



OUR REF: 2023/002187

20 April 2023

The Hon Nic Street MP
Minister for Local Government

By email to: lgconsultation@dpac.tas.gov.au

Dear Minister,

Response to discussion papers on Local Government reforms

Thank you for your letter of 17 March 2023 in which you draw attention to discussion papers concerning proposed reforms to the *Local Government Act 1993* (LG Act).

Merit-based recruitment in councils

Section 1

We welcome the reinstatement of merit-based recruitment in the *LG Act*, as recently recommended as part of Investigation Smithies. As that investigation showed, in the absence of legislation in favour of the merit principle and a policy requiring that the legislation is applied, there was no legal requirement on those involved to ensure that recruitment was based on merit, and to keep proper records evidencing the reasoning behind their decisions.

The Commission supports the proposed explanatory points outlined on pg 7 of the consultation paper. We recommend that the reinstatement of the merit principle be accompanied by educative material and processes to maximise its effective implementation.

As noted in the discussion paper, the Commission also recommended that a model recruitment policy be developed for Tasmanian councils:

*Under section 58(3) of the Integrity Commission Act 2009, the Board of the Integrity Commission has recommended to the Minister for Local Government and Planning that the Minister, in consideration of Report of the Auditor-General No. 2 of 2021-22: Council general manager recruitment, appointment and performance assessment, **develop a model recruitment policy for Tasmanian councils**. The policy should include:*

- **procedures for direct appointments**, including whether and how the merit principle is to be applied to such processes
- **clear record keeping requirements**, including retaining documentation that demonstrates how applicants were compared against each other to determine applicants to be shortlisted and the preferred applicant, and

- ***a requirement for all selection panel members to make a conflict of interest declaration in all recruitments, with a conflict of interest being defined broadly to include a professional relationship.***

We note that it is your intention to separately consider this issue. In the meantime, the lack of direction in the highlighted sections of the above will continue to create potential misconduct risks and perceptions of bias.

To assist you in developing a policy to support the reinstatement of the merit principle, we recommend including a definition of 'conflict of interest' that covers 'actual', 'potential' and 'perceived' conflicts. Our experience suggests that having a more in depth and categorised definition of 'conflict of interest' assists people to properly consider their relationship to those involved and consequently take more appropriate actions. This is of particular relevance to professional associations, which appear to be routinely dismissed as a potential conflict and not declared.

The policy should also require that any proposed direct appointment require a statement from the general manager 'outlining the reasons why direct selection is being sought, the applicant and their assessment of their capacity to fill the position and explicitly cover off conflict of interest considerations' (Glamorgan Spring Bay Council Recruitment Policy).

Sections 2 & 3

The Commission supports the proposed actions as outlined in the discussion paper.

Addressing councillor misconduct

We welcome these reforms in principle and note the positive working relationship between the Commission and the Office of Local Government (OLG) that was evidenced throughout our recent investigations into particular councils. In broad terms, we believe that the OLG having increased capacity to enforce the *Local Government Code of Conduct 2016* and to seek the dismissal of councillors in specific circumstances is a positive measure.

In terms of the proposed options for reform, we note that the Director of Local Government having the ability to apply to the TASCAT provides a non-political approach and creates a helpful check and balance on the process.

As a related issue, we have previously highlighted our support for amending the *LG Act* to improve the management of misconduct complaints made about councillors under either the *LG Act* or the *Integrity Commission Act 2009*. Please find enclosed a summary of 2 of our previous submissions on this issue. In essence, we recommend that the *LG Act* be amended to:

- ▼ provide that referrals of misconduct matters from the Commission may be dealt with by a Code of Conduct panel without the requirements of sections 28V(3)(b), (f) or (g) of the *LG Act*
- ▼ contain mechanisms for the referral of misconduct matters between the Commission and the OLG, as they relate to councillors, and
- ▼ provide that any information gained from an investigation conducted by the Commission may be used by the Director of Local Government or a Code of Conduct panel in any subsequent investigation undertaken by the Director or panel.

Thank you for the opportunity to comment on the discussion papers.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Easton', followed by a period.

Michael Easton
Chief Executive Officer

Encl.

Summary of submissions on amendment of the Local Government Code of Conduct framework - legislation

The Commission has previously supported amendment of the *Local Government Act* to enable a referral of misconduct matters either directly to the Director of Local Government ('the Director') or to a Code of Conduct panel. This has been articulated in its submissions to the Independent Review of the *Integrity Commission Act* and to the Targeted review of the *Local Government Act*, both finalised in 2016. Both submissions are contained below.

In summary, the Commission submits that the *Local Government Act* should be amended to:

- provide that referrals of misconduct matters from the Commission may be dealt with by a Code of Conduct panel without the requirements of ss 28V(3)(b), (f) or (g) of the *Local Government Act*;
- contain mechanisms for the referral of misconduct matters between the Commission and the Local Government Division, as they relate to councillors; and
- provide that any information gained from an investigation conducted by the Commission may be used by the Director or a Code of Conduct panel in any subsequent investigation undertaken by the Director or panel.

The Commission notes that its robust complaint handling procedures would ensure that any potential frivolous/vexatious complaints submitted about councillors would be dismissed where appropriate.

Submission to Independent Review of the *Integrity Commission Act*

When the Commission conducts an investigation, the Board may determine to refer the report of the investigation and any information obtained in the conduct of the investigation to the principal officer of the relevant public authority for action.¹ When an investigation involves a Councillor (or Alderman), the relevant principal officer is the Mayor.

On receipt of such a referral from the Commission, the Mayor has no means of taking action other than to initiate a Code of Conduct process under the *Local Government Act*. The procedure outlined in that Act does not align with the *Integrity Commission Act* for a number of reasons:

- Since a Code of Conduct panel is the only mechanism for action to be taken in relation to a referred investigation, the Mayor (in receipt of the referral in their capacity as principal officer) will have to become a 'complainant' in order to initiate the Code of Conduct process.
- There may be issues (particularly concerning confidentiality) arising from the fact that the Mayor, as complainant, is required to submit the complaint to the General Manager for assessment under s 28Y.

¹ *Integrity Commission Act*, s 58(2)(b)(i).

- The Code of Conduct process does not provide for anonymous complaints (s 28V(3)(b) of the *Local Government Act* requires the complaint to state the name and address of the complainant).
- A complaint must be made within six months of the conduct to which the complaint relates (s 28V(3)(f) of the *Local Government Act*) which may not be possible if the matter has first been subject to an assessment and investigation by the Integrity Commission. The Commission notes that, given Councillors are Designated Public Officers for the purposes of the *Integrity Commission Act*,² complaints about them cannot be referred at any stage before a Board determination (following an investigation) pursuant to s 58 of the *Integrity Commission Act*.
- A complaint, in accordance with s 28V(3)(g) of the *Local Government Act*, must be accompanied by a prescribed fee. This is not appropriate where a Mayor may, as a result of a Commission referral, incur a pecuniary cost in order to take the required action.

If it is considered that the Mayor is not to become the ‘complainant’ for the purposes of the *Local Government Act*, there is a lack of clarity in relation to the officer or person responsible for dealing with the matter.

An alternative to the process outlined above is for referrals made by the Commission under s 58(2) of the *Integrity Commission Act* to be made directly to the Executive Officer as if that referral had been made under s 28Z(1)(a). It is considered that, provided such an amendment clearly stipulated that such a referral from the Commission would not need to comply with the requirements of s 28V(3), this approach would alleviate the above issues.

Section 28ZE(2) provides the Code of Conduct Panel with a broad discretion as to the evidence it may consider in relation to a complaint. For the sake of clarity, it may be appropriate to specifically provide for evidence obtained by the Commission to be utilised by the Code of Conduct Panel.


Submission to Targeted Review of *Local Government Act*

The Commission supports the Director of Local Government (‘the Director’) having sufficient powers to adequately undertake investigations under the *Local Government Act*. The Commission’s experience is that the implementation of coercive powers requires appropriate oversight to maintain public confidence in the use of any such powers, and must be cognisant of the potential for criminal offences which may be prosecuted by the Director of Public Prosecutions.

The Commission notes its role in relation to the investigation of complaints of misconduct under the *Integrity Commission Act*. The Commission’s jurisdiction includes mayors and councillors.

Given the Commission’s role, it is important that there be a well-developed and understood relationship between the Commission’s functions and those of the Director. The Director does not currently have the coercive powers available to the Commission, so, in some instances, the

² *Integrity Commission Act*, s 6(1)(b).



Director may consider that the Commission may be better placed to investigate a particular matter where it may require use of those powers.

Equally, the Commission may, given the nature of a particular matter, determine that the matter may be better considered by the Director and may refer such matters to the Director for action (including investigation). However, the Commission is restricted from such referrals (prior to an investigation by the Commission) where the matter involves a 'designated public officer' as defined in s 6 of the *Integrity Commission Act*; this includes councillors. Consequently, the Commission is required to either dismiss or investigate complaints regarding councillors.

The Commission supports both the *Local Government Act* and the *Integrity Commission Act* containing mechanisms for the referral of matters between the agencies, as they relate to councillors. This was discussed (in the context of code of conduct panels) by the Commission in its submission to the Independent Review of the *Integrity Commission Act*.

The Commission also supports a provision in the *Local Government Act* to the effect that the Director (or a code of conduct panel) may use the information gained from an investigation conducted by the Commission in any subsequent investigation undertaken by the Director or panel.