



Department of Local Government and Regional Development  
Government of Western Australia

ATTACHMENT

Our Ref: 450-98#02

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Mr Steve Cole  
Chief Executive Officer  
Local Government Managers Australia  
Suite 14, 4 Ventnor Ave  
WEST PERTH WA 6005

Dear Mr Cole

**STAND DOWN PROVISIONS**

The Department has undertaken some detailed policy development in respect to a new provision which would provide for the standing down of elected members in certain circumstances. Your Association's views on the proposal are sought.

The *Local Government Act 1976* currently provides for councils to be suspended and dismissed and for elected members to be suspended or disqualified in certain circumstances. While it is believed the impact of these requirements, together with the official conduct provisions, is substantial, there are concerns that from time to time disruptive elements will arise which make a council unworkable.

The concern is with elected members who are being investigated or have been charged by a statutory authority and whose continued presence prevents council from properly discharging its functions and affects its reputation and integrity. Under this proposal the emphasis is placed on a council's continuing ability to properly fulfil its functions. That is, the standing down of an elected member is justified not simply on the basis of the member being investigated or prosecuted, but on the disruption this causes to a council.

In placing the emphasis on a council's continued ability to function, it is proposed that this provision be drafted in line with the provision which provides for the suspension of a council (see s8.19). That is, that an amendment provide for the standing down of an elected member who is under investigation or who is being prosecuted where it is believed that the member's continued presence leads to *"...a suspected failure of the council to ensure that the local government performs its function properly..."*

The proposal as outlined in the attached document provides for:

- o an elected member to have the ability to voluntarily stand down where they are being investigated or have been charged;

- o an elected member to be forcibly stood down where they are being investigated or have been charged and whose continued presence prevents council from properly discharging its functions and affects its reputation and integrity or where it is in the public interest;
- o the Standards Panel to make the stand down decision;
- o such matters to be referred to the Standards Panel only by a council (absolute majority), a statutory agency or the Department;
- o three to six month stand down periods with six month extensions;
- o the elected member to remain entitled to meeting fees and allowances; and
- o inclusion of an offence for providing false information leading to a stand down.

While some of the issues involved in this proposal are complex and difficult to deal with, it is in the public interest to provide mechanisms for stable and properly functioning local government. Accordingly, I look forward to your reply to this proposal.

Yours sincerely



Jennifer Mathews  
DIRECTOR GENERAL

12 May 2008

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## STAND DOWN PROPOSAL

1. Provide for an elected member to voluntarily stand down, thereby relinquishing their powers and duties as an elected member, where that person is under investigation or has been charged by a statutory authority.
2. Provide for the Standards Panel to forcibly stand down (Note: this is not a suspension) an elected council member, thereby relieving them of their powers and duties as an elected member, to protect the institution and integrity of local government:
  - where that person has not voluntarily stood down; and
  - where that person is under investigation or has been charged by a statutory authority; and
  - whose continued presence as a member:
    - a. prevents a council from properly discharging its functions and
    - b. affects the reputation and integrity of the local government as an institution or
    - c. is not in the public interest.
3. Provide for the Standards Panel to consider standing down an elected member where a complaint or a request to stand a member down has been made to the Standards Panel by:
  - the council (absolute majority) in which the member holds office;
  - a statutory authority that is undertaking an investigation into or prosecution of the member; or
  - the Department of Local Government and Regional Development.
4. Provide for it to be an offence for a person to knowingly give false or misleading information which may lead to the standing down of an elected member.
5. Provide for a member to be "stood down" for a period of 3 to 6 months with subsequent 6 month extensions where necessary.
6. Provide for a member who has voluntarily stood down or who has been required to stand down, to be paid meeting fees and allowances for the duration of the standing down.
7. Provide for the stand down period to cease:
  - at the end of the period specified by the Standards Panel; or
  - at any earlier time as determined by the Standards Panel.

Note: The order would automatically cease to apply at the end of the member's term of office. Further, it is not intended that a member be prevented from renominating for council.

**To:** Chief Executive Officer **From:** James McGovern, Manager Local Government Advisory Services **ATTACHMENT**  
**Organisation:** All Councils **Date:** 21 May 2008  
**Reference:** 05-034-01-001  
**Subject:** Proposed Standing Down Provisions – Local Government Act 1995 **Priority:** High

## IN BRIEF

<b>Operational Area:</b>	Governance
<b>Key Issues:</b>	<ul style="list-style-type: none"> <li>The Department of Local Government and Regional Development seeks comment on a proposal to introduce Standing Down Provisions to augment the Local Government (Rules of Conduct) Regulations 2007.</li> <li>The proposal is to introduce a mechanism similar to Section 8.19 of the Local Government Act 1995, permitting the standing down of individual elected members under investigation or being prosecuted by a statutory authority.</li> <li>The purpose of the proposal is to safeguard the workings of a local government, where it is deemed the continued presence of an elected member under investigation or who is being prosecuted leads to "...a suspected failure of the council to ensure that the local government performs its function properly..."</li> </ul>
<b>Action Required:</b>	WALGA seeking feedback from Local Governments on the proposed amendments by 11 July 2008

The Department of Local Government and Regional Development seeks feedback from the Association on a proposal to introduce Stand Down Provisions with respect to individual elected members under investigation or being prosecuted by a statutory authority.

The Department states the Local Government Act 1995 provides for Councils to be suspended and dismissed and for elected members to be suspended or disqualified in certain circumstances. The new provisions will address concerns that from time to time disruptive elements will arise which make a Council unworkable.

The proposal as outlined in the attached Discussion Paper provides for:

- An elected member to have the ability to stand down where they are being investigated or have been charged;
- An elected member to be forcibly stood down where they are being investigated or have been charged and whose continued presence prevents Council from properly discharging its functions and affects its reputation and integrity or where it is in the public interest;
- The Standards Panel to make the stand down decision;
- Such matters to be referred to the Standards Panel only by a Council (absolute majority), a statutory agency or the Department;
- Three to six months stand down periods with six month extensions;
- The elected member to remain entitled to meeting fees and allowances; and
- Inclusion of an offence for providing false information leading to a stand down.

The Association would appreciate your participation by completing the attached survey or making a separate submission by 11<sup>th</sup> July 2008. For further information on this matter please contact James McGovern, Manager Local Government Advisory Services on 9213 2093 or [jmcgovern@walga.asn.au](mailto:jmcgovern@walga.asn.au)

## STAND DOWN PROPOSAL SURVEY

The attached Discussion Paper provides background to the proposal and raises some matters for consideration. Please read prior to completing the survey questions.

Please provide responses to WALGA by Friday 11 July 2008, via email to [jmcgovern@walga.asn.au](mailto:jmcgovern@walga.asn.au) or fax (attention James McGovern) to 9322 2611.

Please complete the following survey to record your Council's response to the following matters :

1. An elected member to have the ability to stand down where they are being investigated or have been charged;

Supported - Yes No

Why / Why not? Any other comment?

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2. An elected member to be forcibly stood down where they are being investigated or have been charged and whose continued presence prevents Council from properly discharging its functions and affects its reputation and integrity or where it is in the public interest;

Supported - Yes No

Why / Why not? Any other comment?

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3. The Standards Panel to make the stand down decision;

Supported - Yes No

Why / Why not? Any other comment?

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4. Such matters to be referred to the Standards Panel only by a Council (absolute majority), a statutory agency or the Department;

Supported - Yes No

Why / Why not? Any other comment?

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5. Three to six months stand down periods with six month extensions;

Supported - Yes No

Why / Why not? Any other comment?

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6. The elected member to remain entitled to meeting fees and allowances; and

Supported - Yes No

Why / Why not? Any other comment?

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7. Inclusion of an offence for providing false information leading to a stand down.

Supported - Yes No

Why / Why not? Any other comment?

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**DISCUSSION PAPER**  
**PROPOSED STAND DOWN PROVISIONS**

The Department of Local Government and Regional Development inform that they have undertaken detailed policy development in respect to a new provision which would provide for the standing down of elected members in certain circumstances.

The Association is seeking feedback from local governments to assist State Council inform the Department of Local Government and Regional Development of the Sectors' consensus of opinion.

This will assist the Department's ongoing policy development process that will inevitably be required prior to the formulation of the Government's policy position on elected members under investigation or charged by a statutory authority, whose continued presence may be a disruption to the Council.

**BACKGROUND**

The intent of the proposed provision is to place the emphasis upon a Council's continued ability to function, in circumstances where the continued presence of an elected member who is under investigation or being charged by a statutory authority may be a disruption to the Council.

For this reason the following proposal is drafted in line with the provisions which provide for the suspension of a Council.

The Department references S 8.19 of the Local Government Act 1995 as the basis for policy formulation and it is noted this provision is at the extreme spectrum of the Minister's powers :

**8.19. *Suspension of council while inquiry is held***

- (1) Before or after appointing an Inquiry Panel to conduct an inquiry and make a report about a local government the Minister may, by order, suspend the council —
  - (a) if the Minister thinks that —
    - (i) the seriousness or duration of a suspected failure of the council to ensure that the local government performs its functions properly; or
    - (ii) such other factors as the Minister considers relevant,make it inappropriate for the council to continue to act as the governing body of the local government; or
  - (b) if the Minister thinks that the conduct of the inquiry would be likely to be seriously prejudiced if the council were to continue to act as the governing body of the local government.
- (2) If an Inquiry Panel has not been appointed when the suspension takes place the Minister is to appoint one within 6 months after the suspension.

The Standing Down Provisions may also have an association in part, to the Corruption and Crime Commission's 'Smiths Beach Development Report' of October 2007 which included within its six recommendations :

*"That consultations be undertaken on an appropriate mechanism to enable the suspension of a councillor who is subject to an investigation for suspected misconduct."*

#### **1. Comment on Stand Down Proposal**

Following the Background, Item 1 is a commentary on each Stand Down Proposal item presented as 'For' and 'Against' considerations. Items 2 to 6 present a range of topics and questions that are associated with the proposal. The Discussion Paper is summarised at Item 7.

*1. Provide for an elected member to voluntarily stand down, thereby relinquishing their powers and duties as an elected member, where that person is under investigation or has been charged by a statutory authority.*

Comment For : The proposal –

- allows the individual to assess the suitability of temporarily discontinuing Council involvement.

Comment Against : This proposal –

- may lead to a public perception the elected member is a disruptive influence on Council. This perception would be magnified in the event the non-voluntary standing down of elected members receives even a moderate level of media coverage.

*2. Provide for the Standards Panel to forcibly stand down (Note : this is not a suspension) an elected Council member, thereby relieving them of their powers and duties as an elected member, to protect the institution and integrity of local government :*

- *where that person has not voluntarily stood down; and*
- *where that person is under investigation or has been charged by a statutory authority; and*
- *whose continued presence as a member :*
  - a) *prevents a Council from properly discharging its functions; and*
  - b) *affects the reputation and integrity of the local government as an institution; or*
  - c) *is not in the public interest.*

Comment For : This proposal –

- supports the Stand Down Proposal intent of removing an elected member who is a disruptive element on Council.

Comment Against : This proposal –

- has capacity to further agitate a situation that has already been found to be a disruption to the effective functioning of a Council.
- by including 'c) *is not in the public interest*' is potentially divisive, particularly if the standing down of the elected member is not requested by the council.



3. *Provide for the Standards Panel to consider standing down an elected member where a complaint or a request to stand a member down has been made to the Standards Panel by :*

- *the Council (absolute majority) in which the member holds office;*
- *a statutory authority that is undertaking an investigation into or prosecution of the member; or*
- *the Department of Local Government and Regional Development.*

Comment For : This proposal –

- provides a mechanism for council to direct their concerns regarding disruptive behaviour to the Standards Panel
- provides a set procedure for complaints and requests to be directed to the Standards Panel.

Comment Against : This proposal –

- at face value, lacks provision for transparency to inform the community why a Council, statutory authority or Department of Local Government and Regional Development made the request to the Standards Panel
- imposes additional responsibility and duties on the Standards Panel, potentially stalling progress on inquiries and investigations.

4. *Provide for it to be an offence for a person to knowingly give false or misleading information which may lead to the standing down of an elected member.*

Comment For : This proposal –

- aligns with S. 5.124 of the Local Government Act 1995, making it an offence to give false or misleading information under prescribed circumstances.

Comment Against : This proposal –

- although providing for it to be an offence, does not detract from the fact the Stand Down provisions creates another avenue for false and misleading information or allegations to be made against an elected member for political advantage or to satisfy a personal resentment.

5. *Provide for a member to be "stood down" for a period of 3 to 6 months with subsequent 6 month extensions where necessary.*

Comment For : This proposal –

- will limit the ability for an elected member whose' behaviour is found to be disruptive, to be removed from the affairs of the Council.

Comment Against : This proposal –

- appears to acknowledge the procedure for investigations into the conduct of an elected member is a lengthy process, despite the very recent introduction of the Rules of Conduct Regulations and appointment of the first Standards Panel.
- is likely to keep the issue of elected member behaviour in the public eye, and may compound negative perceptions about the Councils reputation and integrity.

6. *Provide for the member who has voluntarily stood down or who has been required to stand down, to be paid meeting fees and allowances for the duration of the standing down.*

Comment For : This proposal –

- supports elected members who make a voluntary decision to stand down;
- ensures elected member who are stood down are not unfairly treated nor face peremptory punishment through loss of fees and allowances.

Comment Against : This proposal –

- does not distinguish between voluntary and required standing down, thus denying any incentive for those who stand down voluntarily;
- raises questions as to the entitlement of elected members to be paid fees and allowances at a time when they cease to incur costs and expenses normally attributed to activities of elected members

7. *Provide for the stand down period to cease :*

- *At the end of the period specified by the Standards Panel; or*
- *At any time earlier as determined by the Standards Panel.*

*Note : The order would automatically cease to apply at the end of the member's term of office. Further, it is not intended that a member be prevented from renominating for Council.*

Comment For : This proposal –

- permits a stand down period be brought to an end swiftly

Comment Against : The proposal –

- states that it is not intended that a member be prevented from renominating for Council. Section 5.123 of the Local Government Act 1995 contains the a specific confidentiality protection clause in relation to complaints about the conduct of elected members :

*"(1)A person who —*

- (a) makes a complaint during a campaign period;*
- (b) performs a function under this Act in respect of a complaint made during a campaign period; or*
- (c) as a result of anything done under this Division, becomes aware of any detail of a complaint made during a campaign period knowing it to be relevant to the complaint,*

*and during the campaign period discloses information that the complaint has been made, or discloses information of any detail of the complaint, commits an offence.*

*In this section —*

*"campaign period" means the period beginning on the first day of the period referred to in section 4.49(a) and ending on election day as that term is defined in section 4.1."*

There is an apparent conflict between the intent of this Section to protect individuals about whom a complaint has been made, and the inevitable public exposure of elected member as a consequence of being stood down. It is questioned how the Department intends to protect the right to confidentiality during a campaign period and what would occur if an elected member is stood down concurrent with a campaign period.

## **2. Principles of Procedural Fairness**

The Stand Down Proposal foreshadows a significant shift in the local government democratic process, with elected members under investigation denied the right to represent the interests of their community for a period of time despite there being no adverse finding against them.

It is suggested by the Department the Stand Down Proposal is a necessary mechanism to protect the integrity, uphold the reputation and secure the efficient functioning of a local government in circumstances where the continued presence of an elected member who is being investigated or charged by a statutory authority, is deemed a disruption to the Council.

S 8.19 of the Act is referenced in this context, however the Association's argument for the development of Rules of Conduct Regulations had its origins in the lack of provision for procedural action applicable to individual members of Council.

It may be argued that in the most extreme circumstances, access to a suspension mechanism may be in the best interests of the local government sector and possibly may be in the public interest. However, even within the narrow confines of this scenario, there is a pressing need to fully examine the practical, administrative and perceived consequences of the Stand Down proposal.

## **3. Natural Justice**

The proposal does not contemplate that Stand Down Provisions, especially in the pre-emptive application to elected members under investigation (as opposed in this case, to those charged by a statutory authority) impacts upon the three common law Rules referred to in relation to natural justice. These Rules are :

### *"The Hearing Rule –*

*This rule requires that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker. When conducting an investigation in relation to a complaint it is important that the person being complained against is advised of the allegations in as much detail as possible and given the opportunity to reply to the allegations.*

### *The Bias Rule -*

*This second rule states that no one ought to be judge in his or her case. This is the requirement that the deciding authority must be unbiased when according the hearing or making the decision.*

*Additionally, investigators and decision-makers must act without bias in all procedures connected with the making of a decision. A decision-maker must be impartial and must make a decision based on a balanced and considered assessment of the information and evidence before him or her without favouring one party over another. Even where no actual bias exists, investigators and decision-makers should be careful to avoid the appearance of bias. Investigators should ensure that there is no conflict of interest which would make it inappropriate for them to conduct the investigation.*

### *The Evidence Rule -*

*The third rule is that an administrative decision must be based upon logical proof or evidence material. Investigators and decision makers should not base their decisions on mere speculation or suspicion. Rather, an investigator or decision maker should be able to clearly point to the evidence on which the inference or determination is based."*

It is manifestly clear that an elected member has no right of access to these Rules prior to the act of suspension under Stand Down Provisions (as presented to WALGA).