about all strategic and planning decisions.

We note that through the Tasmanian Planning Reform process, the Government has seriously curtailed the ability of individual local governments to reflect their communities' expectations and aspirations with respect to planning and development. While there may be some efficiencies gained through the standardisation of planning schemes, this has come at the expense of the ability of local governments to craft schemes that adequately reflect and protect local character – geographical, geological, demographic and historical. While the Discussion Paper notes that the "suite of contemporary council planning ... arrangements" fall outside of the review, we urge the Government to heed the concerns expressed by the community through Tasmanian Planning Reform process and endeavour to undertake a significantly more consultative approach in the development of State Planning Policies and other planning directives.

Likewise, we urge the Government to respect decisions like those made by the Hobart City Council to restrict access to land it owns and manages to private developers. We consider legislation designed to facilitate specific developments in the face of strong local community opposition, like the *Cable Car (kunanyi/Mount Wellington) Facilitation Act 2017*, has no justification and is likely to have unwelcome social, environmental and economic consequences.

Mechanisms to support strategic, operational and technical decisions and actions

Strategic, operational and technical decisions and action need to be supported by relevant, expert advice and information.

It is critical that councillors and staff receive adequate training and development opportunities to ensure that they properly understand their respective functions and powers, and are informed about the technical aspects of their decisions/tasks.

Local governments also need to have access to accurate and timely information and data relevant to their area. An example of where such information has been useful is the coastal and inundation hazard mapping which has informed the development of interim planning scheme codes, and in turn, local government decisions on development applications.

In order to support local governments to understand the environmental impacts of their strategic, operation and technical decisions, we strongly encourage the Government to recommence of the publication of State of Environment Reports.⁵ These reports will assist local governments to evaluate whether their plans, policies and procedures are achieving the Resource Management and Planning System objectives and identify where and how they can improve their environmental performance.

Democracy and Engagement

Voting

Currently, voting is not compulsory in Tasmanian local government elections. The Productivity Commission noted that “This potentially creates a risk that Local Governments with relatively small populations will be represented by sectional (engaged) interests, so providing services or making other decisions that may not be those most valued by the community as a whole.”⁶

We consider that sectional interests are also far more likely to be represented by local governments in Tasmania given that:

- corporations that own land within a local government area are entitled to nominate a representative to vote on their behalf; and
- people who own land in more than one municipal area are entitled to vote in each of those areas.⁷

A constitutional law expert has argued that such voting entitlements “dilutes the voting power of individuals, and runs the risk that local governments may become distracted from what is in the interests of their local community”. They have also noted that a number of High Court cases described this type of voting as “conspicuously undemocratic” and “anachronistic” and as otherwise unconstitutional at a Federal or State level.⁸

We agree that there is no justification for voting rules at a local government level that differ from those at the State and Federal levels of government. We recommend that the Tasmanian Government adopt the simple approach to local government elections taken in Queensland: a person is entitled (and required) to vote where they are on the State and Federal electoral role for a district within the municipal area of that local government.

⁵ State of the Environment reports are required to be published every 5 years under section 29 of the *State Policies and Projects Act 1993*, however the last report was published in 2009.

⁶ Productivity Commission (2017) [Local Government, Shifting the Dial: 5 year Productivity Review, Supporting Paper No. 16](#) at pp 13

⁷ Section 254 *Local Government Act 1993*

⁸ See Goss, Ryan (2018) [Votes for corporations and extra votes for property owners: why local council elections are undemocratic](#); *Rowe v Electoral Commissioner* [2010] HCA 46 at [365], and *McGinty v Western Australia* [1996] HCA 48 at [90].

Electoral rules

The Government is presently undertaking a review of the *Electoral Act 2004* in response to concerns that the Act has not kept pace with “rapid changes in technology, social media and community expectations”. We consider that many of the same issues likely to be encountered in that review are equally, if not more, problematic at a local government level.

While councillors are required to register their pecuniary interests once elected and comply with caps on the costs of electoral advertising,⁹ we consider that there are currently insufficient safeguards against corruption and undue influence on local government elections and councillors.

Given that local governments are responsible for performing the very important function of deciding whether to permit developments, we consider that it is absolutely critical that the law is amended to:

- impose a reasonable cap on donations to local government candidates
- impose a ban on developer donations to local government candidates
- require best practice reporting on electoral donations involving real time donation reporting for all donations greater than \$500¹⁰
- expand the definition of “interest” for the purpose of councillors declaring interests to include both pecuniary interests and other beneficial interests
- impose strong penalties for candidates or councillors who breach any of the local government electoral or conflict of interest laws

Jurisdictions such as NSW and Victoria already have some of these measures in place, while Queensland is in the process of reforming its local government electoral act following the Crime and Corruption Commission report *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government*.¹¹

We consider that with effective enforcement, the above proposed reforms would go a long way to reducing the potential for corruption and undue influence on the exercise of the functions and powers of local governments.

Performance, Transparency and Accountability

Performance monitoring and oversight

As local governments are creatures of State legislation, it is natural that the State should have some responsibility for and oversight of their performance. This is currently done in a variety of ways and by a variety of different agencies, including:

- the Director of Local Government;
- the Tasmanian Ombudsman;
- the Integrity Commission;
- the Auditor-General; and
- the Local Government Board and Board of Inquiry.

Most enquiries that EDO Tasmania receives concerning local governments relate to their failure to perform or effectively perform their regulatory functions and powers under LUPAA and EMPCA. While LUPAA makes it an offence for local governments to fail to take all reasonable steps to ensure compliance with their planning scheme, it appears that both the Director of Local Government and

⁹ Sections 54 and 278 *Local Government Act 1993*, and r22A *Local Government (General) Regulations 2015*

¹⁰ Best practice reporting of electoral donations is discussed at length in The State of Queensland (Crime and Corruption Commission) (2017) [Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government](#)

¹¹ See [Local Government Electoral \(Implementing Stage 1 of Belcarra\) and Other Legislation Amendment Bill 2018](#)

the Planning Policy Unit within the Local Government Division of the Department of Premier and Cabinet take the view that it is not their responsibility to investigate or potentially prosecute a local government which has failed in its LUPAA duties, leaving the burden of this responsibility on individual members of the community.

In certain circumstances, our clients may have recourse to the civil enforcement remedies available under LUPAA or EMPCA, however the delays and costs relating to those proceedings can be a significant impediment to effectively resolving the issues (and a barrier to access to justice).

Last financial year, approximately 12 per cent of all complaints to the Ombudsman relate to local governments. Due to lack of resourcing and funding provided to the Tasmanian Ombudsman,¹² we understand that complaints to the Ombudsman about local government performance can often experience long delays. Furthermore, once the Ombudsman has undertaken an investigation of a complaint, he has no power to require that any recommendations he makes to the council in question are implemented.¹³ This means making a complaint to the Ombudsman does not offer a realistic solution to many of the problems our clients encounter with local governments.

Finally, while the Minister may convene a Board of Inquiry to investigate serious issues with a council's performance, this is unlikely to provide a mechanism for resolving non-systemic or one-off issues.

For these reasons, we recommend that:

- a State department or agency be appointed with the duty and power to investigate local governments that are not complying with their duties under s 63A of LUPAA or 20A of EMPCA
- increased funding be provided to the Tasmanian Ombudsman to investigate complaints relating to local government performance.

Reporting and transparency of information

In its recent report on local government, the Productivity Commission noted:

Assessing and reporting on the performance of Local Governments and providing this information in a transparent manner that is accessible to both governments and the wider community is an important mechanism for incentivising improvements. However, at present these mechanisms are not used as widely or as effectively as they could.¹⁴

We agree that a centralised and transparent reporting mechanism will drive better performance by local governments.

Until 2013-14, Tasmania's local governments reported on a range of "sustainability objectives and indicators". These reports were used to measure and compare performance across financial management, asset management, planning and development.¹⁵ One of the objectives local governments were required to report against was the development, implementation and improvement of "planning and development strategies that improve the quality of life for communities through supplying access to facilities and services, appropriate infrastructure provision and sustainable environmental practices." However, the only metrics used measure the achievement of this objective were:

- whether development applications were processed within the statutory timeframe
- the percentage and types of permits issued; and
- number of appeals to the Resource Management and Planning and Appeals Tribunal and their outcome.

While we question whether these metrics are an appropriate measure a council's environmental performance, the information was still important for understanding the difference in councils'

¹² See for example the [Tasmanian Ombudsman Annual Report 2017-18](#) at p 3.

¹³ See [Tasmanian Ombudsman Annual Report 2017-18](#) at p 10.

¹⁴ Productivity Commission (2017) [Local Government, Shifting the Dial: 5 year Productivity Review, Supporting Paper No. 16](#) at pp 13 -14

¹⁵ See for example, http://www.dpac.tas.gov.au/_data/assets/pdf_file/0009/205893/SOI_report_2011-12.pdf

approaches to development assessment. We contend that since ceasing the Local Government Sustainability Objectives and Indicators reporting, Tasmania has fallen behind other states in its reporting on the performance of local governments.¹⁶

We support the Productivity Commission's recommendation¹⁷ that Tasmania develop a centralised website, similar to the Victoria's [Know Your Council website](#), which allows users to:

- find their council
- compare their council's performance to that of other similar councils
- find extensive information on what councils do, and how they work and where to go to make a complaint.

As previously noted, reinstating State of the Environment reporting would provide a useful basis for strategic planning by local governments. These reports could also provide local governments with a benchmark against which they can assess and report (on the central local government website) their performance for key environmental indicators.

In our experience, local governments differ markedly in the information that they make available to members of the community in relation to both proposed and permitted developments. Access to this information is critical to ensuring that councils are appropriately performing their functions and exercising their powers under LUPAA. Without this information, it is also difficult (if not impossible) for members of the community to exercise their appeal and civil enforcement rights. In order to guarantee a more transparent and consistent approach is taken by local governments with respect to this information, we recommend that the centralised local government website also include a portal for all development applications and permits issued by local governments across the State.

¹⁶ Productivity Commission (2017) [Local Government, Shifting the Dial: 5 year Productivity Review, Supporting Paper No.16](#) at pp 15-16

¹⁷ Productivity Commission (2017) [Local Government, Shifting the Dial: 5 year Productivity Review, Supporting Paper No.16](#) at pp 15-16