

12.3 DISCUSSION PAPERS - OFFICE OF LOCAL GOVERNMENT

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Note: The Report Author does not have a pecuniary interest in the subject matter

REPORT CLASS: Public/Open

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ATTACHMENTS:

1. DPAC Discussion-paper- Addressing-councillor-misconduct [12.3.1 - 17 pages]
2. DPAC Discussion-paper- Merit-based-recruitment-in-councils [12.3.2 - 10 pages]

PURPOSE OF REPORT

The purpose of this report is to provide Council with an opportunity to respond to the discussion papers released by the Office of Local Government in relation to:

- Addressing councillor misconduct; and
- Merit-based recruitment in councils.

The Government has invited submission on both papers closing on 19 April 2023.

BACKGROUND INFORMATION

Addressing Councillor Misconduct

This discussion paper has been provided by the Office of Local Government seeking community input into proposed legislative changes to manage councillor misconduct.

The paper states:

“Conduct matters in Tasmania are primarily dealt with through the local government Code of Conduct Framework, which is established under the Local Government Act 1993. However, the existing framework has very few direct mechanisms or escalation options for addressing instances where the misconduct of a councillor is of such a serious nature that it calls into question their suitability for public office”.

“While the community chooses its representatives every four years, the length of these terms means that a mechanism to consider removal from office outside of those democratic processes may be beneficial to the public interest, but only in extraordinary circumstances. Significant caution must be exercised in empowering any decision-maker in that way, be that a Minister, statutory officer, court, or administrative tribunal”.

The Government indicates it is trying to strike a balance between the importance of, and independence of, the democratic function of councillors, while acknowledging occasionally in limited circumstances, there may be need for intervention.

Merit-Based Recruitment in Councils

This discussion paper seeks feedback on two related legislative and regulatory amendments to clarify and improve standards in relation to the recruitment of council staff and general managers by:

- reinstating a merit principle in the *Local Government Act 1993*, and
- requiring vacancies in the position of general manager be advertised and that appointments be according to merit.

The discussion paper proposes a merit-based principle be reinstated into the *Local Government Act*. This would require the elected council and general managers, in their respective roles, to ensure councils undertake recruitment in accordance with the merit principle.

PROPOSAL/SUMMARY

Addressing Councillor Misconduct

In consulting on proposed 'local government legislative review', the Government in April 2020 released a series of approved reforms.

One of the proposed reforms was to empower the Minister for Local Government to dismiss individual councillors upon investigation and recommendation by the Director of Local Government. Due in part to the 'Future of Local Government Review' the proposed legislative change has not as yet been introduced.

The two options outlined in the discussion paper are:

- amendment to the Board of Inquiry provisions of the *Local Government Act 1993*, to enable a Board to be established to investigate misconduct of individual councillors; and
- empowering the Director of Local Government to seek dismissal or extended suspension of a councillor under the Model Code of Conduct by application to the Code of Conduct Panel or, possibly in future, the Tasmanian Civil and Administrative Tribunal (TASCAT).

The discussion paper states 'these are not mutually exclusive, and the preferred outcome may be to legislate both pathways, which would be applicable to separate contexts.

Enable a Board of Inquiry to be established by the Minister for Local Government to consider the conduct of a single councillor or specified councillors.

At present the Act provides narrow reasons where a Minister can establish a Board of Inquiry. The proposal would extend the legislative power allowing the Minister to establish a Board of Inquiry to investigate individual councillor/s.

Comment

It seems a reasonable approach to expand the legislative powers to allow the Minister to establish a Board of Inquiry. As noted in the discussion paper it is likely this would only ever be in the most extraordinary circumstance.

Empowering the Director of Local Government to seek the dismissal or longer suspension of a councillor under the Model Code of Conduct by application to the Tasmanian Civil and Administrative Tribunal or Code of Conduct Panel.

The Government is considering the transfer of the Code of Conduct Panel's functions, or elements of these to TASCAT. The Government considers a formalised tribunal framework may decrease the risk associated with the introduction of very severe sanctions into the regulatory framework. The discussion paper indicates the legislative proposal to deliver this option would only be formulated once the feasibility of the transfer of Code of Conduct matters to TASCAT have been resolved.

The paper suggests that restricting the potential application of enhanced sanctions to those matters brought by the Director, as a statutory officer, would mitigate the risk of vexatious or unsubstantiated applications from councillors or members of the community seeking dismissal. The Government notes currently the Director of Local Government is provided with extensive information gathering powers under the Act but cannot suspend or dismiss a councillor.

Comment

As democratically elected officials, dismissal from office should only occur as a result of a recommendation to the Governor from the Minister of Local Government.

Providing the power for the Director to refer alleged misconduct by a councillor/s to TASCAT or a Code of Conduct Panel is supported.

The findings of TASCAT or a Code of Conduct Panel to suspend a councillor is also supported, however removal from office should involve an extra step requiring the Minister's support of the action and making a recommendation to the Governor for dismissal.

Merit-Based Recruitment in Councils

This discussion paper outlines proposed legislative amendments, and the related and subsequent Ministerial Order, in relation to general manager appointment and performance management. It also includes a brief overview of provisions relating to merit-based appointments of staff.

Reinstating a merit principle in the Local Government Act

It is proposed the Act be amended to reinstate a clear expectation that the appointment and promotion of council employees will be according to merit. The paper acknowledges that many Tasmanian councils already maintain employment practices, and policy and procedure documentation, which is consistent with that principle. However, a legislated expectation is considered beneficial for consistency and broader application.

Appointment according to merit means, in general terms, that:

- *eligible applicants are provided a fair chance to seek work in local government workplaces;*
- *selection is based only upon the relative ability of applicants for roles to perform in that role; and*
- *the candidates selected are those most capable, ensuring the workforce is of high quality.*

Until 2005 there were requirements in the Act which required a council to ensure that all employees were appointed and promoted according to merit and without discrimination.

The specific proposal outlined is that the Local Government Act 1993 be amended to include:

A council will be required to adopt policies, and a general manager to adopt practices and procedures, such that:

- *council employees are appointed and promoted based on merit;*
- *there is reasonable opportunity for members of the community to apply for employment in local government;*
- *recruitment decisions, including the merit assessment process, are documented; and*
- *the council promotes fairness and equity in employment, including access to employment opportunities.*

A decision to appoint or promote an employee is based on merit where:

- *an assessment is made based on the relative suitability of the candidates for the duties;*
- *the assessment is based on the relationship between the candidates' work-related qualities and the work-related qualities genuinely required for the duties;*
- *the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the duties; and*
- *the assessment is the primary consideration in making the decision.*

It is not proposed that:

- *a uniform requirement be imposed that councils, for example, be required to solicit applications for all positions; or*
- *statutory scope be created for the review of individual local government employment decisions in respect of these principles.*

Comment

Council, through its Municipal Alliance with Kentish, already have a number of policies in place which essentially outlines expectations relating to merit-based recruitment.

Amending the Act to reinstate merit-based employment principles is supported.

It is noted that:

- the merit principle and the principle of equitable access to employment and promotion accords with existing Council policy.
- the degree of operational separation, namely the requirements be embedded and operationalised through council policy, practices, and procedures, is appropriate and accords with existing Council practices.
- it is appropriate the focus of the legislative intent is on systemic standards, rather than individual employment decisions.

Requiring that vacancies in the position of general manager be advertised and that appointment be according to merit

The Report of the Auditor-General into Council General Manager Recruitment, Appointment and Performance Assessment, released October 2021, recommended the Minister for Local Government “develop and issue mandatory requirements and supplementary guidance on recruitment, appointment and performance assessment processes that are consistent with contemporary HR practice”.

The Minister for Local Government at that time, as noted in the Report, affirmed Government’s intentions to make a ministerial order, under section 61A of the Act, providing standards for general manager appointment and performance assessment.

Section 61(3) of the Act provides that “If there is a vacancy in the position of general manager and the council chooses to invite applications for that vacancy, the council is to place, in a daily newspaper circulating in the municipal area, a public notice inviting such applications.”

The discussion paper proposes that the Minister for Local Government make an order under section 61A providing that:

Recruitment

- *The process for the appointment of the general manager must be:*
 - *open and competitive,*
 - *based on an assessment against a detailed role description, including selection criteria,*
 - *informed by the recommendations of a selection panel, comprising a majority of councillors and supported by persons appropriately qualified in contemporary human resources practices and the recruitment of senior management personnel, and*
 - *documented comprehensively, including the evaluation of candidates against the criteria in the role description.*
- *Conflicts of interest of any participant must be documented and appropriate mitigation strategies must be agreed by the panel and documented. Where a councillor, member of a selection panel, or consultant cannot reasonably mitigate a conflict of interest with a candidate due to the nature of that conflict, their participation in the general manager recruitment process must be discontinued.*
- *All reports from the selection panel and decisions of council are to be included in the open or closed minutes of a council meeting.*

Performance assessment

- *General managers must be treated fairly in the assessment of their performance, including with consideration to merit, equity, and transparency of the performance assessment process.*
- *The performance management of a general manager is to be:*
 - *conducted on at least an annual basis,*
 - *based on clear and measurable goals agreed with the general manager and the council, and the evaluation of those goals,*

- *based on advice from persons appropriately qualified in contemporary human resources practices in the conduct of the performance assessment cycle, including in the measurement and evaluation of performance against the agreed goals, and*
- *documented and recorded in the open or closed minutes of a council meeting.*
- *Decisions of council regarding the remuneration and reappointment of general managers are to have regard to its most recent performance assessment.*

Variation from the Ministerial Order

- *A council may seek in writing approval from the Director of Local Government to vary the application of a provision of this order to a specific, prospective general manager recruitment or performance assessment process.*

Comment

The suggested Ministerial Order content relating to requiring vacancies in the position of general manager be advertised and that appointments are made according to merit, is supported.

RELATIONSHIP WITH STRATEGIC PLANNING AND POLICY

The Latrobe Council Strategic Plan 2020-2030 provides the following objectives and strategies:

1.2 Governance - Provide consistent, accountable, transparent and effective governance

- 1.2.7 Communicate the rationale and outcome of Council's decisions, policies and activities through appropriate communication channels

LEGAL AND RISK IMPLICATIONS

The purpose of this report is to outline the proposed changes/amendments to the *Local Government Act 1993* relating to addressing councillor misconduct and improved recruitment practices.

FINANCIAL IMPLICATIONS

There are no direct financial implications in relation to this report.

CONSULTATION

The discussion papers have been publicly released and therefore any person with an interest in the subject matters are able to provide submissions as part of the public process. Details on how to make a submission are outlined in the discussion papers. As noted, the consultation period closes on 19 April 2023.

OPTIONS FOR COUNCIL TO CONSIDER

There is a recommendation provided for the Council to consider. Alternatively, the Council may determine an alternative position on any of the recommendations provided.

OFFICER'S COMMENTS/CONCLUSION

The content of the discussion papers is self-explanatory. Comments have been provided to stimulate debate, allowing the Council to form a position in relation to both matters.

RECOMMENDATION

That the report by the General Manager concerning Discussion Papers - Office of Local Government, be received and:

1. In relation to the paper 'addressing councillor misconduct', Council submits that:
 - (a) it appears to be a reasonable approach to expand the legislative powers to allow the Minister for Local Government to establish a Board of Inquiry to consider the conduct of a single councillor or specified councillors; noting as outlined in the discussion paper it is likely this would only be in the most extraordinary circumstance.
 - (b) as democratically elected officials, councillors should only be able to be dismissed from office through a recommendation to the Governor from the Minister of Local Government.
 - (c) providing the power for the Director of Local Government to authorise that a matter of alleged misconduct by a councillor/s is referred to TASCAT or a Code of Conduct Panel is supported.
 - (d) the findings of TASCAT or the Code of Conduct Panel to suspend a councillor is supported, however dismissal should involve an extra step requiring the Minister for Local Government, if in support of the action, being required to recommend dismissal to the Governor.
2. In relation to the paper 'merit-based recruitment in local government', Council submits that:
 - (a) Council, through the Municipal Alliance with Kentish Council, already have a number of policies in place which essentially outlines expectations relating to merit-based appointments and therefore it supports the proposed amendment to the *Local Government Act 1993* to reinstate merit-based employment principles, and in doing so advise that:
 - (i) the merit principle and the principle of equitable access to employment and promotion accords with existing Council policy.
 - (ii) the degree of operational separation, namely the requirements be embedded and operationalised through council policy, practices, and procedures, is appropriate and accords with existing Council practices.
 - (iii) it is appropriate the focus of the legislative intent is on systemic standards, rather than individual employment decisions.
 - (b) Council supports the proposed Ministerial Order content relating to requiring vacancies in the position of general manager being advertised and further that appointments are made according to merit.