

Our ref: AD001079

19 February 2019

Mr Alex Tay  
Director of Local Government  
Department of Premier and Cabinet  
Level 6  
15 Murray St  
HOBART TAS 7001

Dear Mr Tay,



**Review of the *Local Government Act 1993***

I am responding to your invitation to make a submission to the discussion paper, on which comments are due by 1 March 2019, about the review of the *Local Government Act 1993* (the LG Act).

The discussion paper notes that:

*Complaints relating to the conduct of elected members can be made through Code of Conduct and Code of Conduct Panel Processes (which were reformed in 2017 and are outside the scope of this Review).<sup>1</sup>*

However, as a result of our discussions, I understand that there are two issues which involve the Commission that are likely to be significant in the review.<sup>2</sup> The first is ensuring efficiency in complaint handling, and the second is enhancing transparency and accountability of local government. This submission seeks to address those two issues.

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<sup>1</sup> Department of Premier and Cabinet, Local Government Division, *Review of Tasmania's Local Government Legislative Framework: Discussion Paper*, December 2018, p24 (Fact sheet 7). The paper is available at [http://www.dpac.tas.gov.au/\\_data/assets/pdf\\_file/0008/426329/180873\\_DPAC\\_Local\\_Government\\_Legislative\\_Framework\\_WCAG.pdf](http://www.dpac.tas.gov.au/_data/assets/pdf_file/0008/426329/180873_DPAC_Local_Government_Legislative_Framework_WCAG.pdf), retrieved on 21 January 2019.

<sup>2</sup> Telephone conversation between Alex Tay, Director of Local Government, and Richard Bingham, 22 January 2019.

### *Overlapping jurisdictions*

There is currently considerable overlap between the roles of the Commission, in considering complaints of misconduct against local government councillors and staff, and the mechanisms established under the LG Act to deal with local government conduct and other issues.

The overlap is dealt with as a matter of practicality through informal consultation between our two organisations, and the Commission has all powers necessary for it to be able to dismiss or refer complaints as it sees fit.<sup>3</sup> From my perspective, these informal arrangements are working well.

However, the scheme seems unnecessarily complex and the following issues remain:

- the Local Government Division (LGD) is able to undertake investigations into allegations of misconduct by councillors and staff, as well as other facets of local government administration, and this duplicates the jurisdiction of the Commission. However, the Division's powers are not as extensive as those of the Commission
- the LG Act provides for code of conduct panels to deal with complaints about breaches of the code of conduct applying to elected councillors. This also duplicates the jurisdiction of the Commission, although code of conduct panels have the additional ability to impose sanctions
- it is not uncommon for complainants to 'forum-shop' when they receive a decision which they don't like from either the LGD, a code of conduct panel or the Commission. The overlap in jurisdictions permits this to happen relatively easily
- the need for informal consultation about all matters involving local government conduct issues results in some inefficiency for the Commission.

Currently, there are some benefits to the Commission's processes as compared to those under the LG Act:

- we deal with anonymous complaints (the s 28V issue – see below)
- we don't have legislated timeframes for our matters (also the s 28V issue)
- we have stronger coercive powers, and a better capacity to ensure confidentiality through the use of s 98 of the *Integrity Commission Act 2009* (the IC Act)
- we have a capacity to table reports, thus making them public
- our investigations tend to be wider in scope, beyond specific offences or breaches
- because we are not subject to direct Ministerial control, we may be perceived as more independent
- we are able to accept and deal with protected disclosures about council staff. Disclosures about councillors can only be made to the Ombudsman.

The Commission's Board has considered this issue of overlapping jurisdictions, and wishes to make it clear that it does not have a firm position on what resolution may be preferable. We are open to discussion about the range of options available, from vesting exclusive jurisdiction in either the Commission or the code of conduct panels, through to continuing to rely on the current informal

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<sup>3</sup> See, *Integrity Commission Act 2009*, s 36.

mechanisms to ensure that misconduct complaints are addressed expeditiously by the most appropriate body.

However, the Commission believes that the review should more clearly delineate the roles of the Commission, the LGD and the code of conduct panels in an effort to clarify jurisdiction and simplify the legislative scheme for dealing with local government conduct issues.

#### *Section 28V of the LG Act*

We have previously commented that s 28V of the LG Act may operate to limit which matters the Commission may refer to a code of conduct panel. A further issue arises with what a panel may do with any report referred to it by the Commission.

A significant portion of the complaints received by the Integrity Commission relate to alleged misconduct by councillors.

A councillor is a 'designated public officer' for the purpose of the IC Act. Importantly, s 87 of the IC Act operates so as to prevent the Commission from referring complaints about designated public officers to any other person or body until the Commission has first assessed and investigated the complaint.<sup>4</sup> In relation to code of conduct breaches by councillors, the only means of addressing substantiated breaches – following an investigation – is through the code of conduct panel process.

The form requirements of s 28V(3), particularly the need to lodge a 'complaint' within six months of the alleged breach, create substantial difficulty when a Commission assessment and investigation must be completed first. This issue is compounded when the Commission is in receipt of complaints that are submitted some time after the alleged breach occurred.

Further difficulties exist: for example anonymous complaints may be received by the Commission whereas s 28V(3)(b) prevents them. It is also undesirable that a Commission referral would result in the recipient of that referral incurring a cost (by virtue of s 28V(3)(g)) in order to address it.

A solution would be for the Commission to be provided with an exemption from the requirements of s 28V, and enabled to refer a matter (such as above) directly to the Executive Officer. This solution would allow more time for the Commission to fully investigate a matter, and could potentially save the code of conduct panel's time and resources.

A key function of the current form requirements in s 28V is to (correctly) protect the code of conduct process from frivolous or vexatious complaints. As the Commission would only be referring substantiated complaints through this process, this should not be a significant consideration inhibiting the proposed change.

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<sup>4</sup> Note that on receipt of a complaint, the Commission must first assess it in accordance with Part 5 of the *Integrity Commission Act*, and can then investigate the complaint in accordance with Part 6. A complaint cannot be accepted for investigation without first being subject to the assessment process.

The issue was addressed as part of the Five Year Review of the IC Act. The outcome of the review was covered by Recommendation 48:

*That the Local Government Act 1993 be amended to provide for referrals from the Commission to be dealt with without the requirements of sections 28V(3)(b), (f) or (g) of that Act, and that amendments be made to that Act to ensure that such referrals be made directly to the Executive Officer and (as has been recommended in Recommendation [12(b)] in relation to ED5) on such referral the Code of Conduct Panel may treat the evidence gathered by the Commission as part of its investigation.*

In response to this recommendation, the government noted:

*Accepting this recommendation would allow referrals directly from the Integrity Commission to the Code of Conduct Panel Executive Officer, without going through the normal process of a complainant making a complaint, with the prescribed fee, to the general manager of the relevant council.*

*While the concept of allowing direct referrals to the Panel from the Commission may have some merit, there is concern that the proposed amendments may lead to complainants circumventing the framework established in the Local Government Act and allow abuse of the provisions that were brought in following significant consultation with local government and the Integrity Commission. The Government will consult with Local Government and the Local Government Association of Tasmania, but is not currently minded to agree to this recommendation. (Emphasis added)*

It is thus the Commission's view that the issue of direct referrals from the Commission to a panel warrants reconsideration.

#### *Conflicts of interest*

The LG Act provides for a 'two-tier' method of dealing with conflicts of interest. Pecuniary interests are dealt with under the Act, whilst non-pecuniary interests are dealt with under the code. This is unnecessarily confusing, and as a matter of practice both pecuniary and non-pecuniary interests are often combined in a conflict issue.

In the Commission's view, non-pecuniary interests may be just as influential as pecuniary ones, and should be treated with the same degree of seriousness.

There seems little logic in the current dichotomy, and the Commission believes that the 'two-tier' scheme for dealing with conflict of interest issues should be simplified. At this stage we do not express a view about whether this would be best done by incorporating all provisions in the LG Act, or in the relevant code. This will depend on what other arrangements might be proposed for dealing with conduct issues more generally.

*Integrity training for councillors*

The Commission does not propose any further legislative changes regarding integrity training for councillors. We believe that these issues are better left to the existing provision in s 32 of the IC Act, which requires principal officers to ensure that all public officers of the council are given appropriate education and training in relation to ethical conduct.

Yours sincerely,



Richard Bingham

**CHIEF EXECUTIVE OFFICER**

