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Consultation Paper

A Review of the Local Government (Rules of Conduct) Regulations 2007 and Minor Breach Disciplinary Framework

November 2015

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Consultation on Proposed Changes to Local Government Minor Breach System

Submissions are invited on the observations and proposals put forward in this paper to assist the Government to decide which of the proposed changes are necessary or desirable. Comment is also invited on specific issues raised in initial consultation where balancing benefits and risks may be complex and broader consequences need to be considered. These issues are shown in blue boxes in the text.

Public consultation is an important part of transparent decision making. Submissions will be published on the Department of Local Government and Communities website. A person making a submission may request that their identity or parts of their submission be treated as confidential. The submission must clearly identify the information that is the subject of the claim for confidentiality and a non-confidential version of the submission must be provided.

Submissions close on Friday 4 March 2016, and should be sent to legislation@dlgc.wa.gov.au

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1. Executive Summary

Since 2007, the *Local Government Act 1995* (the Act) has provided for a disciplinary framework to deal with minor, recurrent and serious breaches of conduct by individual council members. This review considers only the minor breach element. The minor breach system is separate to and different from the minor and serious misconduct reporting framework that operates under the *Corruption, Crime and Misconduct Act 2003* (CCM Act).

The minor breach system is intended to provide a mechanism to deter inappropriate conduct by individual council members that may lead to council dysfunction, loss of trust between council and administration, impairment of the local government's integrity and operational performance, and consequent reduction in public confidence. The minor breach system complements local government codes of conduct with enforceable standards for specified conduct focused on governance and integrity.

The foundation of the minor breach system is the *Local Government (Rules of Conduct) Regulations 2007* (regulations), enforced through the complaints process set out in Part 5 Division 9 of the Act which provides for the reporting of contraventions of the regulations to the Local Government Standards Panel (the Panel) appointed by the Minister.

The minor breach system is strongly supported in principle by the local government sector, but there is some dissatisfaction among those who have had dealings with it that it is not meeting the sector's pre-commencement expectation. This expectation was that it would be quick, transparent, informal and non-technical, and focused on the general interests of local government. The issues being raised in 2015 are very similar to the issues raised during the previous review by the Standards Panel Review Committee in 2011: specifically the length of the process, a perceived lack of transparency, and a sense that the focus is on legal process rather than addressing the effects of council member conduct on local government.

It is important to recognise that the minor breach system is based on regulatory contravention, unlike minor misconduct under the CCM Act or the code-of-conduct-based misconduct management systems in other jurisdictions. These are generally focused on types of conduct (abuse of power/position, breach of trust, dishonesty, bias) rather than the breaking of prescriptive rules governing specified activities.

It is not feasible for a rule-based disciplinary model, such as the Western Australian minor breach system, to capture all dysfunctional conduct or exclude all minor lapses that might result in vexatious complaints. More flexible outcome-based misconduct management models may have greater focus on the impact, intent and context of the conduct. However, the investigation and evidentiary interrogation required is considerably more resource intensive than the WA minor breach system, which uses a challenge-response approach usually determined solely on the documents provided.

Given the support of the local government sector for the current minor breach system, and lack of support for locally-driven disciplinary systems, this document assumes that the existing minor breach system will continue.

The purpose of this review was therefore to examine the local government sector's concerns with the current minor breach system, identify the likely causes of that concern and consider whether the Rules of Conduct regulations and current complaints processes can be reformed to improve operational efficiency and effectiveness.

The initial stage of this review undertook targeted consultation with the local government sector, particularly local governments with significant experience with the minor breach process and individual stakeholders who had expressed specific concerns. It also involved a technical analysis of the issues, the regulations, past complaints and determinations, and consideration of models in use in other jurisdictions to develop options for reform. This next stage widens the consultation process.

In addition to reiterating the process issues raised in the 2011 review about timeframes, transparency and technical focus, the sector has raised concern about the extent to which the Panel's decisions align with the policy objective to deter dysfunctional conduct. Some local governments are concerned that the impact that a persistently disruptive council member can have on a local government is given insufficient weight in decisions, and that the process is not communicating a clear, effective message about reasonable standards of conduct.

Specific reported concerns and perceptions in 2015 include:

- The length of the complaints process and lack of a complaints tracking mechanism exacerbates tensions and uncertainty within councils, contrary to the intended role of the process as a "circuit-breaker".
- There is need to better balance the intent of the regulations, the rights of the accused council members, and the interests of local government. Some findings have been seen as overly tolerant of serious wrong-doing and others as overly punitive of inconsequential behaviour which would have been quickly forgotten but for the complaint.
- The sanctions available to the Panel are seen as having little deterrent effect, especially since the local government rather than the council member bears the associated financial cost of sanctions such as training or public censure notices.
- The system is not seen to be addressing certain conduct with serious disruptive and dysfunctional consequences for local government: specifically bullying and harassment of councillors and employees, and use of the media to publicly disparage local government functions and local government employees to gain personal or political advantage.
- There is poor understanding of the regulations or what constitutes a minor breach, and the existing training and guidance material does not specifically

focus on interpreting the Rules of Conduct or explain acceptable and unacceptable behaviour by example.

The processing time for complaints has improved significantly since 2012, although there are opportunities for further efficiencies, largely related to reducing system congestion caused by unsound, trivial and vexatious complaints, and prioritising matters with significant implications for the functioning of the local government over those with negligible operational consequences.

Given that the minor breach system is a contravention-based model, it is inevitable that determinations of whether a minor breach occurred will rely more on technical interpretations of the written law than on considering the context and consequences of the conduct. Better defining the regulations to embed the intent within them, and publishing the Panel's positions and policies on interpretation, may improve alignment between the system's intent and its implementation.

The Panel does have a legislated obligation to have regard to the general interests of local government in the State, which influences its decisions on how to deal with a minor breach once found. Documentation of the factors that the Panel must take into account when considering local government interests, and specific reference to those matters in Panel reports may link outcomes more clearly with the purpose of the minor breach system.

In practice, most local governments and most council members have little or no contact with the minor breach system. Between the commencement of the system in late 2007 and August 2015, 68 per cent of the total minor breach allegations (343 allegations out of 507 in total) have been generated from just twelve local governments involving complaints against 74 council members. Eighty local governments have not used the system at all.

A high number of complaints from a particular local government generally correlates with overt tension either centred on an individual or on the relationship between two factions. Departure of one of the parties usually results in the complaint frequency rapidly subsiding.

Despite the intent of the minor breach system, most allegations of minor breach received since 2007 appear to have arisen from personal disputes rather than being reports of significant matters of misconduct affecting local government integrity and good governance. Approximately forty percent of allegations of minor breach related to conduct with potential to cause serious operational consequences, although about one-fifth of these concern conduct that is currently not captured by the regulations. Of the sixty percent of allegations that related to inconsequential behaviour, about half complained about conduct which is not actually prohibited by the cited regulation and therefore cannot be a contravention (unsound complaints).

Amendments are currently before Parliament to allow the Panel to refuse to consider frivolous, vexatious and misconceived complaints and those without substance, and to allow withdrawal of complaints. If enacted, this reform is expected to reduce the

number of inconsequential and unsound complaints considered by the Panel. However, the assessment of these will still require publicly-funded resources. Preferably, unsound and low value complaints should not reach the Panel at all.

This directions paper sets out findings and proposed regulatory and process amendments to address opportunities that have been identified for improved efficiency and effectiveness in the system. Acknowledging the general and specific concerns summarised above, the proposals put forward are based on the following principles:

1. The minor breach system should be driven by the policy objective: early intervention to address inappropriate behaviour by individual council members which may otherwise impair local government integrity and performance, bring local government into disrepute, or escalate to serious council dysfunction.
2. To the extent possible, the Rules of Conduct should capture significant dysfunctional, disruptive or deceptive conduct (unless dealt with in other legislation) which poses an organisational risk to local government.
3. A finding of minor breach is an over-reaction to trivial and inconsequential behaviour, which is better dealt with in other ways.
4. Clearly worded and well-defined regulations should unambiguously specify required and proscribed conduct, with no overlap or duplication between regulations.
5. Standards Panel processes, practice and reporting should be simple, quick, transparent, and as informal and practical as feasible while being consistent with procedural fairness and legal requirements.
6. Council members and prospective complainants should have access to guidance about types of behaviour that do or do not constitute a minor breach for each regulation, clear requirements for a complaint of minor breach, and information about the way in which the Standards Panel conducts its business.
7. Alternatives to the use of the complaints system need to be encouraged.
8. Where regulatory prohibition of specific types of dysfunctional conduct is not feasible, training, coaching, enforcement of local codes of conduct and peer feedback will be necessary to bring about attitudinal change.

Three key problems were identified:

1. The current regulations do not adequately address some significantly dysfunctional conduct that harms local government performance;
2. A very high proportion of unsound, unsupported and trivial complaints that increase system congestion and cost, and impose unnecessary stress on council members, and

3. Relatively poor understanding of the system and low penetration of “lessons learned” from the Panel’s determinations.

The proposed directions encompass four key elements:

1. Amending the regulations to improve clarity and alignment with policy intent;
2. Improving guidance material and complaint documentation;
3. Encouraging mediation and conciliation as an alternative to complaints about interpersonal disputes; and
4. Codifying Standards Panel procedures and practice and simplifying reporting.

Where issues raised can only be fully addressed through legislative change, amendments to the Local Government Act have been suggested for the Government’s consideration in order to reduce red tape, increase responsiveness and improve the effectiveness of outcomes.

Proposed regulatory changes

Regulation 3 (general principles to guide behaviour – not a Rule of Conduct) Add a principle concerning compliance with local government codes and policies. Link Regulation 3 to codes of conduct required under s.103(1) of the Act and the proper use of office.

Regulation 4 (contravention of local laws relating to conduct at meetings) Delete regulation 4 and capture seriously dysfunctional meeting conduct in a new regulation.

Regulation 6 (use of information) Include personal information, information subject to a confidentiality or non-disclosure agreement, legal advice, and commercially sensitive information. Extend application to include confidential parts of otherwise non-confidential documents. Make resolutions that are made in closed meetings explicitly exempt from the regulation.

Regulation 7 (improper use of office to secure personal advantage or disadvantage others) Define key terms to make intent more explicit and focus on matters of integrity, honesty and impartiality; exclude conduct that is the subject of other regulations or local laws and where it is unlikely that significant harm would be sustained as a result of the conduct.

Regulation 8 (misuse of local government resources) Clarify by defining key terms.

Regulation 9 (prohibits involvement in administration) Clarify by defining key terms.

Regulation 10 (relations with local government employees) Define and amend key terms to clarify intent and conditions of application. Add provisions related to CEO employment, threatening or abusive behaviour, unreasonable demands, chastisement of employees and protection of former local government employees. Recognise

technological advances through which the public may have access to livestreamed meeting proceedings and audio/video records.

Regulation 11 (disclosure of interest) Define key terms to clarify meaning – remove or clarify anomalies with Act provisions on interest disclosure; address lobbying by proponents; provide for enduring interest register.

Regulation 12 (gifts) Add definition of “nominal gift” and exempt these from notifiable gifts. Prohibit acceptance of travel contributions from person seeking or intending to undertake an activity involving a local government discretion, and provide for situations where council member accepted a gift unaware that the giver was such a person. Include provisions to cover gifts to council made available to councillors and ceremonial gifts¹. (Note that there are broader issues around appropriate gift value thresholds, consistency of legislative requirements, and gifts from entities likely to benefit from a local government discretion exercised in favour of a separate entity.)

Proposed new regulations

1. Interactions between council members (replaces Regulation 4): Prohibit disparagement, adverse reflection and abusive language during council and committee meetings and public events. Prohibit threatening or abusive behaviour. Requirement to comply with directions of presiding member (except if dissent motion passed).
2. Notification of public statements: Require council members who make comments to the media about the local government administration or council decisions to notify the CEO, who will record the notice in a media contact register available for public inspection.

Concern has been expressed that the Rules of Conduct regulations provide only limited protection to local government employees from public disparagement by council members in the mainstream and social media. The current prohibition in Regulation 10(3) is limited to council/committee meetings/organised events attended by members of the public, and 60 per cent of complaints received about derogatory or offensive comments did not meet these regulatory pre-requisites. Civil defamation action is not available to local governments and tends to be cost prohibitive for most people.

Regulatory options to address this issue were investigated. However, the implied freedom of political communication under the Commonwealth Constitution as well as implementation considerations, make such an approach impractical. The requirement to notify the CEO of comments made to the media has been suggested to improve accountability, but in general non-regulatory measures are likely to be a more practical approach.

¹ NB: The Local Government Governance Roundtable has initiated a separate review into legislative provisions relating to receipt of gifts. These proposals will contribute to that work.

Regular re-assessment of the regulations in light of the types of complaints received and monitoring of behavioural standards will ensure the Rules of Conduct remain relevant to the needs of local government.

Policy, education and process improvements

1. Encourage local governments to offer alternative resolution options to prospective complainants, and further encourage this through complaint documents.
2. Provide greater guidance on how the Rules of Conduct are applied, the intent of the minor breach system and the complaints process to inform complainants, and establish a training program for Complaints Officers.
3. Amend the complaints form to specify the information to be provided in support of allegations of contraventions resulting in a minor breach (this could potentially be regulated under section 5.107(2)(d) of the Act).
4. Take a stricter approach to complaints that are not in accordance with the requirements of the Act, and enforce timeframes for responses to the Department's requests for information on behalf of the Panel.
5. Introduce a mechanism to prioritise complaints that relate to conduct posing the greatest potential risk of impairing the local government's efficient and effective performance, working environment or its public reputation.
6. Ensure that local governments are promptly informed of policy and risk implications arising from the Panel's determination of a complaint or interpretation of the regulations.
7. Include a module on the interpretation of the Rules of Conduct in council member induction and professional development training.
8. Include in council member training, information about the impact of member conduct on organisational risks, particularly conduct associated with negative publicity, damaging working relationships or affecting workplace health and safety.
9. Where inappropriate conduct has occurred but is found not to be a minor breach, clearly advise the respondent that the conduct is not condoned.
10. (Longer term) If the State is to retain the current centralised complaints system, then consider an on-line, centralised, automated "self-serve" complaint lodgement system similar to that used by the State Administrative Tribunal to improve efficiency, reduce red tape, automate compliance checking and notifications, and facilitate complaint tracking.

Potential Act amendments (for future consideration by Government)

1. Reduce the time limit for submitting a complaint from two years after the incident to three months, with provision for an extension up to 12 months to be granted in exceptional circumstances.
2. Align the minor breach process more closely with the serious breach process by providing for complaints of minor breach to be sent to the Departmental CEO, who will decide whether to make an allegation to the Standards Panel that a council member committed a minor breach. This will permit the Departmental CEO to exclude unsound, frivolous, vexatious, trivial and inconsequential complaints, request that dispute resolution processes be engaged before action is taken, and ensure that contraventions are appropriately described and supported before being sent to the Panel.
3. Increase the range of actions available to the Panel after it has found that a minor breach has occurred, including actions appropriate to a technical breach with negligible consequences for the local government, and stronger sanctions for minor breaches involving deliberate conduct with significant consequences for the local government.

Longer term measures to enhance standards of conduct

This document assumes that the current rule-based minor breach system will continue, and focuses on improving the efficiency and effectiveness of that system. In the longer term, consideration could be given to a disciplinary framework that is less prescriptive and more outcome-based. Such a scheme would require council members to refrain from conduct likely to impair the integrity, operational performance or reputation of the local government, and hold them accountable should they fail to do so. The focus would be on demonstrable abuse of position, breach of trust, dishonesty and bias. However, examples and training to assist council members to make those judgements would take the place of regulatory prohibitions relating to specific actions.

Minor breaches as defined through the Rules of Conduct do not cover all forms of minor misconduct. It is not practical for a prescriptive rule-based system to do so. Following recent amendments to the CCM Act, there is no longer an agency with statutory responsibility for dealing with elected members who engage in minor misconduct which does not contravene a specific regulation or legislative provision. If this gap needs to be addressed, there would be advantages in a single misconduct management system for elected members, subject to resolving responsibility, resource and other implementation considerations.

Local governments have a duty to safeguard employees' wellbeing and support those with health conditions. A similarly supportive environment for elected council members, including access to counselling, may better address dysfunctional conduct arising from stress or mental health disorders than an inherently adversarial reporting and penalty system.

2. Introduction

2.1. Background

The *Local Government (Official Conduct) Amendment Act 2007* amended the *Local Government Act 1995* (the Act) to provide a framework to deal with minor, recurrent and serious breaches by individual council members. A minor breach is a contravention of a Rule of Conduct or a specified local law prescribed in the *Local Government (Rules of Conduct) Regulations 2007* (the regulations). The minor breach system comprises the regulations, the Local Government Standards Panel (the Panel) appointed by the Minister, and the complaints process set out in Part 5 Division 9 of the Act.

There are significant differences between this system and the management of serious and minor misconduct under the *Corruption, Crime and Misconduct Act 2003* (CCM Act). “Misconduct” under the CCM Act refers to conduct that is corrupt, criminal, intentionally dishonest, lacking integrity, breaches the public trust and which indicates unfitness for office. Minor misconduct is thus defined in terms of intent and consequences rather than contravention of specific legislation. Following recent amendments, there is no longer a State agency with statutory responsibility for dealing with minor misconduct by elected council members (Figure 1).

Elected Council Members	Local Government Employees
Serious misconduct – intentional corruption and serious criminal behaviour Corruption and Crime Commission	
Serious breaches – offences under Local Government Act or other laws where being a councillor is a key element (including electoral offences) – CEO of DLGC/State Administrative Tribunal	Minor misconduct – conduct contrary to honest and impartial performance, breach of trust, misuse of information, AND is an offence that is grounds for termination of employment – Public Sector Commissioner
Minor breaches – contravention of the Local Government (Rules of Conduct) Regulations – Local Government Standards Panel	
Disciplinary matters that are not minor breaches – Local Government	Disciplinary matters that are not grounds for termination of employment – Employer (Local Government)
Code of Conduct contraventions – Local Government	Code of Conduct contraventions – Employer (Local Government)
Grievances and disputes – Local Government	Grievances and disputes – Employer (Local Government)

Figure 1. Integrity protection framework for local government. Serious and minor misconduct are covered by the *Corruption, Crime and Misconduct Act 2003*. Serious and minor breaches are covered by the *Local Government Act 1995*.

The minor breach system previously supplemented the management of minor misconduct under the CCM Act. It aimed to regulate specified types of conduct by individual council members likely to impair the integrity, efficiency and effectiveness of the local government or bring the local government into disrepute, but which were not otherwise dealt with under the Act or other legislation. Conduct classified as a minor breach is more narrowly defined and generally less serious than minor misconduct as defined by the CCM Act. However, if not checked, it may cause deterioration in the working environment and act as a catalyst for more serious local government dysfunction eventually requiring State intervention.

The minor breach system was intended to provide a quick, informal and non-technical mechanism to discourage target conduct by imposing sanctions on council members found to have committed a minor breach by “breaking the rules of conduct”. The Panel may require the member to undertake mandatory training or impose the sanctions of a public censure and/or a public apology. The Panel’s decisions are reviewable by the State Administrative Tribunal (SAT). Any further minor breach by a council member already found to have committed two minor breaches may be referred by the Panel to the Departmental CEO who may refer it to the SAT as an allegation of recurrent breach. The SAT has the power to impose more significant sanctions including suspension or disqualification.

There is generally strong support for the minor breach system, but there is a persistent perception, in those parts of the local government sector that have dealings with it, that neither the process nor the outcomes are meeting the expectations that stakeholders had of the system at commencement.

2.2. Previous review

The Standards Panel Review Committee established in 2010 by the then Minister for Local Government engaged in extensive stakeholder consultation, finding significant concern “about the efficiency of the Panel, and, as a result of the way local government members use the Panel and the Panel’s own processes, concerns over its effectiveness”. The Review Committee reported to Government in 2011, forming two central conclusions:

“...the current disciplinary framework of a single State-wide Panel, supported by the Department:

- Provides for an independent and informal mechanism to resolve minor inappropriate conduct allegations promptly, that is valued and supported by industry bodies, is a relatively less expensive model to operate from the perspective of local governments, and provides for sitting members who are knowledgeable in local government matters; and

- That it has not been implemented in the way that was originally intended (for reasons unknown), particularly in relation to utilising mediation and/or conciliation services as a preliminary step.”

The Review Committee made 43 recommendations to address anomalies in the Regulations, simplify and streamline processes, provide for greater local management of minor inappropriate conduct, provide for greater transparency, improve public information, standardise policies and terminology, and establish mechanisms to monitor and continuously improve the system.

2.3. Current situation

Many of the Review Committee’s administrative recommendations have been, or are in the process of being, implemented by the Department. The time taken to deal with complaints has been reduced and the Panel has been focusing on clearing the backlog. Legislative amendments are currently before Parliament which will permit the withdrawal of complaints and grant the Panel the power to refuse to deal with complaints that are frivolous, vexatious, misconceived or lacking in substance. These amendments, if approved, will assist in reducing the Panel’s workload, discouraging trivial and mischievous complaints and allowing priority to be given to substantive complaints.

However, the local government sector continues to express similar concerns about the efficiency and effectiveness of the minor breach system as were raised with the Review Committee in 2011. The minor breach mechanism continues to be seen to be as too slow, insufficiently transparent and legalistic.

Following discussions at the Local Government Governance Roundtable², the Department has undertaken another review. This has been focused on whether the regulations could be amended to address unintended consequences that hinder the effectiveness of the system in achieving its objectives, and whether other non-legislative mechanisms might be available to streamline the process.

The scope of this review is restricted to the part of the disciplinary framework that deals with minor breaches, defined as a contravention of a rule of conduct prescribed under section 5.104(1) of the Act or a local law specified in the regulations.

In this report, the type of dysfunctional conduct that is the target of the minor breach system will be referred to as inappropriate, dysfunctional or target conduct, to avoid confusion with “minor misconduct” which is dealt with under the *Corruption, Crime and Misconduct Act 2003* (CCM Act).

² The Local Government Governance Roundtable comprises representatives of the WA Local Government Association, the Local Government Managers Association and the Department of local Government and Communities who meet regularly to discuss governance issues of concern to the sector.

3. Methodology

The Standards Panel Review Committee consulted widely in 2010 and 2011. Initial targeted consultation undertaken at the commencement of the current review revealed that the issues were largely unchanged from 2011.

Key additional concerns raised in preliminary consultation included:

- Some types of dysfunctional conduct are not effectively covered by the regulations. Instances of these types of conduct are believed to be becoming more prevalent as a result of such conduct being found not to constitute a minor breach and not attracting any sanctions.
- Technical legal interpretations of the regulations are permitting some councillors to escape a finding of minor breach despite clearly inappropriate conduct, while penalising other council members for trivial or inconsequential conduct.

Given these preliminary findings, this review has not replicated the broad-scale consultation undertaken in 2011.

An analysis was undertaken of 507 allegations of minor breach (contained in 298 separate complaints) made between November 2007 and August 2015, of which 455 have been determined by the Standards Panel and the findings notified to participants.

Informed by targeted consultation with local government peak bodies, CEOs and some presiding members, and the analysis of previous complaints, proposals have been developed to improve the efficiency and effectiveness of the minor breach system.

Some of these are aimed at reducing the high proportion of minor breach allegations that are unsound, are not in accordance with the requirements of the Act, or involve conduct with no significant consequences for local government integrity, performance or reputation. A substantial element of this report describes proposed amendment of the regulations to address problems arising from lack of coverage of seriously dysfunctional conduct and from apparent ambiguity, duplication, and misalignment between the letter of the law and its intent.

There are limitations to the extent of reform to the existing system that can be undertaken without amendments to the Act, some of which were also identified by the Standards Panel Review Committee. These have been identified for future consideration by the Government.

Comment is invited on each of the proposals shown in boxes in the relevant sections, and on the supplementary questions where included.

The initial consultation raised a number of issues and suggestions that have broader policy or practical implications. Specific proposals have not been made on these matters, which appear in blue boxes, but comment is invited to determine whether the potential benefits of the options are likely to outweigh the risks.

Following consideration of stakeholder comments, advice will be finalised for the consideration of the Minister for Local Government, and subject to his approval, regulatory amendments and process changes will be implemented.

4. Analysis of Complaints Received

4.1. Use of minor breach system

Most allegations of minor breach have been received from relatively few local governments, with 343 (68%) of all the allegations received between November 2007 and August 2015 coming from 12 local governments, involving 71 complainants and 74 council members. Five were local governments in regional areas and seven were metropolitan. Twenty-three council members in these local governments both made complaints and were the subject of complaints.

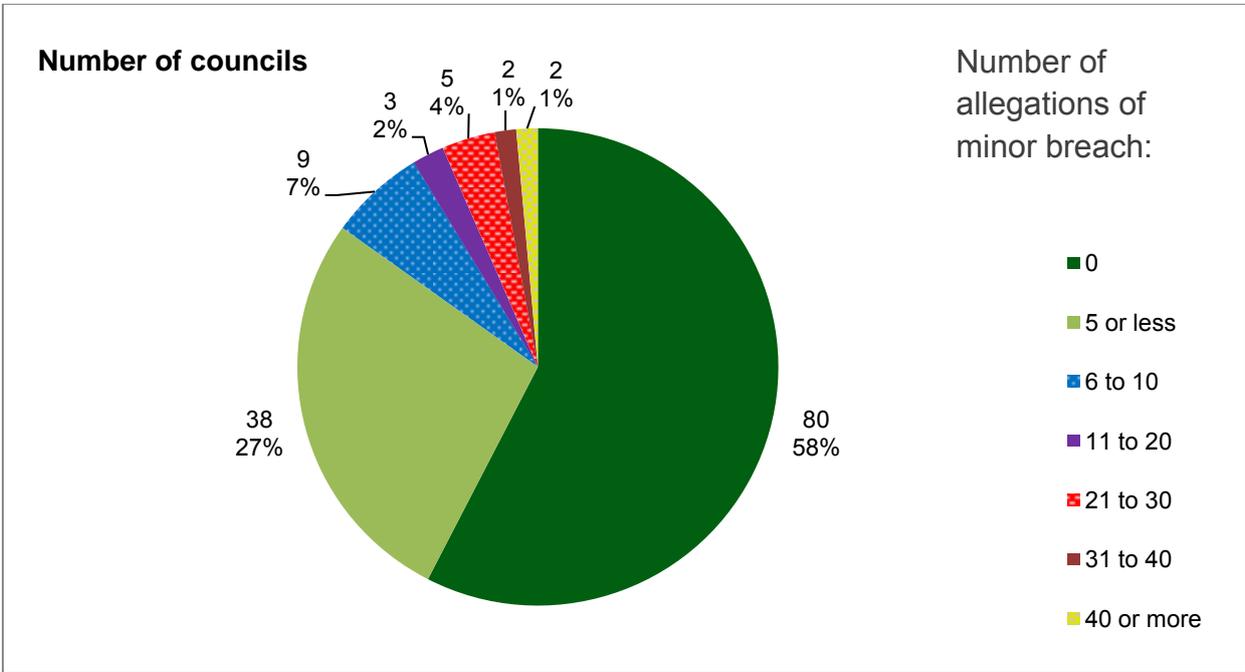


Figure 2. Distribution of allegations of minor breach across local governments.

There is no obvious commonality between local governments with high numbers of minor breach complaints. In most cases the majority of complaints were received over a one to two year period, and appeared to correlate with overt tension either within a local government or between one or more members of the council and a section of the local community. A spike in complaints frequently involves one or two particularly active complainants and one or two councillors who are the focus of their attention. The departure of one of the parties (e.g. a council member ceases to hold office or a complainant leaves the area) usually sees a rapid reduction in the number of complaints.

Council members have made most use of the minor breach complaints system, followed by members of the public (fewer individual complainants but more allegations per complainant) and complaints officers/CEOs.

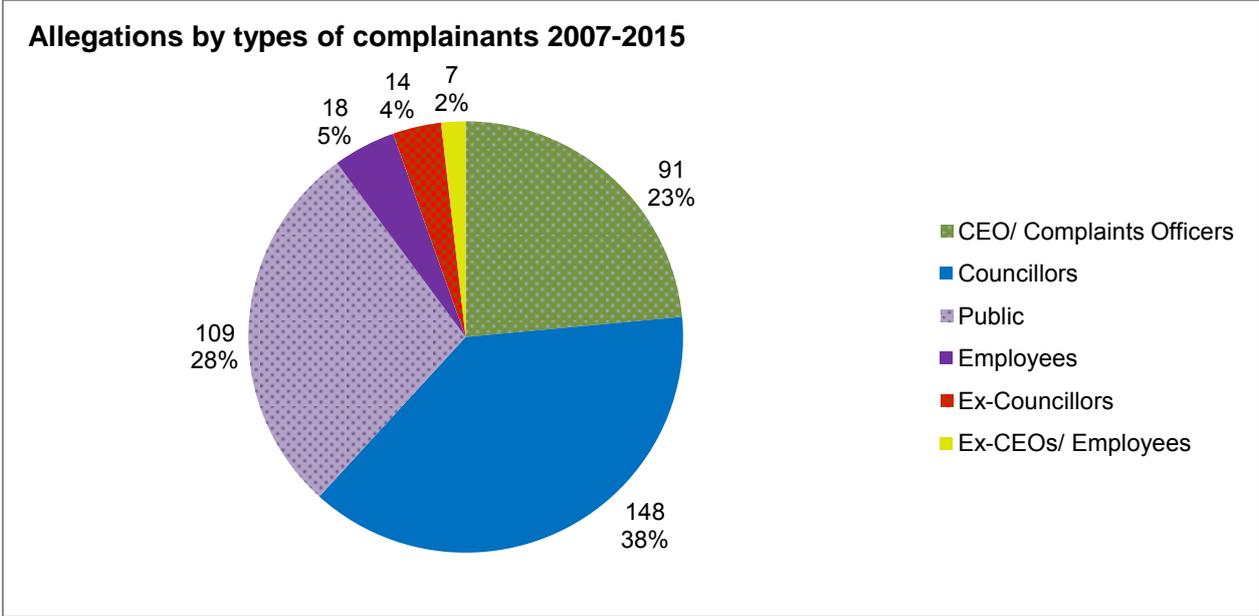


Figure 3. Distribution of allegations of minor breach across classes of complainants.

4.2. Processing times

There is a perception in the sector that the minor breach complaints process takes too long. The lengthy period of uncertainty between the lodgement of a complaint and notification of the Standards Panel’s findings is considered to exacerbate tensions within local government rather than the system acting as a circuit-breaker as intended.

In 2010/11 and 2011/12, timeframes were very long, with the average time from complaint to notification exceeding 400 days and some complaints taking more than two years. However, as Figure 4 shows, the streamlining of processes introduced after the 2011 review started to have a significant impact almost immediately, with the average time from complaint to notification in 2014/15 being 187 days (range 134 to 272 days).

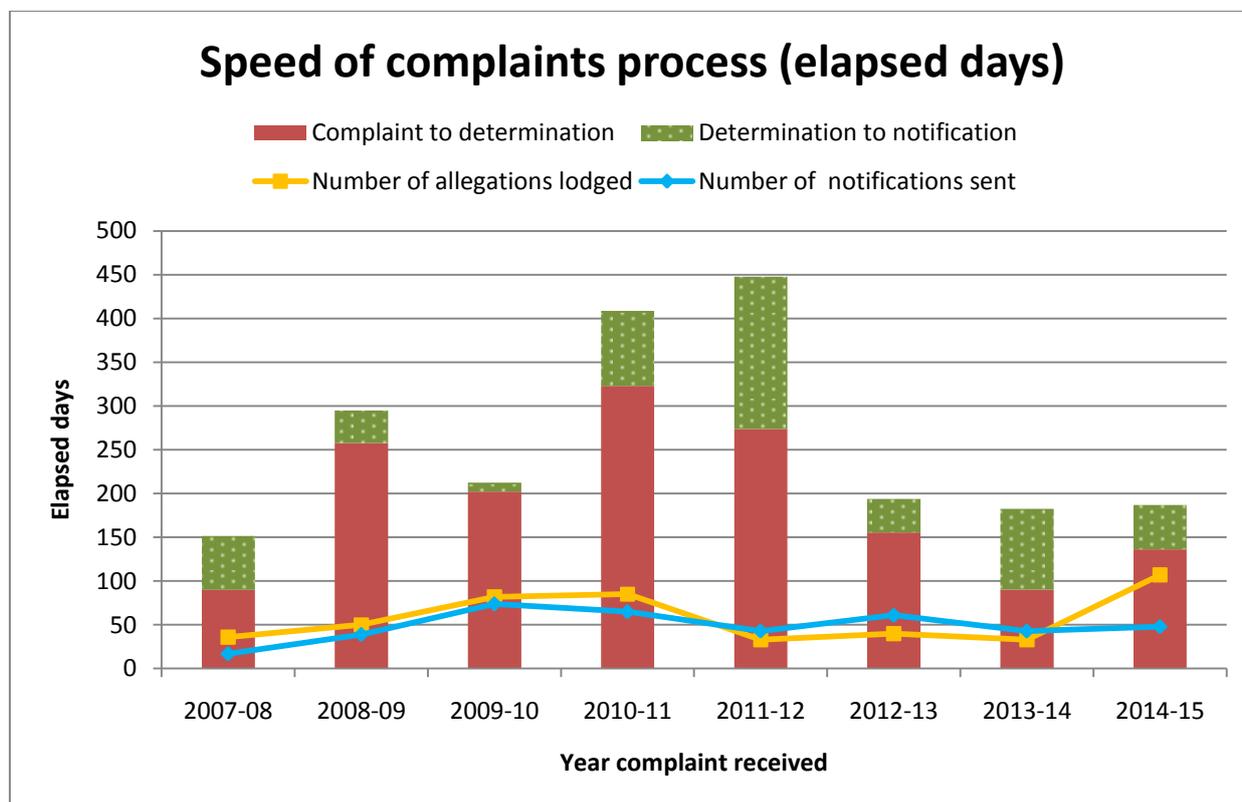


Figure 4. Complaint processing time trends from date of complaint to notification of findings.

However, it should also be noted that the number of determinations per year has tended to be relatively stable in recent years, while the number of allegations received may vary significantly.

The Panel generally meets monthly, and typically deals with three or four complaints per meeting depending on complexity, although some complaints may contain two or more allegations. The chart in Figure 4 shows that the number of minor breach allegations rose sharply in 2014/15, with more than twice as many received as determined. Most of the increase occurred in the first six months of 2015, and a further 31 allegations were made between July and October 2015.

The number of minor breach complaints is used by the Department as a risk indicator for local governments to assist it to allocate resources where most needed, but the intervention may not have an immediate influence on the number of complaints.

While the Department has some flexibility to reallocate resources to meet increasing demand for processing complaints and preparing advice, the capacity of the Panel itself is less elastic, relying as it does on very few individuals with other full-time responsibilities in senior roles.

In addition, current practice is that the legal member of the Panel writes all the findings and decision reports. There is an inherent risk when a single individual is responsible for a major component of a process, and a significant increase in workload will impose substantial pressure on the legal member.

Complaints received by the Panel are broadly handled in order of receipt and availability of supporting information. Particularly when the rate of receipt of complaints exceeds the rate at which they can be finalised, this can lead to resources being expended on trivial matters at the expense of matters with major impacts on, or implications for, local governments.

As at 31 August 2015, 39 allegations received in 2014/15 were yet to be determined or notified. Unless external factors lead to a reduction in the volume of complaints, then intervention to manage demand is needed to avoid timeframes lengthening during 2015/16. A mechanism to give high value complaints priority over inconsequential matters is needed to manage the risk that delays in dealing with more serious issues may have significant impacts on the affected local governments.

4.3. Outcomes

An analysis of 455 allegations of minor breach made and finalised in the period November 2007- August 2015 revealed that 61% resulted in a finding of no breach and 22% resulted in a finding of breach. In 17% of cases, the Panel found that it did not have jurisdiction (Figure 5).

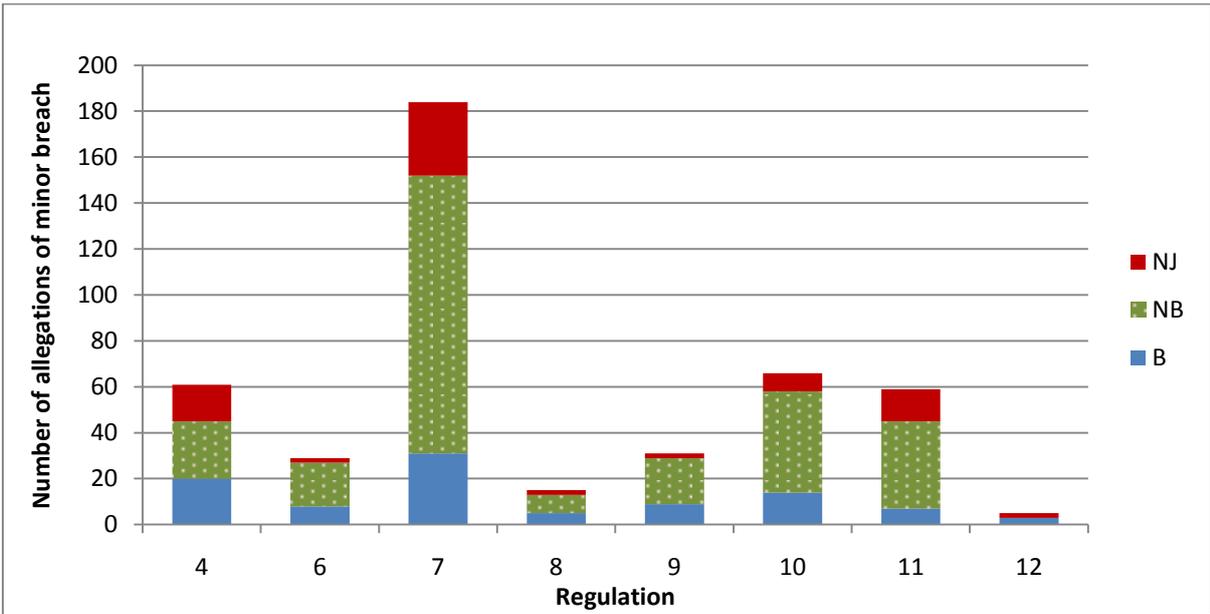


Figure 5. Findings of the Standards Panel relating to 450 allegations determined in the period 2007-2015, by regulation number. NJ = no jurisdiction; NB = no breach; B = breach

Council members found to have committed a minor breach sought review of the Panel’s decision from the SAT in 18 cases covering 24 allegations. The SAT affirmed both the Panel’s finding and sanction order for 11 allegations, affirmed the finding but varied the sanction order for eight allegations, and set aside the Panel’s finding of breach for five allegations. The right of review (section 5.125 of the Act) is restricted to the Panel’s decision to dismiss a complaint or make an order. This decision is only made by the Panel following its finding that a breach was committed, so a complainant has no right to apply to SAT to review a finding of “no breach”.

In the majority of cases where the Panel had no jurisdiction, the council member accused of the minor breach had ceased to hold office before the complaint was finalised. The remainder found not to be within jurisdiction were primarily complaints that did not relate to a minor breach (e.g. complaints about contravention of local codes of conduct or serious breach matters).

Analysis of the complaints and findings revealed that a significant number of findings of “no breach” were made because the complainant alleged that a council member contravened a regulation when the regulation did not in fact prohibit the reported conduct or did not apply to the circumstances in which it occurred. Almost forty percent of allegations of minor breach made since 2007 fall into this category.

Many complainants do not appear to have a good understanding of the limited application of the regulations, and there is little non-technical guidance available to help them confirm whether an allegation of contravention is credible. This is essential because:

1. Section 5.107(1) is a conditional right – only a person who has reason to believe that a council member has committed a minor breach may make a minor breach complaint;
2. There are only two ways in which a council member can commit a contravention resulting in a minor breach:
 - a) Do something that is expressly prohibited by a rule of conduct regulation or a specified local law; or
 - b) Fail to do something that is expressly required by a rule of conduct regulation or a specified local law
3. If the cited regulation is not applicable to the conduct, then it is not possible for the conduct to have contravened that regulation, so:
 - a) an allegation of a contravention resulting in a minor breach must be false;
 - b) details of a valid contravention cannot be provided as required by section 5.107(2)(c) of the Act; and
 - c) there is no valid reason for a person to believe that the council member committed a minor breach, as required by section 5.107(1), and no justification for making a complaint.

If the complaint is not (and cannot be) made in accordance with section 5.107(2), then section 5.107(3) concerning the processing of the complaint and referral to the Panel does not apply. However, complaints that have not been made in accordance with the Act (“unsound complaints”) continue to be sent to the Panel, possibly because the complaints officer has not been trained to determine whether the regulation applies to the alleged conduct, or because they are unsure of their right to refuse to accept a complaint that is not made in accordance with the Act.

In other cases where the Panel has found that no minor breach occurred, the complainant has failed to provide adequate details to prove that the essential elements of the alleged contravention exist. For example, 34% of the minor breach allegations examined related to Regulation 7(1)(b). An essential element of this regulation is that the council member acted with the specific intent of causing detriment to a person and belief that such detriment would occur as a result. If a legitimate and equally (or more) plausible alternative explanation for the conduct exists, then the essential element of intent cannot be proven to the required standard.

The prevalence of unsound complaints and inadequately supported allegations causes unproductive congestion in the complaints system and strains the resources of the Standards Panel, contributing to pressure on the timeframes for dealing with complaints. More guidance for complainants is needed about the conduct to which the regulations apply and the information that they need to provide to support a valid allegation of contravention.

The prevalence of complaints about inconsequential conduct that has a negligible effect on the local government's performance or reputation is another source of system congestion. In contrast to the reporting of misconduct under the CCM Act, reporting a minor breach is not a paramount duty for a principal officer. Even if the pre-requisites and essential elements of a contravention are met, if the conduct is trivial and the actual or likely impact on the local government is insignificant, there may be little or no net public benefit associated with making a minor breach complaint. More efficient and effective ways may be available to handle the matter.

Even using a very inclusive definition, less than 40% of all the allegations of minor breach received by the Panel have related to conduct that could reasonably be considered to pose an appreciable risk to local government integrity, performance (including long term working relationships) or reputation.

This proportion declines to less than 12% of the allegations of minor breach made by members of the public (including ex-councillors). Among this group of complainants, about half of all allegations of minor breach relate to perceived insults or personal disputes between the council member and the complainant, with a significant number having the characteristics of vexatious or frivolous complaints.

4.4. System utilisation and effectiveness in targeting dysfunctional conduct

A few individual participants dominate the use of the system. Thirteen council members have each had ten or more allegations of minor breach made against them, collectively accounting for 38% of all allegations received. Four of these councillors were the subject of 59 complaints comprising 75 separate allegations. Of these allegations, 61 (81%) related to target conduct (conduct that appeared to negatively affect local government integrity, performance or reputation). However, the other nine

councillors in this group collectively attracted 53 complaints comprising 117 allegations of which only ten involved target conduct, with the other 107 allegations relating either to conduct to which the regulations did not apply and/or to conduct with no appreciable impact on the integrity, performance or reputation of the local government.

Over 25% of all minor breach allegations (130 out of a total of 507) were submitted by just eight complainants against 18 council members. In some local governments council members notified of a minor breach complaint against them by a fellow council member submitted their own minor breach complaint against the complainant shortly thereafter. Had the complaints system not been so readily accessible, it is likely that many of these incidents would have been resolved locally or settled down over time.

The process of submitting a complaint is free and intentionally simple, which appears to have inadvertently provided an opportunity for a few people to use it as a tool of harassment in pursuit of personal or political objectives. There appears to be a misapprehension among some people that a minor breach complaint is equivalent to a service or process complaint.

Such people use the minor breach system to protest against conduct to which they have taken personal exception or against a councillor they dislike. This behaviour fails to respect the seriousness of accusing a person of breaking a rule that has the force of law. Such personally-motivated behaviour is encountered in most complaints systems, which need to be designed to minimise the public resources consumed by it.

Complaints driven by a sense of personal offence would be more productively addressed through an alternative dispute resolution mechanism.

Some local governments do offer independent mediation to prospective complainants, but once a complaint has been made in accordance with section 5.107(2) of the Act, the complaints officer has no option but to send it to the Panel.

After this point the process is inflexible: the Panel does not have the option of referring the matter to mediation but must determine whether the council member has contravened the regulation as alleged. By contrast, in Victoria an application to deal with alleged misconduct of this nature may be dismissed if insufficient reasons are given to explain why the matter has not been resolved by internal dispute resolution processes.

4.5. Costs

No fee is charged to complainants, and council members found to have committed a breach are not required to reimburse the local government, which must also pay any costs associated with a sanction order requiring training or public censure.

Local governments are charged a fee by the Department for the processing of minor breach complaints. The fee is related to the time spent by Panel members on the

complaint, but only the time of the privately employed Panel member is charged and none of the cost of State-employed officers is recovered.

The average fee per complaint paid by local governments in 2014/15 was about \$1,000 (with an average of 1.6 allegations per complaint), but the real cost to the public is likely to be several times this amount, including the State and local government administrative component. This does not include intangible costs such as reduced local government productivity or distress to participants.

Processing complaints that are unsound, unsupported by adequate evidence, or which relate to conduct with no significant consequences for local government, is currently incurring a significant net public cost.

Amendments to the Act currently before Parliament will, if approved, permit the Panel to refuse to consider frivolous, vexatious and misconceived complaints and those lacking in substance. However, this assessment will still require resources, and it would be preferable that such complaints are not lodged at all. The amendments to the Act will also allow complainants to withdraw complaints, an option that is not currently available.

Comment invited: Price signals to deter improper, unsound and trivial complaints

An effective mechanism for managing demand is to apply a price signal – whether monetary or in terms of effort expended for reward obtained.

The SAT charges a non-refundable application lodgement fee of \$411. It has been suggested that people wishing to make minor breach complaints under section 5.107 could be charged an application fee for each allegation to discourage complaints made for improper purposes. Is there a risk that this would also discourage complaints about serious matters?

Note that full cost recovery for the complaints process would not be feasible, and that the collection and processing of the charge would incur an administrative cost. The benefit would lie in the influence on complainant behaviour and increased productivity through a reduction in low value complaints.

Alternatively, would there be benefit in requiring complainants to make their complaints as statutory declarations, to make it clear that accusing a council member of committing a minor breach should not be undertaken lightly and require them to make additional effort to do so?

Complaints initiated by Complaints Officers under section 5.109 would be exempted.

The analysis of the allegations received to date suggest that the users of the minor breach system need to be better informed, a stricter approach needs to be taken to unsound and unsupported complaints, and more serious complaints need to be prioritised to maximise the value for money provided by the minor breach system.

5. Matters Raised in Preliminary Consultation

Concerns were expressed primarily about the length of time taken to process complaints, the lack of transparency of the process and the Panel's perceived approach to making its determinations.

The following general concerns and perceptions were expressed:

1. The length of the complaints process may exacerbate tensions and uncertainty within councils, contrary to the intended role of the process as a "circuit-breaker", with the eventual finding sometimes reigniting tension about an issue that had been resolved in the intervening period.
2. There is no complaints tracking process, and no advice is provided about a given complaint's place in the "queue" or the likely timeframe in which a decision can be expected, which makes it difficult for the local government to decide how to deal consistently with repeated occurrences of the conduct.
3. There is some frustration about outcomes that have been seen as having resulted in the perpetuation of inappropriate conduct seriously affecting the local government or alternatively that have penalised council members for trivial and commonplace conduct and exacerbated harassment by vexatious complainants. Specific examples include:
 - a. Apparent over-estimation of the gravity of a finding of minor breach and consequent perceived over-weighting of a respondent's denial compared with opposing evidence of deliberate conduct that contravened the regulation.
 - b. Regulatory terms do not clearly reflect the policy intent, which has resulted in interpretations that in some instances unnecessarily capture trivial, commonplace conduct with negligible consequences, and in other instances exempt deliberate inappropriate behaviour that causes wilful or reckless harm to the interests of the local government.
 - c. The current system does not provide for adequate weight to be given to:
 - i. the effect of the dysfunctional conduct on the affected local government;
 - ii. history of unsuccessful action taken at a local level to address escalating patterns of dysfunctional behaviour in persistently disruptive council members;
 - iii. the amount of harm that can be done by a persistently disruptive council member in a relatively short time (in reference to the practice of not counting a breach towards a recurrent breach unless it post-

dates notification of the previous breach - a particular problem when processing times are long).

- iv. the context of complaints or the motivation, intent and behaviour patterns of complainants;
4. There is a tendency for a “no breach” finding to be interpreted as the Panel deeming the dysfunctional conduct acceptable, with no incentive for the council member to desist. Council members who have behaved inappropriately need to be advised that their conduct is unacceptable by expected standards, even if the Panel has found that no technical contravention occurred.
 5. The range of sanctions available to the Panel needs to be broadened to allow for graduated penalties to suit the severity of the conduct and its consequences, and to reflect the context of the conduct.
 - a. The most serious sanctions available to the Panel are public censure notices and public apologies, to which the community is believed to pay little attention and which some media-savvy council members have used to generate publicity to their advantage. The local government bears the financial cost of publishing censure notices, which are seen as having little deterrent effect on unrepentant council members.
 - b. There is no power for the Panel (or the SAT) to choose not to apply a sanction in cases where neither dismissing the complaint nor a sanction is appropriate.
 6. It has been pointed out that in most civil law matters where one person takes action against the conduct of another person, either party may seek review, but there is no provision in the Act to apply to the SAT for a review of a finding that a breach has not occurred. Minor breach complaints are in effect an accusation that a person has contravened a specific regulation and the review rights of the parties more closely resemble those in a prosecution scenario than a civil law dispute.
 7. There is no current training and guidance material that specifically focuses on interpreting the Rules of Conduct or explains by example what is unacceptable behaviour.
 8. There is little public information available to help stakeholders understand how the Panel operates or how it comes to its conclusions, or to inform all local governments of the implications of Panel findings for their operations and council members.

6. Clarity and Scope of Regulations

It is important to acknowledge that unlike minor misconduct under the CCM Act, which is defined in terms of intent and consequences; a minor breach is only committed if a council member contravenes a specific rule of conduct or local law prescribed in the regulations. A complaint of minor breach explicitly accuses a council member of having done something prohibited (or having not done something required) by a particular regulation.

The Panel is a quasi-judicial disciplinary body charged with looking at the evidence provided and deciding, on balance, whether the allegation is proven. It has no power to investigate, call witnesses or compel information, and it has limited discretion other than in its interpretation of regulatory terms and the weight of evidence it requires to draw a reasonable and definite inference that a breach occurred. Its statutory role is to determine whether a minor breach has been committed, not to address the problems that caused the conduct that led to the complaint or problems caused by that conduct.

In such circumstances, it is probably inevitable that the Panel's determinations will rely more on technical interpretations of the written law than on weighing alternatives, considering policy objectives or determining competing public interests.

This may be an inherent limitation of the regulatory contravention model, for which contributing factors and actual consequences are secondary considerations in determining whether the contravention occurred, although they may be considered in determining penalties. The Panel has a duty to have regard to the interests of local government (clause 8(6), Schedule 5.1 of the Act), which it primarily exercises in making a decision on the application of sanctions. If it is important that these matters be considered by the Panel in determining whether a rule of conduct was broken, the

Regulations will need to make explicit provision for the Panel to do so.

The current regulations appear to:

- contain terms that are not defined for the purposes of the regulations;
- overlap in their application (especially regulations 4, 7 and 10);
- be overly prescriptive in some cases;
- be insufficiently precise about the proscribed conduct in other cases;
- not address some dysfunctional conduct with potential to cause significant harm;
- be inadequately differentiated from Act provisions in other matters; and
- make no provision for considering the materiality of the consequences of the conduct.

These characteristics are likely to have contributed to the perception that the minor breach system does not align well with its policy objectives.

Identifying a contravention

Subsections 5.107(1) and (2)(c) of the Act refer to “the breach” and “the contravention”, which are interpreted as requiring the complainant to identify the specific regulation that has allegedly been contravened by the conduct. The complainant is currently required to tick a box on the complaint form to select the relevant regulation. Under section 5.110(2), the Panel may only consider the breach specified in the complaint referred to it and may not amend the complaint³.

Complainants can usually clearly describe the conduct which they believe is inappropriate and the consequences as they perceive them. They are often less clear about how (or whether) the regulations relate to the conduct or what constitutes a contravention. Such confusion is evident even in some complaints initiated by local government complaints officers. As a result, complainants may cite an inapplicable regulation in their complaint, leading to the perverse outcome of the Panel finding that no breach occurred even if the alleged conduct contravened a different regulation.

Alternatively, some complainants tick multiple boxes if they are unsure which (if any) regulation applies, regardless of whether the regulations selected apply to either the conduct or the circumstances in which it occurred. This obliges the Panel to make a finding about each alleged breach. Both scenarios detract from the efficiency and effectiveness of the process.

The minor breach system is a regulatory contravention model with a high degree of prescription and a binary choice for the regulator: a rule was broken or it was not, based on the balance of probability. Intent may be relevant to the decision, depending on the regulation concerned, but the actual consequences of the conduct are not. While the disciplinary mechanism was intended to be a quick, informal and “common-sense” approach to determine whether a breach is more likely than not, the Panel has no power to conduct investigations or to compel or challenge information.

In order for the Panel to operate effectively under these conditions, the Rules of Conduct need, as far as practicable, to:

1. explicitly capture significantly inappropriate conduct with potential to cause local government dysfunction;
2. clearly differentiate between the types of conduct covered by each rule without overlap or duplication;
3. exclude from the application of the regulations commonplace and inconsequential conduct, situationally appropriate conduct, and conduct that contravenes other legislation;

³ Confirmed in *Re v Local Government Standards Panel* [2015] WASC 51 by Corboy, J.

4. be easily understood and provide certainty of meaning to council members, local government employees and the public, and
5. achieve a practical balance between certainty in legal compliance and discretion to consider consequence and context.

The local government sector has expressed concern that council members are not currently subject to any disciplinary action through the minor breach system for the following potentially damaging conduct:

1. bullying and harassment (of employees and other council members);
2. disparaging comments about employees, council members and council decisions in the mainstream media, on social media and private websites and at (non-council) public forums;
3. disparaging comments about former employees who have recently left the local government's employ, which may significantly affect their future employment prospects;
4. disclosure of confidential material not captured by the narrow definition in the regulations; and
5. participating in discussion and decision making on matters in which they have serious impartiality interests to the benefit of those interests.

At the same time, it is important to the sector that the disciplinary system is not misused to harass and intimidate council members who have a responsibility to act in the public interest, which is occasionally going to conflict with somebody's private interests. A decision made properly and responsibly may not be popular. There is concern that the regulations may not adequately safeguard council members against victimisation or intimidation by complainants making improper use of the complaints system or against the actions of serial complainants.

7. Regulations - Specific Proposals

7.1. Reform principle for regulatory amendment

The underlying principle used in developing the proposed regulatory amendments is alignment with the policy intent of the minor breach system. On this basis, minor breaches would only apply to the types of conduct likely to impair the integrity or efficient and effective performance of local government, or bring it into disrepute, by causing or increasing the risk of:

- real or reasonably perceived lack of impartiality in decision-making;

- disruption or unnecessary delay to council business;
- internal division or damage to working relationships;
- loss of trust between the council and local government staff;
- compromising the efficient operations of local government;
- loss of public confidence in local government integrity or competence;
- financial loss or diversion of public resources.

Council member behaviour that is less than exemplary, but does not pose such a risk, does not justify the public cost of being dealt with by the Panel, and should be dealt with at the local level. Conduct that displeases another individual but is otherwise inconsequential should not be referred to the Panel but dealt with in more appropriate ways.

This review has taken the position that the system should not be used as a tool of harassment or retaliation, or for the purpose of intimidating or influencing council members in the legitimate performance of their duties, or to unreasonably restrict freedom of political expression.

In order to improve clarity, remove duplication, effectively capture all target conduct and mitigate the risk of misuse of the minor breach system, it is broadly proposed to make the following regulatory changes:

- As far as practicable ensure that the wording of each regulation accurately reflects the policy intent, clearly defines the conduct and circumstances covered, and minimises the scope for complaints about matters of no consequence to the public interest.
- Insert explicit definitions of all significant terms used in the Regulations, so that the Panel will not need to interpret them by reference. Where a regulatory definition is impractical, the definitions that the Panel will use should be public.
- Rationalise the regulations to minimise duplication and overlapping application.
- Amend or insert regulations, where feasible, to cover conduct not currently addressed but which has the potential to result in significant council dysfunction or loss of public confidence.
- Make use of advisory standards and policies to provide more extensive guidance as to the intended use of the regulations.

7.2. Regulation 3 - General principles of behaviour

Regulation 3 is not a Rule of Conduct, and failure to observe it does not result in a minor breach, but it does not explicitly indicate how it is intended to be implemented. Most council codes of conduct prepared under section 5.103 of the Act broadly reflect the principles, although codes have the status of policies and are not enforceable for elected members. Previous attempts to give codes of conduct the status of local laws have been unsuccessful.

The Standards Panel uses the principles in Regulation 3 as a guide when determining whether “improper use of office” has occurred when considering an alleged breach of Regulation 7. It is proposed to make these links explicit in the regulation, and include an expectation of council member compliance with council codes and policies.

Proposal 7.2 – Regulation 3:

1. Amend Regulation 3 by specifically linking the principles to the concept of “proper use of office”.
2. Add a principle: “act in accordance with council policies, codes and resolutions”.
3. Add a new subregulation requiring the principles to be used to inform the preparation of a code of conduct prepared under section 5.103(1) of the Act.

7.3. Regulation 4 - Contravention of certain local laws

Section 5.105(1)(b) of the Act provides for the contravention of a local law to be specified as a minor breach under the Regulations. Regulation 4 currently specifies that contravention (by a council member) of a local law “relating to conduct of people at council or committee meetings” is a minor breach. In practice, this generally refers to a council’s **Standing Orders or Meeting Procedures** local law or the equivalent, although not all local governments have such an instrument.

If a council member persistently disrupts council or committee meetings, rejects the authority of the presiding member, attacks the credibility of other council members, employees or the council’s decision-making process, and undermines good working relationships, then impairment of the operations of the council and the performance of the local government is a likely result. This in turn potentially brings the local government into disrepute and reduces public confidence in it.

It is therefore appropriate for such conduct to be addressed by the Rules of Conduct, whether or not it is also addressed under the relevant local law. Regulation 10(3) already does this in part with reference to comments about local government employees. This duplication has often led to confusion about whether a complaint about such conduct should be considered under Regulation 4 or Regulation 10(3). In a number of cases, Regulation 7 has also been invoked.

Local laws relating to meetings vary widely around the State, and in addition to the conduct described above, usually cover matters such as simple courtesy, the rules of debate and the roles of certain council members, with some going into extensive detail. These are not matters that the State intended to deal with through the minor breach process and it is not efficient to deal with them at State level several months after the meeting occurred. Regulation 4 has been problematic for the Panel in considering complaints as it must first examine the particular local law and determine whether the provisions alleged to have been contravened are within its jurisdiction as “conduct” envisaged by Regulation 4.

Regulation 4 permits a complaint of minor breach to be made against a council member who contravenes a local law relating to conduct at a council or committee meeting, regardless of whether the transgression has already been dealt with under the local law at the time of the incident. If the presiding member responded promptly at the meeting, and directed withdrawal of the offending comment, an apology and cessation of the offending conduct, there is no public benefit in also finding a minor breach for the same incident but the Panel has little discretion to do otherwise if it receives a complaint.

If significant dysfunctional meeting conduct were to be specifically addressed in the Regulations, there would be no value in retaining Regulation 4. The deletion of Regulation 4 would remove current duplication with other regulations and the unfairness of double penalties. Discourtesy and procedural matters covered by Standing Orders do not merit State attention, and can be appropriately dealt with under local laws as the council deems fit.

Proposal 7.3 – Regulation 4:

1. Insert new Rules of Conduct to cover persistent, inappropriate, council and committee meeting conduct with significantly dysfunctional potential consequences such as disparagement and disruption (see section 7.9 for inclusions).
2. Delete regulation 4 which effectively duplicates local laws and potentially reduces the incentive to make effective use of local laws relating to meeting conduct.

Supplementary Question (Proposal 7.3 – Regulation 4):

1. Are there any risks in repealing Regulation 4?

7.4. Regulation 6 - Unauthorised disclosure of information

The improper use of confidential information by council members to gain advantage or cause detriment is prohibited by section 5.93 of the Act and section 83 of the *Criminal*

Code. Improper use of information is a serious breach, rather than a minor breach, and may be serious misconduct.

Regulation 6 exists in recognition that irresponsible disclosure of confidential information can potentially result in significant financial, legal and reputational damage to a local government even if neither advantage nor detriment was intended. Regulation 6 prohibits disclosure by a council member of confidential information acquired at a closed meeting or obtained from a council document marked as confidential by the CEO. Previous Panel decisions have limited these definitions by interpreting them to exclude confidential parts of otherwise non-confidential documents (such as agendas) and resolutions made in closed meetings. Regulation 6 does not cover other types of information.

Confidential reports in agendas

For administrative convenience, some local governments may distribute a single agenda to council members including reports on both non-confidential and confidential items, but publish the agenda with the confidential reports excised. The Panel has previously interpreted the definition of “confidential document” in Regulation 6(1) to include only a document marked in its entirety as confidential by the CEO. This has implications for local governments relying on Regulation 6(1) to protect confidential reports relating to agenda items, and it is proposed to clarify Regulation 6 to explicitly allow parts of documents to be marked by the CEO as confidential.

Personal information

Since the Regulations came into effect in 2007, community expectations about protection of personal information have increased. The release of personal information to unauthorised people may have serious consequences for the person to whom it refers and for others. Personal information or opinion about an identified individual, or an individual who is reasonably identifiable, includes official correspondence between an individual and the local government concerning that individual’s affairs, debts owed by an individual to the local government and private information provided in confidence by employees and job applicants. The accuracy of the information is irrelevant to confidentiality requirements. Personal information, however obtained by a council member, should not be disclosed to a third party without the permission of the individual concerned, their legal guardian, or as provided for by law.

Legal advice

Advice provided by a legal practitioner to a local government may be relied upon in commercial negotiations or in legal proceedings. Untimely disclosure of that advice may significantly weaken the local government’s position. Legal advice is protected from disclosure in most circumstances while it remains the subject of legal professional privilege. However, that privilege may be lost if the advice is not kept confidential.

Contractual obligations of confidentiality

Council members are bound by applicable confidentiality agreements and non-disclosure agreements whether these have been entered into by them as individuals or by the local government as an entity. Disclosure of information that the local government has contracted to keep confidential may expose the local government to litigation.

Commercially sensitive information

Council members may have access to information and intellectual property with significant commercial value. Careless or improper disclosure may cause financial or legal detriment to commercial entities and potentially result in breaches of corporate law obligations, particularly for listed companies. This in turn may expose the local government to litigation or other liabilities.

Resolutions made at closed meetings

Section 5.95(4) requires the record of a decision made at a closed meeting to be available for inspection as part of confirmed minutes, but neither the Act nor the associated regulations specify immediate disclosure when the meeting is re-opened. Most local governments deal with the matter in their *Standing Orders or Meeting Procedures* local laws, but the approach varies from full disclosure immediately to disclosure after the need for confidentiality has passed (limited by the requirement for the resolution to be in the confirmed minutes).

WALGA and the Department advise local governments to read out the resolution immediately. In order to protect confidentiality when premature disclosure would be detrimental, local governments taking this approach usually word such resolutions in a way that ensures no significant information is actually revealed, although this seems to negate the value of the revelation. Some local governments that do not automatically and immediately read out resolutions made in closed meetings may have relied on confidentiality requirements rather than coded resolutions to manage the risk of premature disclosure.

In interpreting Regulation 6, the Panel has taken the position that a resolution made at a closed meeting should be considered in the public domain immediately the closed meeting ends, whether or not the local law requires that it be read out. This raises uncertainty about the interpretation of the relationship between subsections 5.94(n), 5.95(3)(a) and 5.95(4)(a) of the Act, and the validity of various local laws provisions. Clarity is needed for the purposes of subregulation 6(2)(b) and information risk management practices in local governments.

Proposal 7.4 – Regulation 6

1. Include “parts of documents” in the definition of confidential document in subregulation 6(1).
2. Amend subregulation 6(2) to include personal information acquired in the person’s capacity as a council member, with the definition of personal information consistent with that used in existing Australian legislation.
3. Amend subregulation 6(2) to include professional legal advice, information that is subject to a confidentiality or non-disclosure agreement to which the local government is a party, and commercially sensitive information provided in confidence to the local government.
4. Amend subregulation 6(3) to add a provision that allows personal information to be disclosed to the extent permitted by the informed consent of the person to whom the information relates, or a person nominated by them, or their legal guardian.

Supplementary Questions (Proposal 7.4 – Regulation 6)

1. Is the above proposal relating to personal information sufficiently flexible to allow council members to assist their constituents while adequately protecting the privacy of individuals?
2. Should disclosure of other types of confidential information be prohibited?
3. Should resolutions made at closed meetings be explicitly excluded from the application of subregulation 6(2)(b)?

“Private” correspondence

Several minor breach complaints (often submitted as alleged contraventions of Regulation 7) have related to council members who have sent emails with sensitive content to trusted correspondents, which a recipient has then chosen to distribute more widely without the author’s knowledge or permission.

In dealing with disclosure of “unofficial” confidential information, a balance needs to be struck between ensuring that:

- council members are able to feel safe in exchanging views freely and frankly between themselves and with the CEO on council matters;
- council members are able to seek confidential advice on sensitive issues without their concerns being made public;
- council members are held accountable for statements they make to others, and

- genuine “whistle-blowing” about matters of public interest is not inadvertently disallowed.

Despite the detriment that can be caused when a council member breaches the trust of a colleague, it is recommended that regulation 6 not be expanded to include correspondence sent between council members. However, council member training should include the importance of discretion in both sending and receiving correspondence about sensitive matters, of maintaining trust between council members, and of clearly marking correspondence that is confidential and not to be copied or forwarded.

As a matter of respect and courtesy, this also applies to correspondence sent by external parties when it is marked as confidential. If the council member believes that disclosure is genuinely in the public interest, the author should be notified before disclosure.

Accidental disclosure

While not explicitly stated, Regulation 6 has been interpreted as referring to deliberate disclosure. It has been suggested that disclosure as a result of a council member failing to securely store confidential information should also be a minor breach. While council members should behave responsibly to keep confidential information secure, the minor breach process is targeted at inappropriate conduct arising from deliberate action. It seems unreasonable to extend it to deal with carelessness or lack of technical training. Secure storage of confidential information by council members is considered to be better dealt with through training, technology, or through restricting access other than under circumstances where information security can be effectively managed.

Comment invited: deterring “leaking” of sensitive information to provoke controversy or gain political advantage

It has been argued that a person who chooses to “leak” an email containing sensitive material, whether to the subject of the comments, other people, or the media, is as responsible for any detriment or controversy arising from wider distribution of the statements as the original author, who at least has the defence that the communication was intended for a restricted audience of trusted recipients.

Comment is invited on the merits of prohibiting a council member from copying or forwarding, other than to a disciplinary or investigatory agency as evidence of misconduct, any non-public correspondence received in confidence from another council member, unless with the permission of the author. An essential element would be that it was done with intent to gain an advantage for themselves or another person, or to cause a detriment to another person or the local government. (Note that this point refers to disclosure of information, rather than improper use of that information).

7.5. Regulation 7 - Securing personal advantage or disadvantaging others

Regulation 7 is cited in more complaints than any other regulation, accounting for 42% of all allegations received by the Panel – more than the next three most frequently cited regulations (Regulations 4, 10 and 11) combined.

Regulation 7 specifically excludes conduct that would contravene the Criminal Code section 83 (corrupt behaviour to gain a benefit or cause detriment) or section 5.93 of the Act (improper use of information to gain a benefit or cause a detriment). It does not specifically exclude conduct that would contravene the Criminal Code Chapter XXXV (criminal defamation) or conduct against which civil action could be taken under the *Defamation Act 2005*, and neither does it exclude conduct that contravenes another Rule of Conduct. Regulation 7 is frequently cited in complaints that make multiple allegations about the same conduct and complaints of a personal dispute nature.

A significant number of Regulation 7 complaints received by the Panel relate to comments made by council members during debate in council meetings. The SAT has previously found⁴ that Regulation 7(1) applies to conduct at council meetings despite that conduct being covered by local laws and partially covered by Regulation 10(3), partly basing this interpretation on the absence of a specific exemption in Regulation 7. There is therefore an overlap between Regulations 4, 7 and 10(3) in application to conduct at council meetings.

Regulation 7 is the least well-defined of the Rules of Conduct. The terms “improper use of office”, “advantage” and “detriment” are not defined in the regulation or in other legislation, a deficiency on which SAT judges have commented on several occasions.

In considering Regulation 7 complaints, the Panel and the SAT have come to rely on the interpretations set out in 2010 by Judge Pritchard, then Deputy President of the SAT, in reviewing a Panel decision against two council members⁵. In considering whether to find that the condition of “improper use of office” was met, Judge Pritchard listed five elements of impropriety, based on a variety of legal references. Judge Pritchard’s interpretation may be summarised as applying the following criteria in determining an improper use of office:

1. Breaches the standards of conduct expected of a council member by reasonable, informed observers;
2. Includes abuse of power or exceeding authority;
3. Does not depend on the member being conscious of, or intending, the improper use of their office;

⁴ Treby and Local Government Standards Panel [2010] WASAT 81 (DR238 and 289 of 2009).

⁵ Treby and Local Government Standards Panel [2010] WASAT 81 (DR 238 and 289 of 2009).

4. Is relevant to the member's knowledge of the extent of their power and their purpose in exercising it; and
5. Can be found to have occurred even if the council member genuinely believed they were acting in the interests of the local government (i.e. undertaking their role as set out in section 2.10(a) of the Act).

The Panel considers a further criterion in finding whether a council member made improper use of their office: "that the conduct was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty"⁶ which recognises that "improper use of office" is dependent on context and is a charge that should not be made lightly.

The last essential element of Regulation 7(1) is satisfied only if the council member acts with the intent and belief that the result of their actions would be the claimed advantage or detriment and that such was their purpose or aim.

A number of the Panel's findings of "no breach" have rested on lack of sufficient evidence to support a finding that the council member more likely than not acted with the intent and belief that their action would result in the advantage or detriment, regardless of whether any actual advantage or detriment occurred. If there is a legitimate, plausible alternative explanation for the conduct, the essential element of "intent and belief" is unlikely to be proven to the required standard.

The most frequently alleged contravention of Regulation 7 concerns a comment or remark to which the complainant has taken offence and which they allege has either caused them detriment because unspecified people "may think less of them" or that has gained a reputational advantage for the council member, or both.

While there are exceptions, few of these incidents could reasonably be considered by an impartial observer to affect the integrity, performance or reputation of the local government. Viewed objectively, the circumstances are usually such that the complainant is very unlikely to sustain significant or lasting harm attributable to the conduct, but Regulation 7(1) provides a tool for retaliation.

The *Defamation Act 2005* contains numerous safeguards to prevent overly sensitive individuals from unreasonably fettering other people's freedom of expression, but

Regulation 7 contains no checks and balances of this nature.

In addition, the Panel has applied a wide interpretation of "detriment" encompassing any kind of "loss" with no clear threshold of materiality or probability. These factors appear to have encouraged allegations of Regulation 7 contravention relating to comments for which the council member would have had a legitimate defence had the complainant brought civil proceedings for defamation.

⁶ Hipkins and Local Government Standards Panel [2014] WASAT 48 at [9], quoting O'Bryan J in *Robbins v Harness Racing Board* [1984] VR 641 at [646].

An additional danger in allowing Regulation 7 to be used as a substitute for defamation law is that a finding of breach involves a finding that the council member has improperly used their office in undertaking their core role of engaging in debate at council meetings or communicating on council business. Within the Australian democratic system, elected members have traditionally been free to express controversial opinions and to challenge the positions of opponents, even robustly, although in the cause of orderly and productive meetings, a case may be made for restricting invective, vilification and the impugning of character.

The imprecision of Regulation 7 in its current form is open to misuse by individuals seeking to hinder council members in performing the responsibilities conferred on them by section 2.10 of the Act and the role expected of them by their constituents. Regulation 7 complaints may also be used by parties seeking to influence an outcome to their advantage through harassment and intimidation of an individual council member in an attempt to restrict the member's freedom of expression during public debate.

A new regulation is proposed later in this report to address interactions between council members, which would include seriously disparaging and abusive statements and other dysfunctional conduct at council and committee meetings.

That proposed new regulation and amendments to Regulation 10 to strengthen protections for local government employees will provide an opportunity to refocus Regulation 7 on non-trivial inappropriate conduct with implications for the ethical, honest and impartial performance of a council member's role, similar to the matters covered within the meaning of minor misconduct under the CCM Act.

Proposal 7.5 – Regulation 7

1. Amend regulation 7 to clearly define “improper use of office” in the context of the interpretation currently used by the SAT and the Panel (as summarised above), with reference to the local government’s code of conduct and regulation 3 principles of behaviour.
2. Amend sub-regulation 7(1) to clarify that it applies only when the action is taken with the primary intent and belief that it will result in gaining an advantage or causing detriment.
3. In addition to the current exemptions, specify that sub-regulation 7(1) does not apply to:
 - a. advantage or detriment that is trivial, negligible or hypothetical; or
 - b. conduct of council members at council or committee meetings; or
 - c. a matter to which another Rule of Conduct in the Regulations applies; or
 - d. a remark, comment, statement or implication if:
 - i. it was clearly expressed as the council member’s personal opinion rather than as a statement of fact, and that opinion was based on factual material and related to a matter of public interest; or
 - ii. the circumstances were such that no harm attributable to the conduct was likely to be sustained.

Supplementary Question (Proposal 7.5 – Regulation 7):

1. These changes will make Regulation 7 less of a “catch-all” for matters relating to personal disputes and trivial matters. Is there a need to focus this regulation on any specific issues related to improper use of office?

7.6. Regulation 8 - Misuse of local government resources

Regulation 8 does not clearly define what constitutes a local government resource for the purposes of the regulation, or even what constitutes “use” in the regulatory context. The Panel and the SAT have resorted to generic dictionary definitions which are very broad and of limited relevance in achieving the policy intent of the regulation.

Local government resources consist of the tangible assets of the local government such as money, property, plant and equipment, stationery and other consumables; and intangible assets paid for by the local government including staff time, intellectual property, licences, and third party utilities and services.

The common factor is that these resources are owned by or have been paid for by the local government on behalf of the community in general, whether or not the council member's use deprives the local government of use, access or revenue. The relevance is less clear when extended to intangible concepts like the "position of councillor", reputation, public events or images, as occasionally claimed.

The term "any other purpose" in sub-regulation 8(2)(b) is also overly broad. The key point is that public resources should be used for the public benefit. Council members have a right to use the public resources that are necessary for them to carry out their duties, and to use publicly available resources under the same conditions of access that apply to everyone else. Any other use of resources to which a council member has privileged access by reason of holding office must be both transparent and accountable, and must not mislead observers into wrongly assuming official local government support for the purpose. Clear definitions would provide more certainty and discourage misguided and trivial complaints.

It has been suggested that the exemption for authorised use offers insufficient protection as it does not restrict the uses that can be authorised by the council, but it is unclear whether this is a significant issue for local government.

Proposal 7.6 – Regulation 8:

1. Define the term "resource" in Regulation 8 to cover tangible and intangible assets, services and other means of supporting the functions of the local government, and that are owned or paid for by the local government from public money, but excluding intangible concepts without monetary value (such as an address or title).
2. Define the term "use" to include both consumption and deriving a benefit not associated with consumption, including misrepresenting local government support for the purpose.
3. Clarify the term "any other purpose" in sub-regulation 8(2)(b) to refer to any purpose other than fulfilling the legal obligations and duties of the council member's office.

Supplementary Questions (Proposal 7.6 – Regulation 8):

1. Are these definitions of "resources" and "use" sufficiently comprehensive and unambiguous?
2. Should authorisation be restricted to purposes that contribute to performing the functions of the council and local government as set out in the Act?
3. Is it necessary to explicitly exempt the use of publicly available local government resources where the council member's use occurs under the same conditions as any other person?

7.7. Regulation 9 - Prohibition against involvement in administration

Clear separation of the roles of the council and of the administration is fundamental to the *Local Government Act* but remains a cause of friction. Blurring of these lines of separation diminishes accountability, increases risk and reduces efficiency. The intrusion of council members into operational matters and disputes about end-of-line responsibility are common themes in inquiries into dysfunctional local governments.

Since 2007, the Panel has received 35 allegations (<7%) of minor breach for contravention of Regulation 9, but only four were made by CEOs, which suggests that matters of this type are generally handled professionally and in-house by CEOs. Members of the public (including ex-councillors) made 15 allegations (none of which related to significant conduct), council members made 13 allegations and employees/ex-employees made three (of which two later sought to withdraw the complaint).

The Act makes the council responsible for the performance of the local government but simultaneously limits its autonomy by directly allocating very broad powers and responsibilities to the CEO. These are supplemented by whatever level of delegation the council approves. However, as the Corruption and Crime Commission found⁷, this does not absolve the council from its obligation to scrutinise the CEO's actions and to ensure proper accountability and risk management concerning public assets, as part of being responsible for local government performance.

The challenge is in determining the point at which scrutiny and due diligence becomes interference. The variations in the size and capacity of local government organisations, and in the nature of the working relationships between the CEO and the presiding member, mean that the boundary between strategic oversight and operational activities may vary between local governments and over time in the same local government. The regulation is not intended to hamper effective and mutually agreed local arrangements.

However, the proportion of trivial complaints received from complainants external to local government operations suggests that the regulation needs to be clarified, if only to specify what it does not cover and preclude allegations based on misunderstanding.

For the purposes of the regulation, it is proposed to define "administration" in terms of the legislated functions reserved to the CEO and the management of his or her legislated or delegated responsibilities.

The complexity of the interaction between the council and the local government operational arm, and recent concerns raised about accountability and risk management, suggest there may be merit in developing an advisory standard.

⁷ Corruption and Crime Commission (WA) (2015) Report on Misconduct Risk in Local Government Procurement.

This would explain how to differentiate between strategic and operational matters, when specific authorisation should be considered for efficient operations (for example to facilitate the provision of administrative assistance to a presiding member), and suggests the level of reporting that council members may legitimately expect to enable them to comply effectively with their fiduciary obligations.

Proposal 7.7 – Regulation 9:

1. Define “administration” in Regulation 9 to mean the functions of the CEO as described in section 5.41 of the Act, CEO delegations under section 5.42 of the Act, the executive functions of local government as described in Part 3 Division 3 of the Act, and other functions specifically reserved to the CEO under the Act or any other written law.
2. Define “task” to exclude the transmittal of non-confidential information provided by the CEO, and to exclude the expression of an opinion, comment, objective or intent.
3. Extend the exemption in sub-regulation 9(2) to apply to tasks related to the legislated and undelegated functions of the council, in addition to tasks done as part of deliberations at a council or committee meeting.
4. Develop and publish an advisory standard to assist council members in determining the boundaries of their roles and the level of reporting that they may expect

Supplementary Questions (Proposal 7.7 – Regulation 9):

1. Is the proposed definition of “administration” sufficiently clear about where council members should not take an active and uninvited role?
2. Should authorisation be by both the council and the CEO, rather than either, or should it be initiated by the CEO?

7.8. Regulation 10 - Relations with local government employees

Mutual trust and respect between council members and local government employees, based on realistic expectations and a professional working relationship, is essential to a high performing local government and the retention of skilled and experienced employees. Regulation 10 addresses the asymmetry of power that exists between council members and local government employees.

Regulation 10 focuses on achieving a balanced and productive relationship between the council members and the employees through whom they achieve their objectives

for the local government, recognising that sometimes there may be conflicting objectives or priorities. The proposals in this section are based on a set of assumptions about what is or is not reasonable council member behaviour, and comment is invited on whether these assumptions are realistic and appropriate.

It is considered reasonable for council members to:

- seek assurance from the CEO that the local government is performing satisfactorily against appropriate agreed criteria, and specify the information needed to provide that assurance;
- expect to be kept informed about matters that affect the local government's performance, financial position, corporate risk profile and reputation;
- raise, with the CEO through council process, matters concerning the allocation of resources to local government priorities;
- request timely, accurate, relevant advice on matters requiring a council decision;
- rationally and respectfully challenge the accuracy or appropriateness of employees' advice, decisions, reports or actions, for which employees should expect to be held accountable;
- respectfully raise and discuss concerns about the operational performance of the local government, which may sometimes reflect on the performance of individual employees;
- express any concerns or criticism respectfully and constructively through established channels.

It is considered unreasonable for council members to:

- seek excessively frequent or detailed operational reporting irrelevant to strategic decision-making or to council's legal governance and fiduciary responsibilities;
- demand that employees undertake extensive research or retrieval of records that are accessible by the member themselves or for a purpose other than the council member's legislated duties;
- seek to influence the enforcement of local laws, implementation of policies, allocation of resources, prioritisation of work or other operational decisions through directly communicating with operational level employees;
- conduct discussions or make comments that reflect negatively on employees in the presence of their co-workers or in a public forum;
- impugn an employee's character or impute dishonest motives to them rather than objectively critique the outcome or activity;
- make assumptions, theorise or allege wrong-doing without knowing all the facts, or use a single incident to attack an employee's credibility;
- be disrespectful or abusive towards, or seek to humiliate or hurt an employee;

- seek favourable public attention by disparaging local government employees in the community.

Regulation 10 is cited in about 14% of minor breach complaints, but a high proportion (more than 60%) of these allegations are found not to be a breach, frequently because the conduct complained about occurred outside the narrowly defined set of circumstances to which Regulation 10 applies, and therefore the conduct was not prohibited by the regulation. Such a finding should not be misinterpreted as the Panel's endorsement of the conduct as being acceptable or appropriate.

Regulation 10 is perceived by some local government managers as dealing inadequately with certain types of inappropriate conduct and misuse of power by council members in relation to local government employees, either because of the restricted application of existing provisions or because the conduct is not addressed at all. The specific reported shortcomings of Regulation 10 are dealt with below.

7.8.1 Narrow conditions of application do not reflect intent

The current provisions of Regulation 10 narrowly limit the application of some provisions, allowing for seriously dysfunctional conduct to occur without technically being in breach, but in other cases inadvertently proscribe conduct associated with normal working relationships. Particular issues related to the sub-regulations are:

Sub-regulation 10(1)(a) - direction

This sub-regulation is intended to prohibit a council member making wrongful use of their position to interfere with enforcement of local laws, implementation of policies, or to vary operational decisions, priorities and resource allocation. Imprecision of key terms ("anything") has allowed allegations of minor breach to be made about normal professional interactions that contribute to local government outcomes (e.g. between a presiding member and an employee assigned to provide them with administrative assistance, or members responding to invitations from officers for comment on documents).

Sub-regulation 10(1)(b) – influence through threats and promises

This prohibition has been interpreted to apply only to threats made in relation to a future specific action, and not to extend to retaliatory or generic threats intended to generally intimidate an employee or generic promises intended to elicit favourable consideration of a member's future requests. It does not appear to apply to a perceived threat by a council member to punish an employee for a completed action, or to harassment through non-specific threatening behaviour, regardless of the distress such conduct may cause.

Sub-regulation 10(3)(a) – accusations of incompetence or dishonesty

This sub-regulation refers only to dishonesty and incompetence, not to other types of disparagement that impugn the character of employees (e.g. accusations of negligence, bias or laziness).

Application is restricted to council and committee meetings and other organised events where members of the public are actually present (interpreted not to include local government employees). This does not recognise the effects on staff morale, trust, and working relationships of witnessing a colleague or manager being treated disrespectfully by a council member.

The sub-regulation does not provide for the “virtual” presence of members of the public through communications technology (e.g. live-streaming), nor for the potential for the accusations to be witnessed after the event through publicly accessible recordings.

This sub-regulation also does not require council members to refrain from denigrating employees in the mainstream or social media, on public websites, or in newsletters or written correspondence sent to multiple recipients including members of the public.

There are potential consequences for the local government of council members expressing overt disrespect for employees. These include: loss of trust and staff morale, reduced productivity, occupational safety and health risks (including workers’ compensation liability), difficulty in attracting and retaining talented staff, loss of public confidence in the local government, and the diversion of resources from productive work to manage the negative publicity.

While the Act provides that only the mayor or president speaks on behalf of the local government, it does not explicitly prohibit council members from making public statements on their own behalf. Some local government stakeholders expressed a desire for regulatory change to protect local government employees from defamation by council members in broader public forums, including mainstream and social media, publicly accessible blogs, newsletters and other publications.

However, the implied freedom of political communication under the Commonwealth Constitution as well as implementation considerations make regulating this conduct problematic, and deterring such behaviour through non-regulatory measures is a more feasible approach. One alternative option for holding council members accountable for their public statements is explored and offered for comment in subsection 7.9, below.

Regulation 10(3)(b) – offensive or objectionable expressions

As with sub-regulation 10(3)(a), application is restricted to council and committee meetings and other organised events where members of the public are present, and similar concerns have been expressed about the regulation not capturing offensive references in social media and other public forums.

The application of this sub-regulation is open to broad interpretation. The usual intent when the word “offensive” is used in legislation concerning freedom of speech is to prohibit the use of inflammatory language⁸ directed against a person. The focus is on

⁸ Inflammatory language may involve invective, abuse, expletives, vilification or derogatory epithets with negative discriminatory overtones (racial, sexual, cultural, or relating to physical or mental characteristics) directed against the character, personal attributes, values, background or motives of a

the disrespectful way in which a view is expressed rather than on the view itself. The intent appears to be the deterrence of behaviour that impedes communication by causing emotion to overcome rational thinking. In extreme cases this may lead to physical altercation but in the current context it is more likely to disrupt the rational consideration of local government matters.

Minor breach complaints have alleged contraventions of Regulation 10(3)(b) for comments ranging from insensitive or distasteful to mildly critical to clearly abusive. Regulation 10(3)(b) is also cited in complaints about disparaging statements that could not be captured by the term “incompetent or dishonest” in sub-regulation 10(1)(a). Almost all of these allegations have been made on the basis of the underlying connotation of the alleged remark rather than its actual expression, which effectively treats this sub-regulation as an extension of sub-regulation 10(1)(a).

The Panel and SAT have not challenged this use of the sub-regulation, but have then needed to debate and explain at some length how they decided whether what was said was an “offensive or objectionable expression”, with extensive reference to dictionary definitions of the individual words used. However, in everyday interactions, it is rarely necessary for most people to consult a dictionary to decide whether an expression is offensive or objectionable.

Response to concerns

Amendments are proposed to change, clarify or define terms to ensure the words of the regulation align with the intent, and include appropriate exemptions. This is intended to ensure that severely dysfunctional conduct is prohibited without compromising the practical and efficient operations of local government and to remove restrictions on regulatory application that act against the intent.

7.8.2 Inadequate protection against bullying or harassing behaviour

Bullying and harassment are serious issues with significant occupational health and safety implications where they occur. The Commonwealth *Fair Work Act 2009* defines elected council members as “workers” for the purposes of the legislation, with the responsibilities and obligations consistent with that status in regard to preventing bullying. However, many local governments in Western Australia are not subject to the *Fair Work Act*. The *WA Occupational Safety and Health Act 1984* is based on the use of employment contracts for implementation. It does not provide a mechanism to deal with elected local council members who are not defined as either employers or employees.

The actions of a small minority of council members who are disrespectful or abusive towards local government employees potentially place local government CEOs in a dilemma. CEOs are expected under the *Occupational Safety and Health Act* to provide

person. It is interpreted in the context of a reasonable adult’s understanding of contemporary community standards, but generally the term is not applied to childish taunts or non-emotive factual descriptions.

a safe workplace for the employees under their care, but may have limited real power to prevent bullying of those employees by representatives of the CEO's own employer.

Employees who are repeatedly bullied or harassed may suffer distress to the extent that both their wellbeing and their productivity are compromised. The effects extend to other parts of the workplace and work culture, and overall organisational performance may suffer. Bullying-related staff resignations reflect poorly on a local government, reducing its competitiveness in attracting and retaining high quality staff.

Response to concerns

Workplace bullying allegations are emotionally charged, rarely straightforward and require the power to investigate and the capacity to query evidence. The Standards Panel has neither the power nor the resources to undertake such work. There is no current intention to amend the *Occupational Safety and Health Act 1984* to address the unclear status of elected council members, and no enforcement mechanisms in local codes of conduct.

To suggest that bullying or harassment is equivalent to a "minor breach" unacceptably trivialises a serious issue, but the Rules of Conduct are currently the only readily available enforceable mechanism to deter conduct by council members that could be perceived as bullying or harassment.

It is proposed to introduce new sub-regulations in Regulation 10 prohibiting abusive or threatening behaviour by council members, and prohibiting council members from making repeated and unreasonable demands of local government employees. While this is certainly not an ideal solution, this amendment may reduce the incidence of distress caused by conduct that is thoughtless and insensitive rather than intentionally malicious. A stronger State response to the issue would require substantial policy development and legislative change to either the *Local Government Act* or the *Occupational Safety and Health Act*, which is beyond the scope of this review.

It must be acknowledged that vexatious bullying complaints are themselves a form of abuse with the capacity to cause reputational and psychological harm to those unfairly accused. If this proposal is adopted, this risk will need to be managed by local government CEOs in relation to complaints against council members with the same diligence with which it is managed in relation to complaints against local government employees.

7.8.3 Council members directly reprimanding employees

The CEO, through the management structure, is responsible to the council for the performance of the organisation and its staff. A council member's criticism of an activity for which an employee is responsible may have an exaggerated impact on an employee, particularly a junior employee, because of the perceived power of the member to affect their employment and reputation. The consequences include distress to the employee, undermining the manager's relationship with the employee, and eroding the work environment. Feedback from council members on services or

performance of local government functions, or on any employee's performance, should be directed through the CEO.

Response to concerns

A new sub-regulation is proposed for Regulation 10 to prohibit council members from personally chastising or reprimanding an employee for a perceived deficiency in a local government service or the employee's performance.

7.8.4 Covert conduct to disadvantage CEO

The appointment, performance appraisal and dismissal of the CEO is a council responsibility. However, there is an inherent conflict created by the CEO's responsibilities to ensure good governance at the council level, effectively requiring CEOs to "police" the behaviour of the people who will assess their performance and determine their employment conditions and tenure. This contrasts with the situation at State level where the Public Sector Commissioner ensures some separation between agency CEO employment arrangements and elected members.

The local government CEO's governance responsibilities may occasionally lead to a difference of opinion between the CEO and individual council members about the boundaries between the strategic and operational functions of the local government, the power of the council to direct the local government in certain matters, and the extent to which councillors are constrained by legislation from acting as they think best. This may result in ill-feeling by the council member, which occasionally manifests in overt disrespect, publicly or privately undermining the CEO's reputation, open threats to "get rid of" the CEO, and colluding with others in attempts to bring about the premature termination of the CEO's employment outside legitimate disciplinary processes.

Regardless of the council member's stated justification, this conduct is highly damaging to the local government. It can erode trust between the council and the CEO, affect local government performance and reputation as a fair employer, and lead to operational dysfunction, but the rules of conduct do not specifically address this issue.

Response to concerns

It is the council's role to recruit, select, manage the performance of, and if necessary dismiss the CEO, but it is essential that these processes be transparent, impartial, fair and lawful.

A new sub-regulation is proposed for Regulation 10 to prohibit a council member seeking to influence the performance appraisal or dismissal of a CEO other than through an authorised process consistent with legal requirements and natural justice.

In the longer term, it may be desirable for the Government to minimise the potential for this kind of conflict by considering a more independent process for appointing CEOs and managing any termination action, while retaining the day to day accountability arrangements between the council and the CEO. A variation of the model currently used for State Government agency CEO employment might be appropriate.

7.8.5 No protection for former local government employees

Local government employees, particularly CEOs and senior managers, sometimes have little choice but to resign as a result of a breakdown in their working relationship with council members. These individuals should not have their future career prospects unfairly blighted by derogatory comments made by council members upon their departure. Ex-employees are particularly vulnerable, because they have limited access to forums where they can refute untrue or unfair allegations, and may have signed an agreement as part of their separation arrangement which prohibits them from making comment on the circumstances that led to their departure.

Response to concerns

Amendments are proposed to Regulation 10 to extend the protection of local government employees from reputational detriment to former local government employees who have separated from the local government in the previous six months.

Proposal 7.8 – Regulation 10

1. Amend sub-regulation 10(1) by:
 - a. In sub-regulation 10(1)(a), replacing “to do or not to do anything” with a reference to taking action related to local government functions such as enforcement of local laws, implementation of approved policies and procedures, or varying of decisions, priorities or resource allocation.
 - b. Providing for the CEO to authorise a limited exemption to subregulation 10(1)(a), at the CEO’s discretion, for individual council members for specified operational purposes.
 - c. Adding a prohibition against behaving in an abusive or threatening manner towards any local government employee, including the CEO (the exemption for meetings is not to apply to this rule).
 - d. Adding a prohibition against making repeated or unreasonable demands for information or assistance from a local government employee to an extent that impairs the employee’s capacity to complete their designated work responsibilities.
 - e. Adding a prohibition against attempting to influence the performance appraisal or dismissal of a CEO other than through an authorised process consistent with legal requirements and procedural fairness.
 - f. Adding a prohibition against personally chastising or reprimanding any local government employee for matters related to the administration of the local government.
2. For the purposes of sub-regulation 10(2) and other regulations where the term is used, “council or committee meeting” should be defined as a formally constituted meeting of the council or a committee established under section 5.8 of the Act. Informal meetings such as site meetings or information forums would not be included in the exemption.
3. Amend sub-regulation 10(3) by:

- a. Replacing the condition “members of the public are present” with a condition specifying that the sub-regulation applies if any person other than council members and the CEO is present, or if the meeting or event is being broadcast, or if an audio or video record is being made of the meeting or event and that record will be publicly available.
 - b. Clarifying that the term “attending” covers the periods immediately before and after the meeting or event and during any period in which proceedings are suspended.
 - c. In sub-regulations 10(3)(a) and 10(3)(b), extending the protection to former local government employees for a period of 6 months after separation from the local government.
 - d. In sub-regulation 10(3)(a), replacing the current reference to “statement...is incompetent or dishonest” with a reference to disparaging or impugning the character of a local government employee or former local government employee. This to be defined as stating or implying deficiency in the person’s honesty, integrity, competence, diligence, impartiality or loyalty; or imputing dishonest or unethical motives to them in the performance of their duties.
 - e. In sub-regulation 10(3)(b), replacing the term “offensive or objectionable expression” with “abusive or offensive language”, defined as inflammatory words likely to incite ridicule or contempt and which would offend a reasonable adult applying contemporary community standards.
4. In sub-regulation 10(4), extend the exemption to statements made to an authority responsible for regulating the conduct of public officers and to statements made under oath or affirmation to a body authorised by Parliament to conduct an inquiry or during judicial proceedings.

Supplementary Questions (Proposal 7.8 – Regulation 10)

1. Do the proposals listed above address to a practical extent the types of conduct relating to local government employees that may cause disruption to the orderly operation of the local government and impair its efficiency and effectiveness?
2. Are any of the proposals likely to be impractical or negatively affect the efficient and effective operations of the local government?
3. Is there a more appropriate definition for “unreasonable demands” in the proposed amendment to sub-regulation 10(1)?
4. Should the condition about meeting attendees in proposal 7.8 3(a) above include an official record taker in addition to council members and the CEO?
5. Are any other explicit definitions or exemptions needed to prevent ambiguity?

7.9. New regulation - Public statements

Provided they do not claim to be speaking on behalf of the council or the local government, council members' rights to publicly air their views about local government functions and employees or about council decisions should not be fettered by Rules of Conduct regulations.

Negative published comments and lack of council solidarity potentially cause dissension and detriment to the local government's performance and reputation, and result in employee resources being diverted from productive activities to managing that risk. Council members who are concerned that council decisions or local government operations do not serve the public interest should in the first instance attempt to resolve these concerns with the mayor/president and/or the CEO. However, if they feel they must make a public statement, council members must be prepared to openly take responsibility for what they say. This is particularly important for attributed views and comments published in the mass and local media, although other forms of mass communication, such as on social media or in e-newsletters, also have potential to cause harm and should be used judiciously.

It has been suggested that greater accountability could be achieved by a requirement for council members to notify their local government of comments that they make to the media in their capacity as council members.

This would not interfere with a council member's right to express personal opinions, but would improve transparency in local government. It would also ensure accurate record-keeping and facilitate risk management by the local government, and provide some protection for councillors who are misquoted. This proposal would enable a local government to:

- maintain a record of public statements made by council members about the local government;
- more effectively manage its response to the publication (including preparing for any subsequent media interest and managing any staff impacts); and
- provide assistance to a council member in seeking a retraction should the council member be misquoted, misinterpreted or have comments wrongfully attributed to them.

Proposal 7.9 – New Regulation (Public statements)

1. Insert a new regulation that:
2. Requires a council member to notify the CEO in writing of any comments or written material that the council member provides to a representative of the mass or local media concerning the performance or administration of the local government, the actions or performance of local government employees, or a council decision.
3. Requires the CEO to maintain a register of media contact in which details of such notices are kept, and to make this register available for public inspection.
4. This regulation would not apply to anything that a council member does as a part of the deliberations at a council or committee meeting, or to any authorised communication by or on behalf of the mayor or president in their official capacity.

Supplementary Questions (Proposal 7.9 – Regulation on public statements):

1. Will the proposed regulation provide a practical mechanism for council members to take responsibility for their public statements without fettering their right to make them?
2. Is there a need to more closely define the circumstances requiring notification?
3. Should the requirement for notification be extended to social media, blogs, e-newsletters, etc.?
4. What is a reasonable time limit for notification given the likely immediacy of the consequences of the conduct?
5. What could be the disadvantages for council members or local governments if such notification is required?
6. Should this regulation apply all the time or only during campaign periods?

7.10. New regulation - Interactions with council members

Proposal 7.3 suggests deleting Regulation 4, which has proven to be problematic in terms of coverage, consistency and duplication. However, some common provisions in local laws relating to conduct at meetings are appropriate for inclusion in consistent, State-wide standards of conduct that council members are expected to meet in relation to fellow council members.

The provisions of the proposed new regulation have been drawn primarily from existing local laws, but have been limited to conduct that is considered to be significantly

disruptive, likely to impair the effective performance of the local government or likely to bring the council and local government into disrepute and undermine public confidence.

This proposed regulation is not intended to stifle robust debate, including rebuttal of the opinions and arguments of opponents, but to ensure that such debate is conducted in a respectful, orderly, constructive and reasonable manner and is focused on issues and facts.

Proposal 7.10 – New regulation (Interactions with council members)

Insert a new regulation that:

1. Prohibits a council member from behaving in an abusive or threatening manner towards any other council member or the CEO.
2. Prohibits a council member from stating or implying that a council decision or decision process was incompetent, dishonest, corrupt, negligent or unlawful (but does not prohibit expressing disagreement with a decision).
3. Prohibits a council member, when attending a council or committee meeting or other organised event, and if any person other than council members, the CEO and an official record taker is present, or if the meeting or event is being broadcast, or if an audio or video record is being made of the meeting or event and that record will be publicly available, from:
 - a. Disparaging or impugning the character of any council member (to be defined as stating or implying deficiency in the person's honesty, integrity, competence, diligence, impartiality or loyalty), or imputing dishonest or unethical motives to them in the performance of their duties.
 - b. Using abusive or offensive language to, or in reference to, any council member (to be defined as inflammatory words likely to incite ridicule or contempt or which would offend a reasonable adult applying contemporary community standards).
4. Requires a council member, when attending a council meeting or committee meeting, to:
 - a. Comply with a direction given by the presiding member at that meeting; and
 - b. Cease any conduct that has been ruled out of order by the presiding member,

unless the majority of council members who are present vote to dissent from the presiding member's ruling.

5. Sub-regulation (2) is not to prevent a council member from reporting suspected dishonest, corrupt, negligent or unlawful council decisions or processes to a regulatory agency with responsibility for overseeing any aspect of the performance of local governments or the conduct of public officials.

6. This regulation is not to prevent a council member from making a statement under oath in a hearing conducted by Parliament, before a judicial body or as otherwise required by law.

Supplementary Questions (Proposal 7.10 – Regulation on interaction with council members):

1. If Regulation 4 is repealed, and Regulation 7 no longer applies to conduct in council and committee meetings, will the proposals above adequately capture the key provisions in local laws related to conduct of council members in meetings?
2. Is there a need for rules of conduct in relation to any other interactions between council members that may impair the integrity, performance or reputation of local governments?

7.11. Regulation 11 - Disclosure of interest

There appears to be some confusion⁹ about the intent and scope of Regulation 11, which specifically excludes financial interests and proximity interests, disclosure of which is provided for by Part 5 Division 6 of the Act. Further clarification has been requested on the kinds of impartiality interest that should be declared.

This confusion arises in part because disclosure of an impartiality interest has no practical consequences for the outcome of the matter being deliberated, in that the disclosing council member is not required to be absent for either the discussion or the vote, and under section 5.21(2) of the Act is required to vote if present. A disclosing member who participates in the deliberations may declare that they will act impartially, but realistically there is no way to confirm that they do so.

Regulation 11 complainants frequently appear to have interpreted the examples in the definition (kinship, friendship or membership of an association) as an alternative definition rather than a clarification of the primary condition (that the interest could, or could reasonably be perceived to, adversely affect the impartiality of the person having it). This has led to allegations of non-disclosure of very tenuous and insignificant connections unlikely to bias the judgement of any reasonable person. Regulation 11 is silent on the interests of closely associated persons and it is unclear whether these should be disclosed.

The extent of significant practical public benefit achieved by Regulation 11 in its current form may be debatable:

⁹ Even the Panel has expressed “great difficulty in arriving at a considered view as to what circumstances regulation 11 is intended to address” (Standards Panel Findings SP 36 of 2008 – unpublished).

- The interests most likely to adversely affect a person’s impartiality are those associated with beliefs, values, ideology, passion for a cause or election commitments, yet these interests are not required to be disclosed under Regulation 11. The rationale is that most council members are elected on a particular platform, set of promises or firmly stated beliefs, and it is to be expected that these will affect the way in which they consider related matters. If there is no requirement to disclose interests almost certain to affect impartiality, then the value of disclosure of lesser impartiality interests seems questionable.
- Fear of contravening Regulation 11 has led to some council members assuming a very broad interpretation of “impartiality interest”, with anecdotes about councillors disclosing their membership of council committees, former patronage of closed businesses and their own retirement function. Recording these kinds of interests is little more than red tape with no real benefit.
- Formal disclosure is not the only source of information about interests, particularly regarding “enduring” interests such as employment, association membership or familial relationships. Impartiality interests may also be known from previous statements or be public knowledge, and a number of allegations of minor breach have concerned interests that are so widely known as to be unremarkable, or that had been previously disclosed on other matters, but the council member had neglected to disclose the interest on a particular occasion. A more efficient approach to enduring interests would be to have a permanent (on-line) register to eliminate the need for multiple disclosures of the same interests. Associating the interest with a relevant matter could then be automated and managed as an administrative function.
- Most allegations of contravention of Regulation 11 involve interests that are so trivial (sometimes even hypothetical) that no reasonable person would believe that they prevented the council member from acting impartially. Allegations of minor breach have even been made for alleged non-disclosure concerning administrative agenda items with no consequences external to the council’s own processes. The regulation in its current form is vulnerable to frivolous complaints because it does not require justification for a complainant’s claimed perception that the interest affects impartiality, and does not consider materiality.
- The benefit associated with processing a minor breach complaint about non-disclosure of an impartiality interest after the event appears negligible. Since disclosure would not have restricted the councillor from contributing to the discussion or the decision, the non-disclosure is unlikely to have adversely affected the quality or outcome of council decisions and the public cost of processing a complaint is difficult to justify.

Transparency is improved by disclosure of a close association with a community organisation likely to receive a significant direct benefit (such as a grant, lease or authorisation of an activity) from the council’s decision, although if the council member still participates in the decision, the benefit is more academic than practical. One

intangible benefit of disclosure of impartiality interests may be more productive debate as a result of better mutual understanding, but this is difficult to measure.

Assuming that there is general local government support to retain a rule of conduct requiring disclosure of impartiality interests, the following proposals focus on attempting to reduce red tape and focusing the rule on significant interests.

There has also been some public debate about whether council members should disclose whether they have been lobbied by or held discussions with persons seeking local government authorisation of an activity involving local government discretion. Such disclosure would also improve transparency.

Proposal 7.11 – Regulation 11

1. Amend sub-regulation 11(1) to clearly restrict the definition of interest to one that could or could reasonably be expected to adversely affect impartiality of the person having the interest, deleting the “inclusions”.
2. Include examples of significant impartiality interests in an advisory standard rather than in the regulation.
3. Define “matter to be discussed” to mean substantive matters to be determined by council and exclude administrative matters where the effect is limited to the council itself.
4. Amend sub-regulation 11(3) to add a provision that Regulation 11 does not apply to trivial, negligible or non-current interests.
5. Add a sub-regulation permitting a disclosing member to elect to leave the meeting while the council discusses and makes a decision on the matter, but if the member elects not to leave the meeting, the council member must vote as required by under section 5.21(2) of the Act.
6. Add a sub-regulation providing for council members to register, at their discretion, enduring interests that may be perceived as affecting their impartiality.
 - a. Enduring interests may include, but are not limited to, familial relationships, employment or board membership, membership of associations, election commitments and public statements of position on specific matters.
 - b. The CEO is to maintain a register of enduring interests that is available for public inspection.
 - c. Council members may request the CEO to make amendments to their recorded enduring interests as necessary.
 - d. Sub-regulation 11(2) would not apply to interests that are recorded in the register of enduring interests.

Supplementary Questions (Proposal 7.11 – Regulation 11):

1. Would a register of enduring interests provide adequate transparency?
2. Should Regulation 11 provide for the situation where a council member wishes to contribute to the discussion but feels that they may be unable to vote impartially and wishes to leave the meeting before the vote?
3. Should council members be required to disclose, prior to discussion on a matter concerning an activity involving a local government discretion (as defined in Regulation 12), whether they have been in communication with the person seeking the local government authorisation or commercial dealing? This would not include merely receiving unsolicited correspondence and promotional material.

Comment invited – impartiality interests and participation in discussion and decision making

In focusing solely on the disclosure of impartiality interests without the declaration having any practical effect, Regulation 11 is perceived to provide inadequate protection against decision making conduct that is not impartial. This is a controversial issue.

One option to strengthen this protection would be to align the management of impartiality interests and financial interests, permitting councils to make the decision about whether the impartiality interest is so trivial that it is unlikely to affect the council member's impartiality, and to resolve that the member either should or should not participate in the discussion and decision. This would require amendment to the Act to provide an exemption to section 5.21(2) and provide for the council to have the power to make such a resolution.

There are two potential disadvantages to this approach:

- Particularly in smaller communities, a majority of the council members may share the same impartiality interest, and if they are prevented from participating in discussion and decision making, the council may fail to achieve a quorum.
- It seems contrary to a democratic system to prevent a council member from debating and voting on a matter about which they are not impartial if they have been elected to the council on the basis of that stated position.

Another option is to specify a clear materiality threshold for the kinds of significant impartiality interests that must be disclosed, but leave it to council members' discretion whether to disclose more trivial non-financial, non-proximity interests.

How can the community be assured that non-financial, non-proximity interests do not affect the perceived integrity of the council's decision, while not restricting participation

on matters where a council member's interest is unlikely to bias their decision? Should a strong personal opinion, previous public statements or ideological position on a matter be clearly declared as an impartiality interest prior to debate?

7.12. Regulation 12 - Gifts¹⁰

Relatively few complaints have been received concerning alleged breaches of Regulation 12, but there are anecdotal reports of some confusion among council members about the scope, application and practicality of the regulation, and its consistency with other legislation covering receipt of gifts.

The CCC recently released an investigation report¹¹ which highlighted a potential ambiguity in the regulatory requirements, particularly when an entity closely associated with the donor, but not the donor themselves, is seeking or likely to be seeking local government approval of an activity or some other benefit within the local government's power to grant.

In the public's perception, a council member's impartiality may be questioned if they accept a gift from a party that will benefit from a local government's discretionary approval, even if it is not the entity seeking that approval. However, a council member may not always be aware that a relationship exists between the donor and an applicant for approval, particularly if a commercial relationship between them is contemplated but not yet in place or if no application from the third party has yet been received.

The CCC's report also illustrated some potential complexity in acceptance and disclosure mechanisms for donation packages that include both a contribution to travel (excluded from the definition of a gift for the purposes of Regulation 12) and non-travel components (which may be notifiable or prohibited gifts). This has resulted in proposed amendments to the Act that are currently being considered by Parliament (as at November 2015). For the purposes of Regulation 12, if accepting a gift from a particular person is prohibited, then logically a contribution to travel from the same person should also be prohibited.

Regulation 12 has a notifiable gift value range of \$50-\$300 and a prohibited gift threshold of \$300. By comparison, Regulation 30B of the *Local Government(Elections) Regulations 1997* has a disclosure threshold of \$200 for electoral gifts; the *Local Government (Administration) Regulations 1996* prescribes an annual return (section 5.82 of the Act) gift disclosure threshold of \$200 (Regulation 25) and also requires that codes of conduct mirror Regulation 12 including value thresholds (Regulation 34B).

¹⁰ NB: The Local Government Governance Roundtable has initiated a separate review into legislative provisions relating to receipt of gifts. These proposals will be coordinated with that work.

¹¹ Corruption and Crime Commission - [Report on an Investigation into Acceptance and Disclosure of Gifts and Travel Contributions by the Lord Mayor of the City of Perth](#) (5 October 2015).

The Local Government Operational Guidelines No. 12 refer to nominal gifts, but these are not recognised in the regulations. Rationally, a council member's decision in a significant matter is unlikely to be swayed by the receipt of a nominal gift (e.g. flowers, confectionery, bottle of wine) offered as a token of appreciation. It is proposed to define token or nominal gifts which do not need to be included in the cumulative value of notifiable or prohibited gifts. This will reduce the administrative burden of monitoring these small items, the donation of which poses minimal risk to local government integrity.

It is unclear from the definition as to when hospitality should be classified as a gift. Some council members have reportedly become reluctant to accept invitations to community events, particularly when the community group may have hired a council property or sought some other kind of authorisation for the event. They are unsure whether the associated hospitality may be construed as a gift. This is rarely the intention of the inviting organisation, which in many cases hopes to achieve additional status and publicity by the presence of one or more council members at their event. It is an important part of a council member's role to support local community groups. Discouragement of community participation is not an intended outcome of this regulation.

Some council members, particularly mayors/presidents, may be presented with a ceremonial gift with the intent of it being a gift to the council or to the community. The regulation does not explicitly limit its application to gifts received for personal benefit and complaints have been received alleging a contravention of Regulation 12 relating to such gifts.

Other concerns have been reported relating to:

- the threshold gift values being perceived as impractically low, and no provision to readily adjust the threshold gift values to keep pace with the values of common gifts such as meals and tickets for entertainment or sporting events;
- the difficulty of establishing a value for some gifts, particularly when the gift is not readily purchasable (e.g. an art work or private event) so independent valuation is unreliable, or the amount paid by the giver is commercially confidential;
- the practicality of the 10 day rule, and clarification about whether the 10 days commences from the actual receipt of the gift or the (sometimes provisional) indication that the member will accept the gift. In the case of events, several weeks may elapse between the issuing of the invitation and the event itself, and the member's attendance may not be confirmed until shortly before the event.
- a council member accepting a gift in good faith, and becoming aware some time later that the giver is seeking, or intending to seek, a decision from the council, rendering the gift prohibited or notifiable;
- a person offering to make a donation to a third party, such as a community group, which a council member is known to hold in high esteem;

- a council member making private use of part of a gift provided to the council as a whole (such as a block of event tickets);
- perceived soliciting of gifts or benefits by council members; and
- gifts or benefits provided in ways that avoid the definitional boundaries of the regulation.

Proposal 7.12 – Regulation 12

1. Insert a new definition of “nominal gift” in Regulation 12(1), to include the following:
 - a) occasional hospitality of a modest nature received in the course of performing the role of council member, such as:
 - b) meetings to discuss official business concerning the local government,
 - c) information sharing and professional development events (such as forums, seminars or workshops),
 - d) an event at which the council member has been invited to speak or present,
 - e) social events organised by the council, a government body or a community group;
 - f) attendance at a function as an invited representative of the local government or council; or
 - g) single small promotional items of no commercial value; or
 - h) modest, “one-off” expressions of gratitude or appreciation such as confectionery, flowers or single bottles of moderately priced alcohol.
2. In subregulation 12(1), exclude nominal gifts from the definitions of “notifiable gift” and “prohibited gift”.
3. In subregulation 12(2), add “financial or other contribution to travel” to the things that a council member must not accept from a person undertaking, seeking to undertake or likely to be intending to undertake an activity involving a local government discretion.
4. Insert a new subregulation to provide for the situation of council members who have accepted a gift in the belief that the giver was not undertaking, seeking to undertake or intending to undertake an activity involving local government discretion, and who become aware within six months of accepting the gift that their assumption was inaccurate. Council members would be required to rescind their acceptance (if the gift had not yet been received) or return (if practical) a prohibited gift or to notify the CEO of a notifiable gift or a non-returnable prohibited gift, as soon as practicable.

5. Provide for the CEO, at the request of a council member, to record declined or returned gifts.
6. Insert a new subregulation to clarify that this regulation does not apply to ceremonial gifts received by a council member on behalf of the council. A ceremonial gift is an item presented to the local government as a mark of respect, commemoration or appreciation, usually from another government entity or an organisation, and ownership is held by the local government.
7. Clarify that when a gift is presented to the council, and that gift or part of the gift is then provided to a council member for their personal benefit, it is to be treated as though the council member had accepted the gift directly from the giver. If the gift meets the definition of a notifiable gift, then Regulation 12(3) applies.

Supplementary Questions (Proposal 7.12 – Regulation 12):

1. Is there a need to amend or clarify the “10 day rule” and the date from which it should be calculated? If so, what would be a practical provision?
2. Is there a need to address the issue of a donor seeking to influence a council member by making a gift or donation to a person, group, organisation or cause in which the council member has a significant interest? If so, how should this be managed?

Comments invited - Gifts

1. Value thresholds and consistency between legislative requirements

Comment is invited on what criteria should be used to establish value thresholds for notifiable and prohibited gifts. How can a balance be struck between practicality in light of standard business practice and acknowledging public concerns about “buying favours”?

Should the disclosure/notification threshold for gifts to council members be set at the same value in all local government regulations? Should there be an automatic (e.g. CPI) escalator for thresholds or alternatively, how and how often should thresholds be reviewed?

2. Gifts from persons likely to benefit from a local government discretion exercised in favour of another person

Comment is invited on whether regulatory controls are necessary or practical concerning the acceptance and disclosure of gifts offered to council members by entities which are closely associated or in a commercial relationship with a person undertaking, seeking to undertake or likely to undertake an activity involving a local

government discretion. Such associations or relationships may not be immediately apparent. If regulatory controls are not appropriate, is there a need for policy guidance for council members in such situations?

3. Hospitality

Is monetary value the most appropriate indicator for gifts involving hospitality? Using hospitality to facilitate informal discussion of business matters and encourage networking is a common business practice, and community groups who wish to have a council member present at their events do not consider the associated hospitality as a gift. Unless it is a public, ticketed event, monetary value can be difficult to estimate. Should thresholds for notification of hospitality invitations be based on factors other than the estimated value (e.g. composition of the guest list, whether it is a public (ticketed) event or invitation-only, the primary purpose of the invitation, whether the member is being invited as a representative of council/local government, or to make a speech/presentation)?

4. Cash gifts

A special significance applies in the public mind to gifts of cash to public figures. Cash donations are often perceived as less acceptable than non-cash gifts even when the monetary value of the non-cash gift is greater. Comment is invited on whether Regulation 12 should contain a specific reference to cash gifts (or cash equivalents such as gift vouchers) and whether receipt of cash gifts should be prohibited regardless of the amount.

7.13. Application of Rules of Conduct to election candidates

Concern has been expressed that council members who nominate for re-election are constrained by the Rules of Conduct, whereas candidates who are not currently council members are not held to the same standards. This is particularly apparent in relation to statements made that disparage local government employees or other council members, with intent to gain an electoral advantage for the candidate making the statements.

For practical purposes, a complaint made during the campaign period is treated in the same way as any other complaint. Should a council member be re-elected, they may be found to have committed a minor breach for their conduct during the campaign period. The same conduct by a non-sitting candidate, even if that person was then elected, would not be penalised as a minor breach.

It should also be noted that in considering conduct occurring during election periods, the Panel has found on occasion that the accused council member was acting as an election candidate rather than making use of their office as a council member.

Comment invited: Application of Rules of Conduct to candidates in local government elections

Comment is invited on the merits of amending the Act to apply selected Rules of Conduct (particularly regulations 7, 10 and the proposed new regulation concerning relations with council members) to all local government election candidates during the campaign period.

Complaints of minor breach would be able to be made against any candidate, but would be progressed only if the candidate was successful in being elected to the council.

7.14. Improving understanding of regulations

It has become clear through the analysis of complaints of minor breach that there is a high level of misunderstanding of the regulations and how they apply, or even of the purpose of the minor breach system. In part this is due to ambiguity in the regulations themselves, but there may be a need to provide more guidance to council members, prospective complainants and complaints officers. In particular, complaints of minor breach used as a way of escalating personal disputes to an “independent authority” is an inappropriate use of public funds and should be actively discouraged.

Proposal 7.14 – improving understanding

1. The Panel, with the assistance of the Department, is advised to publish advisory standards to assist in the interpretation of the Rules of Conduct and describe the types of conduct that would or would not be found to be a minor breach by way of examples drawn from Panel determinations.
2. Training materials for Complaints Officers need to be developed under the auspices of the Local Government Governance Roundtable (Department, Local Government Managers Association and WA Local Government Association), and offered to all local governments through existing training providers and products.

8. Standards Panel Procedure and Practice

It appears that the processes and practices of the Panel are not well known or understood. Stakeholders commonly express the view that they perceive the process as slow, non-transparent and legalistic, contrary to the intent of the legislators or the expectations of the sector when it commenced. There is also some perception that the Panel focuses too much on the letter of the law and gives insufficient regard to the interests of local government when making its findings.

In part, these perceptions may be a result of a mismatch between original local government sector expectations, which envisaged standards panels as roving

independent investigators and mediators, with a strong on-the-ground role, and the rule-based, contravention-focused system which was enacted with the Panel as a quasi-judicial disciplinary body with no investigatory or mediating powers.

8.1. Improving processing times

The length of the process of dealing with complaints is still perceived to be excessive relative to the seriousness of the conduct and the sanctions, although it has improved markedly since 2012 and in 2014/15 the average time was about six months between the date of complaint and the notification of findings. Long timeframes between complaint submission and notification of findings may lead to:

1. Loss of jurisdiction if a respondent ceases to be a councillor before the Panel has completed its process;
2. Continued or exacerbated tension within the local government;
3. Repeated incidents of the inappropriate conduct;
4. Inability of the Panel to invoke the recurrent breach provisions for multiple transgressions within a short timeframe.

The causes of the delays in determining minor breach complaints include:

1. System congestion caused by a combination of:
 - a. High proportion of complaints (almost 40 per cent of all allegations) not made in accordance with section 5.107(2) of the Act, most of which allege contraventions for conduct not proscribed by the regulations or specified local law; and
 - b. High proportion of complaints (about 60 per cent) which relate to trivial or inconsequential conduct that poses negligible risk to the integrity, performance or reputation of local government. Many of these could be considered vexatious or frivolous.
2. Under-prepared complaints with insufficient or irrelevant supporting information that does not adequately address the essential elements of a contravention;
3. Time taken to obtain responses to requests for clarification (complainants) and responses to the complaints (respondents);
4. Undefined terms in regulations requiring research into possible meanings;
5. The time taken to prepare complex Panel reports, and the sole reliance on the legal practitioner Panel member for the preparation of all Panel reports;
6. Variable rate of complaints received and relatively limited elasticity in Panel capacity.

It has been suggested that a statutory timeframe be imposed on Standards Panel decisions. However, a statutory timeframe necessitates a statutory default decision should the decision-making body fail to issue its determination within that time. This may provide incentives for some parties to engage in behaviour to delay the process because they perceive the default decision to be more favourable to their own interests. A statutory time limit for a body responsible for making disciplinary decisions is not considered practicable.

Proposal 8.1 – improving processing times

1. Provide mechanisms to help prospective complainants determine whether they have valid grounds for alleging a contravention resulting in a minor breach and guidance on describing a contravention.
2. Replace the current complaint form with a more structured version that requests the specific information needed to demonstrate the essential elements of a contravention for each regulation, and to advise the outcome of any dispute resolution processes undertaken. There is potential to regulate information requirements under section 5.107(2)(d) of the Act.
3. Provide guidance material to complaints officers.
4. Develop guidance for local governments concerning treatment of complaints that are not made in accordance with the Act.
5. Establish and enforce timeframes for receipt of responses of parties to information requests.
6. Introduce a prioritisation system for complaints received by the Panel, based on the significance of the potential consequences for local government, the extent to which the conduct indicates deliberate intent rather than poor judgement, and whether there has been a pattern of inappropriate behaviour and complaints made against that council member
7. Further simplify and streamline Panel reports on findings and decisions, consistent with the needs of the audience.

Supplementary Questions (Proposal 8.1):

1. How should complaints of minor breach be ranked so that matters significant to the good operation of the local government are prioritised over inconsequential matters?
2. What information do complainants, council members and Complaints Officers require in Panel reports on findings of whether a minor breach has occurred and decisions about the sanction to be applied?

8.2. Improving efficiency

The resources available to the minor breach system are limited. The current model of a single Panel to which all complaints of minor breach are directed can be challenging when demand for the function is unpredictable or increasing.

The value added to the process by directing complaints through the local government complaints officer is unclear. Section 5.107(3) of the Act only requires the complaints officer to receive and acknowledge minor breach complaints, send a copy to the accused council member and send the complaint to the Panel. The requirement to advise the Panel of previous breach findings against the council member is redundant since the Panel already has this information. The local governments consulted to date are reluctant to have their complaints officers take a more proactive role in filtering unsound complaints, and removing this administrative “post box” function could potentially save up to 14 days at the beginning of the process.

Given the reluctance to expand the complaints officer role, and the high proportion of low value minor breach complaints that would be more appropriately dealt with through alternative mechanisms, a longer term option to obtain better value from the Panel’s time and expertise may be to extend the application of the serious breach process under the Act to minor breaches.

Under section 5.116 of the Act, serious breach complaints are sent by the complaints officer or directly by the complainant to the CEO of the Department. On the advice of the Department, the CEO decides whether to make an allegation of serious breach to the SAT. This ensures the SAT is only asked to consider valid, substantive and well-supported complaints and that other matters are dealt with in more appropriate ways.

Adopting a similar model for all breach complaints would allow the Department to deal with the majority of time consuming but straightforward matters, and advise the CEO whether further action was warranted. Should the Act amendments currently before Parliament be approved, the Department could also assess complaints to screen those that are frivolous, vexatious, misconceived or lacking in substance.

Under a single pathway system, the CEO would make a decision whether to refer the matter for determination to the SAT (serious breaches), the Standards Panel (minor breaches) and either the SAT or the Panel for recurrent breaches depending on the seriousness of the issue. A single entry pathway for all complaints would also allow the Department to streamline and harmonise practices and procedures, which may provide opportunities for further efficiency benefits, potentially including a centralised, automated, on-line complaints lodgement system similar to the model used by the SAT.

In conjunction with other initiatives to reduce the number of low value minor breach complaints received, this approach could relieve pressure on the Panel and timeframes and potentially reduce costs for both local and State government. Since the Department already separately acknowledges complaints received, communicates with the complainant and the respondent, and develops advice for the Panel, resource

implications for the Department should be minimal. However, this change would require amendments to the Act.

Proposal 8.2 – Improving efficiency

1. In the longer term, consider amending the Act to align the handling of minor breach complaints with the current serious breach complaint process to create a single pathway for receipt of breach complaints.
2. Under this model, complaints of minor breach would initially be sent by complaints officers to the CEO of the Department, who, on the advice of the Department, would decide whether to make an allegation of minor breach to the Standards Panel.

Supplementary Question (Proposal 8.2):

1. Would a single centralised pathway for receiving both minor and serious complaints result in any risks for local government that would need to be managed?

Comment invited: Automated centralised complaints lodgement process

Comment is invited on the merits of developing a central, automated, on-line complaints lodgement process, similar to that used by the State Administrative Tribunal. This would reduce administrative costs for local government and offer opportunities to avoid the lodgement of complaints about conduct to which the regulations are not applicable. It could automate notification to relevant parties and potentially be linked to a complaints tracking system.

At present, the role of the complaints officer role involves little more than acknowledging receipt of complaints, copying them to the accused council member and sending them on to the Panel. The information required from the complaints officer under section 5.107(3) about previous breaches is already held by the Department on behalf of the Panel, so this is an unnecessary step.

Although there would be establishment costs, a single automated on-line system is likely to deliver ongoing administrative savings and the benefits of centralised record keeping.

8.3. Improving transparency

Clause 8(10) of Schedule 5.1 of the Act provides that to the extent that it is not prescribed by regulation, the Panel may determine its own meeting procedure and

other procedure and practice. No such regulations currently exist, and the Panel's practice manual is not public. By contrast, the way in which the SAT operates is largely codified in the *State Administrative Tribunal Act 2004*, which provides greater transparency to users, as does the routine publication of the SAT decisions.

Codifying and publishing the key elements of the Panel's procedures and practice would provide more transparency and certainty to stakeholders, and facilitate consistency as new Panel members are appointed. Supplemented by simple explanatory guides, this would also remove the necessity for much of the explanatory and background material currently included in each Panel report.

Current practice is that no information is provided concerning the progress of a complaint received by the Panel until the formal notification of findings is sent. This can be frustrating for both the parties to the complaint and to the local government, particularly if the circumstances that led to the complaint recur and the outcome is relevant to how these circumstances are managed, or if a particular outcome is likely to necessitate a review of processes or policies.

A complaints tracking system, even in a relatively unsophisticated form indicating the stage of the process reached, would reduce uncertainty for stakeholders and provide comfort that progress was being made. If, for example, delay was being experienced because the Department was awaiting requested information, the local government may be able to assist.

The prioritisation of complaints according to the seriousness of the effect of the conduct on the local government would lead to faster resolution of more important matters. It would potentially permit the Panel to establish target timelines for at least the highest priority complaints, further improving certainty if the local government and parties to the complaint were notified of the priority ranking.

Proposal 8.3 – Improving transparency

1. Publish standards panel procedures, practices and basis for making decisions, setting out or providing for:
 - a) The main objectives of the Panel: resolve complaints quickly, fairly, with as little formality and technicality as practicable and to minimise costs;
 - b) The ways in which the Panel will ensure procedural fairness, including timeframes for responses to requests for information;
 - c) The way in which the Panel will have regard to the general interests of local government in WA, and the matters it will take into account;
 - d) Criteria used to prioritise complaints;
 - e) The Panel's privacy policy;
 - f) The nature and weight of the evidence that the Panel requires from complainants to determine the standard of proof as required by section 5.106 of the Act;
 - g) How the Panel will treat frivolous, vexatious and trivial complaints;
 - h) Key regulatory terms and how the Panel interprets them in making its findings; and
 - i) Circumstances under which hearings will be held, and processes for requesting a hearing.

Supplementary Questions (Proposal 8.3):

1. Should the Panel's practices and procedures be regulated under Schedule 5.1 of the Act, such as a simplified version of Part 4, Divisions 1 and 2 of the State Administrative Tribunal Act 2004, or is it sufficient to publish these on the website as an information document?
2. Should local governments and parties to a complaint be able to track the progress of a complaint to provide more certainty about timelines and manage expectations?

8.4. Improving effectiveness

Penalties

When it finds that a council member has committed a minor breach, the Panel has a very limited selection of actions open to it and little ability to adjust its response according to the seriousness of the consequences of a breach. It must either dismiss the complaint or apply one or more of three sanctions: training, public apology or public censure. The SAT has observed¹² that there are cases where even when a breach is found, none of these options is appropriate and there would be merit in an option such as that no sanction should be imposed.

For more serious conduct, there is a perception that public censures and public apologies, the most severe sanctions available to the Panel, are ineffective as deterrents. In practice, few members of the public appear to be aware of them and there is no indication that the public considers them noteworthy.

Censure notices are published at the expense of the local government, which must use the publication medium prescribed by the Panel in the order. This may not be cost effective for the local government in the circumstances. In these circumstances, no financial penalty is borne by the council member.

Apologies and public censure notices impose a transitory embarrassment, which for some council members is sufficient to make them determined never to repeat the conduct. However, other council members appear to regard the sanctions as unimportant, and some have used the opportunity to attract free media attention and generate public sympathy. There is little benefit in a patently insincere apology, particularly if it is publicly repudiated later. There are no powers for the Panel or Department to take action in such cases.

A council member's refusal to comply with an order may be referred by the CEO of the local government to the SAT, which may impose further sanctions, including suspension or disqualification. This power has rarely been exercised.

Other sanctions used at State agency level for inappropriate conduct of local government councillors in Australian jurisdictions provide for more flexibility to match the sanction with the seriousness of the breach. These include various combinations of:

- applying no sanction,
- mandatory counselling,
- professional coaching,
- written reprimands,
- a direction to cease the conduct,

¹² Comment by Parry J in *Yates and Local Government Standards Panel* [2012] WASAT 23 [43-44].

- a direction to engage in mediation,
- a direction to take leave of absence,
- suspension from executive or committee positions,
- forfeiture of an allowance, benefit, payment or privilege,
- suspension of the right to remuneration (while remaining in office),
- suspension from office for up to three months,
- monitoring of the individual for compliance for a specified period,
- reimburse the local government, and
- pay the local government a specified amount.

Tribunals equivalent to SAT have the power to impose longer suspensions or to disqualify a person from office, or in some cases to recommend that the Minister dismiss the person.

Some jurisdictions are providing local councils with greater powers to discipline their own members for misconduct, with escalation to the State if the council member refuses to comply with the penalty. This is often paired with the use of local independent conduct panels drawn from a register of qualified people as discussed later in this document.

Having regard to the interests of local government

Another concern raised by the sector is the extent to which the Panel has “regard to the general interests of local government in the State” (clause 8(6), Schedule 5.1 of the Act). As a quasi-judicial body charged with enforcing regulations in a disciplinary context, the Panel has limited discretion. It cannot find that a council member committed a minor breach if the conduct was not prohibited by a regulation, or if the complainant has provided insufficient evidence to show that a contravention was more probable than not. Neither can the Panel find that a breach has not occurred, regardless of the triviality of the matter, if the conduct is admitted or undisputed by the council member and the regulatory provision is so well-defined that a high probability of contravention is a matter of observation rather than interpretation.

The Panel has discretion over the weight of evidence its members require to make a finding of breach, its interpretation of undefined regulatory terms and the penalty it applies for a breach.

It is in these arenas that the Panel’s obligation to “have regard to the general interests of local government in the State” may take effect. However, the Act gives no guidance to the Panel on how it is to determine those interests, the matters it is to take into account, or to what extent it is to give regard to them. The Panel’s reports do not specifically indicate the way in which regard to the interests of local government influenced its deliberations or address the implications of the finding or decision for local government in WA.

Proposal 8.4 – Improving effectiveness:

1. Provide discretion for the local government to decide how to publish a **public** censure notice or public apology ordered by the Panel, within the parameters of reasonable public exposure and audience reach.
2. In future, consider amending the Act to provide the Panel with a greater range of actions following a finding that a minor breach was committed, including an option to impose no sanction.
3. The Standards Panel specifically make reference in its reports to how it has given regard to the interests of local government in its deliberations on minor breach allegations.

Supplementary Questions (Proposal 8.4):

1. Should the local government be permitted to recoup the cost of implementing a sanction from the council member on whom the sanction was imposed?
2. What matters should be taken into account by the Standards Panel in having regard to the general interests of local government when deliberating on minor breach complaints?

8.5. Materiality

Comment has been made previously about the high proportion of allegations of minor breach that have related to trivial and inconsequential conduct, and that a number of such complaints appear to be made with improper intent.

Frequently, complaints have been made about conduct that is inconsequential, relatively common and generally considered unremarkable by the community, but a regulation could be read in a way that makes it a contravention. An example may be negative remarks made during robust council debate on a matter about which some people feel strongly.

On occasion, council members may engage in this behaviour and most will variously be ignored, rebuked, responded to in kind or called to order by the presiding member. Most such incidents will be forgotten by most witnesses shortly afterward. In a few cases, a person will see an opportunity to cause detriment to a council member with whom they have a dispute and lodge a minor breach complaint for the behaviour. The council member concerned must respond to the complaint and may face a sanction several months after the incident, regardless of the actual impact of the conduct or how it was dealt with at the time.

There is no materiality threshold for a minor breach, in contrast to the definition of minor misconduct in the CCM Act, which requires not only that the characteristics of misconduct be present, but that the conduct is sufficiently serious to give grounds for termination of employment.

Comment invited: Complaints about commonplace behaviour

Comment is invited on the situation of some council members being the subject of minor breach complaint for conduct that other council members (perhaps in the same council) engage in freely. Does this affect the organisational culture, sense of fairness and freedom of expression in local governments. Are allegations of minor breach appropriate for behaviour that is, while unseemly, relatively common in the circumstances and of no real consequence?

If a materiality threshold should be applied to minor breaches, should this be linked to the significance of the effect of the conduct on the performance or reputation of the local government, and should the complainant provide evidence to demonstrate this impact?

8.6. Improving educational value

The Panel publishes its reports of findings and decisions only in cases where a minor breach has been found and a sanction(s) imposed under section 5.110(6)(b) and (c), consistent with the requirements of clause 11(2) of Schedule 5.1 of the Act for its annual reports. These constitute a very small proportion of the complaints.

All other Panel reports effectively have an intended audience of three people: the complainant, the respondent and the complaints officer, which means the opportunity for others to learn from the case are minimal unless the information is published in another way.

The Department publishes de-identified case studies based on some minor breach findings. However, these appear in the Governance Bulletin which is published quarterly, and are also drawn from the relatively small number of cases that resulted in a breach finding and sanctions. No information is published about any other allegations or why they were found not to be a breach or why, if a breach, they did not merit an order for censure, apology or training. However, there is no legislative prohibition against publishing information about these cases provided the council member cannot be identified from the information.

In interpreting the Regulations, the Panel has also sometimes taken a position that can have significant implications for common local government practices, but there is no formal mechanism for the Panel to disseminate these implications, or policy advice related to them, to local government generally.

Common practices, for example, may either inadvertently place council members at risk of committing a minor breach for behaviour that is considered quite usual and acceptable; or expose the local government to increased risk because the assumed

protection of regulatory prohibition of certain behaviour is found not to exist. The Panel's own reports generally do not identify or address these policy implications for local government, and a mechanism is needed to determine when these arise and if so to prepare and disseminate advice to local government.

De-identified case studies would generally protect confidentiality while being informative. If a particular case with unique features is well-known locally, then the council member may be identifiable by people familiar with the case, and in such circumstances a composite case study may be necessary to remove the unique elements.

Proposal 8.5 – Improving educational value

1. A simple on-line searchable database of anonymised summaries of findings should be established, demonstrating common complaints, formatted as “frequently asked questions” or case studies, and keep it updated as new issues arise for use in training.
2. Establish a process to identify implications arising from Panel or SAT determinations of minor breach complaints involving common local government practices, and ensure that local government is alerted to those implications.

Comment invited – Rules of Conduct and risk management

To what extent do local governments consider the Rules of Conduct as part of their risk management process for operational practices, including the risk of inadvertently placing council members at risk of committing a minor breach?

9. Supplementing the State-Based Complaints Process

Most other Australian jurisdictions provide for inappropriate councillor conduct to be handled firstly at the local level. This is usually through enforcement of the council's code of conduct, which may be supported by legislation establishing a model code of conduct and sanctions that may be applied by local councils to their members. Referral to the State agency is usually limited to more serious or repeated wrongdoing or refusal to comply with orders made by the council.

Previous attempts by some WA local governments to give their codes of conduct the status of local laws have been unsuccessful, limiting their capacity to enforce their codes through formal mechanisms (although Regulations 11 and 12 are required to be duplicated in codes of conduct under *the Local Government (Administration) Regulations 1996*). Informal mechanisms involving counselling of elected members about breaches of the code of conduct and mediation of interpersonal disputes appear

to be effective in some local governments, but success depends on the culture of the local government and the willingness of council members to comply.

9.1. Independent conduct review panels

Some other Australian jurisdictions have systems of independent conduct review panels that can be called on by local governments to investigate allegations of misconduct and advise the council on appropriate action. In NSW, qualified people are appointed to panels by councils or regional council organisations in a common user contract arrangement. In Queensland and Victoria, the State appoints people to panel pools, and then convenes panels to investigate allegations as requested by councils. In South Australia, the Local Government Association provides this service.

These independent conduct review panels appear similar in concept to the sector's original vision of standards panels that visited local governments to investigate complaints, except for the final step of the council determining breach and penalty.

A number of local government representatives in WA have explained the risks to workplace relationships in conducting in-house investigations into council member conduct, but have also expressed doubt about whether councils would be prepared to implement the recommendations of an independent investigator or conduct reviewer.

Local governments cannot expect to abrogate their responsibility to forge a collective culture capable of dealing with local conflicts, but to do so they need the tools, the training and the power to take effective action, backed by State enforcement where necessary.

Certainly the introduction of a system of independent conduct review reporting to the council itself on the conduct of a council member may create tensions initially. In other jurisdictions there appears to have been a long term adjustment of attitudes, supported by scrupulously maintaining the independence of the investigations and conclusions. However, it has been suggested that the greater presence of organised political parties with their own disciplinary systems in those jurisdictions is a key success factor for local disciplinary mechanisms that is generally not present in WA.

Comment invited: Independent conduct review panels

Comment is invited on the option of introducing a system to establish panels of independent investigators to advise councils on alleged breaches and appropriate action, along with legislated sanctions that councils may impose on councillors who breach the rules. The council's role would be to decide whether to accept the independent conduct reviewer's findings and implement their recommendations, a decision that must be made impartially.

This system, like those in other jurisdictions, would permit matters to be referred to the Standards Panel in cases where the council was unable to make a decision on the

independent conduct reviewer's report, or the council member refused to comply with the orders made by the council.

Specified types of misconduct with serious consequences could still be referred directly to the Panel, but the State would not deal with trivial matters or those arising from personal disputes. This is a similar approach to that being taken by the Public Sector Commission in relation to minor misconduct of local government employees.

With appropriate legislative changes and training would this assist local governments to manage most forms of non-serious misconduct at a local level without the disadvantages and conflicts of conducting in-house investigations?

A crucial pre-requisite to the success of a locally-based system is that council members would need to have confidence that it would not be used for factional or retribution purposes and that all decision-makers were strictly impartial. Would this be difficult to achieve under the current WA system?

9.2. Mediation and conciliation

A formal mediation and conciliation process was originally expected to operate to filter out resolvable disputes at the local level before a complaint was lodged. This is not incorporated into the legislation, but there is no legal barrier to the local operation of such a process prior to a complaint being made.

It is understood that most local governments do try to resolve issues with councillor behaviour internally before initiating or receiving a complaint. Some have more formal internal procedures that provide for prospective complainants to be offered mediation before they lodge a complaint.

Similarly to the local investigation and enforcement option, the local governments consulted to date do not consider it practical or desirable to undertake in-house mediation between complainants and council members. However, a centralised, State-funded mediation framework is unlikely to be cost effective, particularly for the number and nature of most minor breach complaints.

Professional mediation services are available and used by councils for other matters, although access may be more difficult in some regional and remote areas. WALGA and LGMA have in the past offered such a service, although as member-driven organisations, disputes between members may be challenging. Greater use of mediation services would provide a quicker and less formal resolution of complaints arising from interpersonal disputes, particularly if other measures proposed in this document reduced the appeal of submitting minor breach complaints for grievance matters.

Greater acceptance of mediation opportunities by complainants may be encouraged by requiring complainants to explain what action they have taken to resolve the matter

before lodging the complaint. This approach would be consistent with most other State government complaints mechanisms, and would emphasise that the lodgement of a complaint should be regarded as a last resort to address inappropriate council member behaviour. In Victoria, insufficient reason given for failure to resolve the matter through local dispute resolution processes is grounds to refuse to consider an allegation of misconduct.

Regardless of the action taken before the complaint is made, once a minor breach complaint has been formally lodged in accordance with section 5.107(2) of the Act, the legislation currently provides no further scope for mediation. While the CEO of the Department is required to consider whether a complaint of serious breach would be more appropriately dealt with in an alternative way, the Act does not give the Panel that discretion.

The Panel has only two options after receiving a complaint: it must refer it to the CEO of the Department as a suspected recurrent breach, or it must make a finding on the complaint (as received) whether it is more likely than not that a minor breach has occurred.

There is currently no provision in the Act for a complaint to be withdrawn¹³ should resolution outside the complaints process be successful. There have been cases where a complainant has unsuccessfully sought to withdraw a complaint because the matter had been resolved, and then the Panel made a finding of minor breach against the council member several months later on the basis that the resolution did not change the fact that a regulation had been contravened. This outcome delivers no benefit to any of the stakeholders and may potentially reignite tensions in the local government that had been alleviated by the local solution.

There is no formal process for the Panel to be informed of any developments in the matter after receiving the complaint but before making a finding. Inability to withdraw a complaint may be a disincentive to further mediation action at local level due to uncertainty about the impact of the finding on any agreement reached.

Proposal 9.2 - Mediation

1. All local governments with access to professional mediation services are encouraged to offer mediation opportunities to people contemplating a complaint under the minor breach framework.
2. Amend the complaint form to require complainants to advise what action they have taken to resolve their concerns, and the outcome of that action, or alternatively to explain why they have not made use of alternative resolution processes.

¹³ An amendment is currently before Parliament to allow for the withdrawal of a complaint.

Supplementary Questions (Proposal 9.2):

1. Do local governments find mediation processes involving council members useful for matters other than minor breach complaints?
2. What are the implications of diverting some prospective minor breach complainants to alternative resolution processes?
3. Would there be benefits in having a centralised pool of suitably qualified mediators selected through a competitive merit process and remunerated at a standard rate, possibly managed through bodies such as WALGA or regional councils?

Comment invited: Panel option to order mediation as an alternative to making a finding

A significant number of complaints of minor breach relate to a personal dispute between the complainant and a council member. Local governments have concerns about their power to direct the parties to mediate, but it has been suggested that if the direction came from the State, they would be happy to facilitate it.

Comment is invited on whether consideration should be given to amending the Act to provide the option of ordering mediation as an alternative to making a finding about whether a minor breach occurred. This order could be made by the Panel, or, if a single breach pathway is implemented, by the Departmental CEO on the advice of the Department.

9.3. Support for council members

While training is available to elected members, including “personal development” such as conflict resolution and leadership, not all council members choose to take advantage (and may not recognise the benefits) of the training opportunities available. The local government sector and the Department are currently working on a mandatory training model, although the initial focus is likely to be governance and skill related.

Council members are as diverse as the communities that elect them, and become council members for a variety of reasons. Most have a very positive experience, but others may experience frustration if they feel unable to achieve the outcomes that inspired them to nominate for local government, or if they feel that fellow councillors or sections of the community do not appreciate the value of their contribution or do not support their views. This situation may result in stress that affects a council member’s health, behaviour, and their ability to manage their emotions and maintain productive interpersonal relationships with people who disagree with them.

Dysfunctional conduct arising from stress, frustration or mental health disorders is unlikely to be addressed effectively by legalistic disciplinary measures. Such a response may even result in a negative feedback spiral that increases the person's sense of isolation and misunderstanding and may exacerbate the tensions in the work environment.

The *Occupational Safety and Health Act 1984* imposes a duty on local governments to safeguard employees' wellbeing and support those with health conditions. Many employers provide access to an external Employee Assistance Program for employees seeking confidential help in managing work stress. There is currently no equivalent legislative requirement to provide a similarly supportive environment for council members.

Mayors, presidents and CEOs generally try to offer coaching and support to council members who are struggling with the stresses associated with their role, but however well-intentioned, few of these people are trained counsellors. If the council member feels that the mayor, president or CEO is one of the people thwarting their aspirations and objectives, they may not be receptive to the advice given.

Comment invited: Support for council members

Comment is invited on whether there is a need to establish formalised support mechanisms for council members, similar to those available for employees, including access to confidential professional counselling and coaching services.

Could this reduce the incidence of dispute-related conduct currently leading to minor breach complaints against council members? If so, is this an initiative that the sector can undertake collaboratively or would it be more effective for individual local governments to extend the reach of systems already in place for their employees?

10. Matters requiring legislative amendments

This document has focused primarily on regulatory and procedural changes, which offer opportunities to streamline the existing system and improve its efficiency and effectiveness.

Further opportunity exists to amend some provisions within the Act that inhibit efficiency, add administrative complexity, or are unnecessarily rigid. Where relevant to the issue discussed, these have been raised in previous sections.

Act amendments that were identified by the 2011 review are currently before Parliament. If approved, these will allow refusal of complaints that are frivolous, vexatious, misconceived or lacking in substance, and will allow for complaints to be withdrawn after lodgement. They have been initiated as a result of specific situations experienced by the Panel, and will improve efficiency by filtering some complaints that are unsound or made with improper intent. This process will still incur some

administrative cost as the complaints must be received by the system in order to be dealt with under the system, and it would be preferable to minimise the incidence of them through some of the proposals previously described.

Other potential amendments to the Act that could be considered in future are canvassed below.

10.1. Time limits for submitting complaint (sections 5.107(4), 5.108(3), s.5.109(2))

Given the nature of the minor breaches, allowing people to make a complaint up to two years after the incident appears disproportional to the seriousness of the conduct. Figure 6 indicates that most complaints are made within three months of the incident, and very few more than six months after the incident.

Provision for an extension of time in exceptional circumstances would address the possibility that inappropriate conduct was not revealed until several months after it occurred.

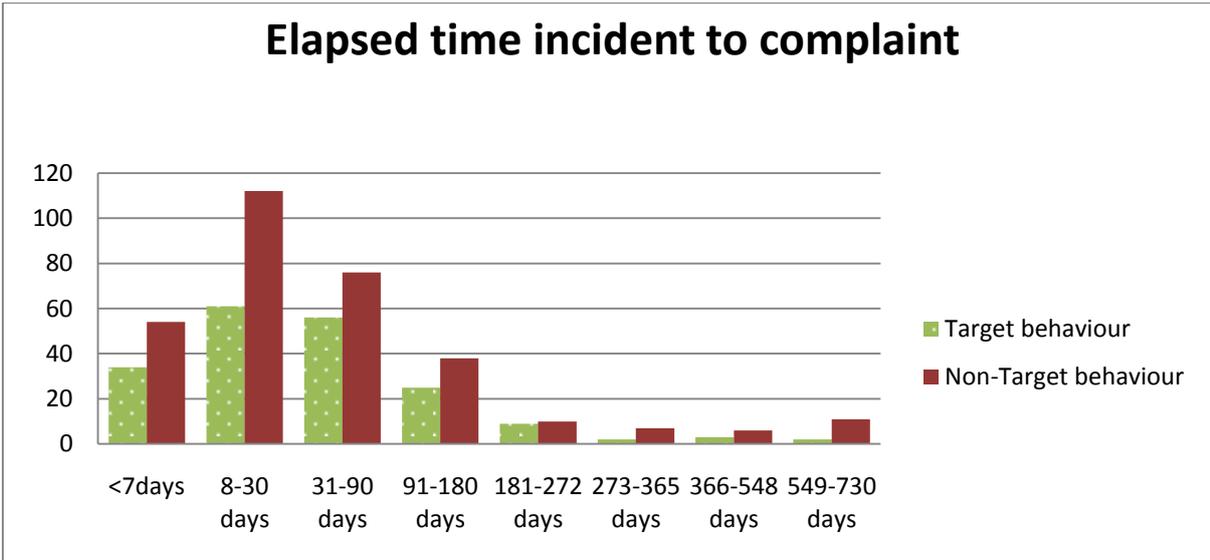


Figure 6. Average time taken after an incident for a complaint of minor breach to be lodged. Target behaviour is that which has significant potential consequences for local government integrity, performance or reputation. Non-target behaviour has no significant consequences for the local government.

Proposal 10.1 Amendments for future consideration - time limit for minor breach complaints:

Amend sections 5.107(4) and 5.109(2) to reduce the time limit for complaints to be made from two years to three months after the alleged breach, with provision for extension at the Department CEO's discretion.

Amend s.5.108(3) to reduce the time limit to 12 months, to recognise that it may not be clear that the breach is minor rather than serious until an investigation has been undertaken.

Supplementary Question (Proposal 10.1):

1. Should the time limit for submitting a complaint of minor breach be three or six months?
2. On what basis should an extension of the time limit be granted?

10.2. Confidentiality (section 5.123)

It has been suggested that the requirement for confidentiality under section 5.123 should apply at all times, rather than be limited to election campaign periods. This would better shield a council member's reputation while the complaint was being determined and protect council members found not to have committed a minor breach.

Extending the requirement for confidentiality may be difficult to enforce and incur significant prosecution costs if enforcement was to be effective. Without a commitment to enforce the requirement and prosecute offenders, little is likely to change.

There may also be potential disadvantages for council members. Strict confidentiality requirements would prevent a respondent or local government addressing inaccurate rumours about the existence or nature of complaints. Unless an exemption was allowed, or a time limit applied, they would also prevent a council member from publicising a finding that they had not committed a breach, which is important to some council members who wish to clear their name.

Comment invited: Confidentiality

Section 5.123(1) of the Act makes it an offence to disclose the existence of, or any detail about, a complaint made during a campaign period. Comment is invited on the benefits and risks of extending the effect of this provision to apply to complaints made at any time, including comment on the practical challenges and resource implications of enforcing such a requirement and prosecuting offences.

10.3. Review of minor breach decisions (section 5.125)

Section 5.125 of the Act restricts applications for review by the SAT to the Panel's decisions to dismiss a complaint or to make an order under section 5.110(6)(b) and (c). This effectively prevents any application for a review of a case that resulted in a finding that no breach occurred.

It has been suggested that the right to apply for a review should be available to either party, as it is in most civil law matters. A complainant could then seek a review of a "no breach" finding. However, the Panel is a disciplinary body, not a dispute resolution body, and the right of a complainant to seek a review of a "no misconduct" decision by a disciplinary body is less common.

Review rights vary among other jurisdictions, but it must be noted that these are primarily systems that are based on codes of conduct and the focus is on determining whether the alleged misconduct was inappropriate in the circumstances, not on whether a prescribed regulatory provision was contravened.

In Queensland, decisions by regional conduct review panels are not subject to review or appeal at all. In New South Wales, a person subject to a sanction imposed by the local government on advice from the independent conduct reviewer may seek a review by the Department. In Victoria, either the complainant or the respondent may apply to the Victorian Civil and Administrative Tribunal for a review of a councillor conduct panel decision, but the application to have the alleged misconduct dealt with by a councillor conduct panel in the first place may only be made by the council or a councillor(s).

The WA minor breach system has no restrictions on who may make a complaint. Analysis of complaints since 2007 has revealed that the system is overloaded with a high proportion of unsound and trivial complaints apparently arising from personal disputes. In these circumstances, permitting complainants to seek reviews is likely to add significantly to the cost of the system without delivering a net public benefit.

A suggestion was made that a complainant should be permitted to challenge a council member's response to their complaint of minor breach. This fails to recognise the point that this is not an adversarial system, but an accusation made to a disciplinary body that a person has done something contrary to regulation. The onus is on the accuser to provide sufficient evidence to demonstrate that the contravention has occurred.

Following amendments to the *Corruption, Crime and Misconduct Act 2003* in July 2015, the Corruption and Crime Commission's responsibility for dealing with alleged misconduct by local government public officials, including elected members, is restricted to serious misconduct. The Public Sector Commission is responsible for dealing with minor misconduct by local government employees. There is no clear mechanism or responsibility for dealing with council member misconduct that may be "corrupt, criminal, intentionally dishonest, lacking integrity, breach the public trust and indicate unfitness for office", but which neither meets the criteria for serious misconduct nor specifically contravenes a Rule of Conduct regulation.

Comment invited: Inappropriate conduct that is not a minor breach

Comment is invited on options that could be considered for dealing with minor misconduct that does not constitute a minor breach under the Rules of Conduct Regulations.

10.4. Improper use of information (section 5.93)

Section 5.93 of the Act makes it an offence for a person who is a council member, committee member or an employee to make improper use of any information acquired in their performance of their functions under the Act to gain an advantage or cause detriment.

It has been suggested that councillors may retain copies of sensitive information after they leave office, and the Act does not prohibit them from then making use of the information for any purpose. Most such information would have limited currency, but the consequences of its misuse during that time could potentially be significant.

Comment invited: Improper use of information by former councillors or local government employees

Comment is invited on the merits and risks of amending section 5.93 to extend its application to persons who were formerly council members, committee members or employees.

10.5. Public censure motions (new)

There is no specific provision governing censure motions within the WA legislation, although this option is available to local governments as a local disciplinary measure. The mechanism has been used by some Western Australian local governments for councillor conduct considered damaging to the local government. Unlike a public censure order made by the Panel, a censure motion is a judgement of the member's peers and is moved and debated within a council meeting open to the public, which may make it more effective as a deterrent, and almost certainly allows a more prompt response to the incident that caused concern.

The NSW local government legislation¹⁴ prescribes a process for local governments to resolve to formally censure a council member for inappropriate conduct. This provision ensures the mechanism is used consistently and transparently by all local governments. Notice must be given of a censure motion, which must specify the grounds on which the council is satisfied that the council member should be censured,

¹⁴ NSW Local Government Act 1993, section 440G.

and the resolution is to be passed only if the council is satisfied that the council member has engaged in inappropriate conduct on one or more occasions.

Relevantly, the NSW legislation specifically refers to contravention of the council's code of conduct. Several WA local governments have complained that the effectiveness of their codes of conduct is limited by their inability to apply sanctions for contravention by elected members.

Comment invited: Formal censure motions by councils

Comment is invited on the merits of amending the *Local Government Act 1995* to provide for a clear and consistent process to be followed by local government councils to resolve to formally censure a council member for misconduct, such as a significant contravention of the council's code of conduct, similar to section 440G of the *NSW Local Government Act 1993*. Would this encourage councils to use this mechanism to discipline their own members?

10.6. Records of meetings (new)

Not all councils choose to make an electronic record of their meetings, and some council members may feel uncomfortable about such recording. These recordings, if made, must be kept according to the requirements of the *State Records Act*. Under current requirements, access may be requested under the *Freedom of Information Act 1992*.

The existence of an electronic recording and a verbatim transcript has been of significant value to the Panel in determining the precise nature of incidents in council meetings, which may not be captured by the formal minutes of the meeting. Such records have also been of value in other fora, including investigations conducted by the Corruption and Crime Commission.

There is a wide range of approaches among WA local governments for recording meetings, with some councils live-streaming meetings through the internet, others relying on written notes taken at the meeting and others making use of various forms of technology. The extent to which any meeting records other than the formal Minutes are made public is at the discretion of individual local governments.

With increasing demand in the community for transparency at all levels of government, it seems likely that the trend will increase towards both broadcasting and electronic recording of council and committee meetings that are open to the public. Pressure for public access to recordings is also likely to increase. This would have an impact on assumptions about whether the meeting and conduct at the meeting was witnessed, or could be witnessed after the event, by people other than those physically present at the meeting. It may also affect meeting behaviour.

While broadcasting or recording public council meetings is unlikely to affect whether any specific comment made at a meeting is likely to be found to be defamatory or in

breach of a Rule of Conduct, increasing the size of the potential audience may affect the probability of a claim of defamation or allegation of minor breach being made.

There may be merit in establishing consistent standards, including the extent to which such records are made accessible to the public after the meeting and the legal status of such records of proceedings in relation to the confirmed minutes.

Comment invited: Mandatory recording of council and committee meetings

A number of minor breach complaints relate to incidents that occur at council meetings. Where the parties are in dispute about what was said or the manner in which it was said, the availability of an audio recording and verbatim transcript can be invaluable to establish the facts, with a video record providing additional depth through being able to see the body language of the participants.

Comment is invited on the merits, disadvantages and risks of mandating the electronic (video and/or audio) of council meetings and committee meetings, and establishing common standards for quality of product and for management and disclosure of the information.

Is it likely that the behaviour of individuals will be affected by the knowledge that a public recording is being made, and how might this influence overall standards of conduct at meetings?

11. Next Steps

Comment is invited on the proposals and issues explored in this directions paper, and on any other relevant matters pertaining to the minor breach system. Submissions are requested by 4 March 2016, and should be sent to the Department of Local Government and Communities at legislation@dlgc.wa.gov.au and marked Rules of Conduct Review.

Public consultation is an important part of transparent decision making. Submissions will be published on the Department of Local Government and Communities website. A person making a submission may request that their identity or parts of their submission be treated as confidential. The submission must clearly identify the information that is the subject of the claim for confidentiality and a non-confidential version of the submission must be provided.

Following consideration of submissions, the report and recommendations will be finalised and submitted for the Minister's approval.

Regulatory amendments that are supported by the Minister will be drafted as soon as possible for the Government's consideration. Improvements to Standards Panel processes will be implemented by the Department in collaboration with the Standards

Panel, and public guidance documents will be progressed by the Department within the constraints of existing resources.

Proposed legislative amendments will be considered by Government at an appropriate time.

For more information, please contact:

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Western Australia

Local Government Act 1995

**Local Government (Rules of Conduct)
Regulations 2007**

Western Australia

Local Government (Rules of Conduct) Regulations 2007

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Local Government (Rules of Conduct) Regulations 2007

Part 1 — General

1. Citation

These regulations are the *Local Government (Rules of Conduct) Regulations 2007*¹.

2. Commencement

These regulations come into operation as follows:

- (a) regulations 1 and 2 — on the day on which these regulations are published in the *Gazette*;
- (b) the rest of the regulations — on the day on which the *Local Government (Official Conduct) Amendment Act 2007* section 11 comes into operation.

3. General principles to guide the behaviour of council members

- (1) General principles to guide the behaviour of council members include that a person in his or her capacity as a council member should —
 - (a) act with reasonable care and diligence; and
 - (b) act with honesty and integrity; and
 - (c) act lawfully; and
 - (d) avoid damage to the reputation of the local government; and
 - (e) be open and accountable to the public; and
 - (f) base decisions on relevant and factually correct information; and

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- (g) treat others with respect and fairness; and
- (h) not be impaired by mind affecting substances.

- (2) The general principles referred to in subregulation (1) are for guidance of council members but it is not a rule of conduct that the principles be observed.

4. Contravention of certain local laws

- (1) In this regulation —
local law as to conduct means a local law relating to conduct of people at council or committee meetings.
- (2) The contravention of a local law as to conduct is a minor breach for the purposes of section 5.105(1)(b) of the Act.

Part 2 — Rules of conduct

5. Rules of conduct

- (1) This Part contains the rules of conduct referred to in section 5.104(1) of the Act.
- (2) The rules of conduct apply to a council member whether or not acting as a committee member.

6. Use of information

- (1) In this regulation —
closed meeting means a council or committee meeting, or a part of a council or committee meeting, that is closed to members of the public under section 5.23(2) of the Act;
confidential document means a document marked by the CEO to clearly show that the information in the document is not to be disclosed;
non-confidential document means a document that is not a confidential document.
- (2) A person who is a council member must not disclose —
 - (a) information that the council member derived from a confidential document; or
 - (b) information that the council member acquired at a closed meeting other than information derived from a non-confidential document.
- (3) Subregulation (2) does not prevent a person who is a council member from disclosing information —
 - (a) at a closed meeting; or
 - (b) to the extent specified by the council and subject to such other conditions as the council determines; or
 - (c) that is already in the public domain; or
 - (d) to an officer of the Department; or
 - (e) to the Minister; or

- (f) to a legal practitioner for the purpose of obtaining legal advice; or
- (g) if the disclosure is required or permitted by law.

7. Securing personal advantage or disadvantaging others

- (1) A person who is a council member must not make improper use of the person's office as a council member —
 - (a) to gain directly or indirectly an advantage for the person or any other person; or
 - (b) to cause detriment to the local government or any other person.
- (2) Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or *The Criminal Code* section 83.

8. Misuse of local government resources

A person who is a council member must not either directly or indirectly use the resources of a local government —

- (a) for the purpose of persuading electors to vote in a particular way at an election, referendum or other poll held under the Act, the *Electoral Act 1907* or the *Commonwealth Electoral Act 1918*; or
- (b) for any other purpose,

unless authorised under the Act, or authorised by the council or the CEO, to use the resources for that purpose.

9. Prohibition against involvement in administration

- (1) A person who is a council member must not undertake a task that contributes to the administration of the local government unless authorised by the council or by the CEO to undertake that task.
- (2) Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.

10. Relations with local government employees

- (1) A person who is a council member must not —
 - (a) direct or attempt to direct a person who is a local government employee to do or not to do anything in the person's capacity as a local government employee; or
 - (b) attempt to influence, by means of a threat or the promise of a reward, the conduct of a person who is a local government employee in the person's capacity as a local government employee.
- (2) Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.
- (3) If a person, in his or her capacity as a council member, is attending a council meeting, committee meeting or other organised event and members of the public are present, the person must not, either orally, in writing or by any other means —
 - (a) make a statement that a local government employee is incompetent or dishonest; or
 - (b) use offensive or objectionable expressions in reference to a local government employee.
- (4) Subregulation (3)(a) does not apply to conduct that is unlawful under *The Criminal Code* Chapter XXXV.

11. Disclosure of interest

- (1) In this regulation —

interest means an interest that could, or could reasonably be perceived to, adversely affect the impartiality of the person having the interest and includes an interest arising from kinship, friendship or membership of an association.
- (2) A person who is a council member and who has an interest in any matter to be discussed at a council or committee meeting

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attended by the member must disclose the nature of the interest —

- (a) in a written notice given to the CEO before the meeting;
or
 - (b) at the meeting immediately before the matter is discussed.
- (3) Subregulation (2) does not apply to an interest referred to in section 5.60 of the Act.
- (4) Subregulation (2) does not apply if —
- (a) a person who is a council member fails to disclose an interest because the person did not know he or she had an interest in the matter; or
 - (b) a person who is a council member fails to disclose an interest because the person did not know the matter in which he or she had an interest would be discussed at the meeting and the person disclosed the interest as soon as possible after the discussion began.
- (5) If, under subregulation (2)(a), a person who is a council member discloses an interest in a written notice given to the CEO before a meeting then —
- (a) before the meeting the CEO is to cause the notice to be given to the person who is to preside at the meeting; and
 - (b) at the meeting the person presiding is to bring the notice and its contents to the attention of the persons present immediately before a matter to which the disclosure relates is discussed.
- (6) If —
- (a) under subregulation (2)(b) or (4)(b) a person's interest in a matter is disclosed at a meeting; or
 - (b) under subregulation (5)(b) notice of a person's interest in a matter is brought to the attention of the persons present at a meeting,

the nature of the interest is to be recorded in the minutes of the meeting.

12. Gifts

(1) In this regulation —

activity involving a local government discretion means an activity —

- (a) that cannot be undertaken without an authorisation from the local government; or
- (b) by way of a commercial dealing with the local government;

gift has the meaning given to that term in section 5.82(4) of the Act except that it does not include —

- (a) a gift from a relative as defined in section 5.74(1) of the Act; or
- (b) a gift that must be disclosed under regulation 30B of the *Local Government (Elections) Regulations 1997*; or
- (c) a gift from a statutory authority, government instrumentality or non-profit association for professional training;

notifiable gift, in relation to a person who is a council member, means —

- (a) a gift worth between \$50 and \$300; or
- (b) a gift that is one of 2 or more gifts given to the council member by the same person within a period of 6 months that are in total worth between \$50 and \$300;

prohibited gift, in relation to a person who is a council member, means —

- (a) a gift worth \$300 or more; or
- (b) a gift that is one of 2 or more gifts given to the council member by the same person within a period of 6 months that are in total worth \$300 or more.

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- (2) A person who is a council member must not accept a prohibited gift from a person —
- (a) who is undertaking or seeking to undertake; or
 - (b) who it is reasonable to believe is intending to undertake, an activity involving a local government discretion.
- (3) A person who is a council member and who accepts a notifiable gift from a person —
- (a) who is undertaking or seeking to undertake; or
 - (b) who it is reasonable to believe is intending to undertake, an activity involving a local government discretion must, within 10 days of accepting the gift, notify the CEO of the acceptance in accordance with subregulation (4).
- (4) Notification of the acceptance of a notifiable gift is to be in writing and is to include —
- (a) the name of the person who gave the gift; and
 - (b) the date on which the gift was accepted; and
 - (c) a description, and the estimated value, of the gift; and
 - (d) the nature of the relationship between the person who is a council member and the person who gave the gift; and
 - (e) if the gift is a notifiable gift under paragraph (b) of the definition of “notifiable gift” (whether or not it is also a notifiable gift under paragraph (a) of that definition) —
 - (i) a description; and
 - (ii) the estimated value; and
 - (iii) the date of acceptance,of each other gift accepted within the 6 month period.
- (5) The CEO must maintain a register of gifts in which details of notices received under subregulation (4) are recorded.

Notes

- ¹ This is a compilation of the *Local Government (Rules of Conduct) Regulations 2007*. The following table contains information about those regulations.

Compilation table

Citation	Gazettal	Commencement
<i>Local Government (Rules of Conduct) Regulations 2007</i>	21 Aug 2007 p.4203-16	r. 1 and 2: 21 Aug 2007 (see r. 2(a)) Regulations other than r. 1 and 2: 21 Oct 2007 (see r. 2(b) and <i>Gazette</i> 21 Aug 2007 p. 4173)

Local Government (Rules of Conduct) Regulations 2007 and Minor Breach Disciplinary Framework Review

Introduction

The City of Joondalup supports the general intent of the Consultation Paper '*A Review of the Local Government (Rules of Conduct) Regulations 2007 and Minor Breach Disciplinary Framework*', released for local government comment by the Department of Local Government and Communities, and the proposed changes to the current disciplinary framework intended to:

- empower local governments to better manage the risk of misconduct
- establish a more pro-active complaints management culture
- streamline and simplify the process of dealing with complaints that allege low-level misconduct or that are trivial or vexatious.

City of Joondalup Comment and Recommendations

The City of Joondalup provides the following comments and recommendations in relation to the *Local Government (Rules of Conduct) Regulations 2007 and Minor Breach Disciplinary Framework Review*, as endorsed by Council at its meeting held on 16 February 2016.

Regulation 3 - Proposal 7.2 (page 27)

Proposed Amendment:

1. Amend Regulation 3 by specifically linking the principles to the concept of "proper use of office".
2. Add a principle: "act in accordance with council policies, codes and resolutions".
3. Add a new subregulation requiring the principles to be used to inform the preparation of a code of conduct prepared under section 5.103(1) of the Act.

Comment:

While it is noted that Regulation 3 is not a rule per se but a general principle to guide the behaviour of elected members, it is considered that the discussion points raised by the DLGC in relation to this regulation will improve clarity regarding its application.

It is however, questioned whether the words "act in accordance with Council policies..." dilute/restrict an elected member's ability to consider policies in their decision-making processes as a guide. It is suggested that "act in accordance" be replaced with "observe", similar to the wording used in section 5.103 of the Act in relation to observing a local government's code of conduct.

The proposed amendments to Regulation 3 are supported subject to the above amendment.

It is noted that the City of Joondalup's code of conduct provides, among other things, that elected members are to always act in accordance with their obligations to the City and in line with any relevant policies, protocols and procedures. This intent is that they are to consider the policies of the City to guide them in their decision-making processes. Further, the

principles of Regulation 3 of the *Local Government (Rules of Conduct) Regulations 2007* are contained within the City's code of conduct.

Regulation 4 (breach of local laws related to meeting behaviour) - Proposal 7.3 (page 28)

Proposed Amendment:

1. Insert new Rules of Conduct to cover persistent, inappropriate, council and committee meeting conduct with significantly dysfunctional potential consequences such as disparagement and disruption (see section 7.9 for inclusions).
2. Delete regulation 4 which effectively duplicates local laws and potentially reduces the incentive to make effective use of local laws relating to meeting conduct.

Comment:

It is considered that the discussion points raised by the DLGC in relation to this regulation will improve clarity regarding its application. As such, the proposed amendments to Regulation 4 are supported.

It is noted that the City of Joondalup's *Meeting Procedures Local Law 2013* contains a range of procedural matters, that are of a minor nature, that can be adequately dealt with at the time by the Presiding Member of the meeting. Where meeting conduct is significantly dysfunctional then such matters should be referred to the Standards Panel.

Regulation 6 (unauthorised disclosure of information) - Proposal 7.4 (page 31)

Proposed Amendment:

1. Include "parts of documents" in the definition of confidential document in subregulation 6(1).
2. Amend subregulation 6(2) to include personal information acquired in the person's capacity as a council member, with the definition of personal information consistent with that used in existing Australian legislation.
3. Amend subregulation 6(2) to include professional legal advice, information that is subject to a confidentiality or non-disclosure agreement to which the local government is a party, and commercially sensitive information provided in confidence to the local government.
4. Amend subregulation 6(3) to add a provision that allows personal information to be disclosed to the extent permitted by the informed consent of the person to whom the information relates, or a person nominated by them, or their legal guardian.

Comment:

It is considered that the discussion points raised by the DLGC in relation to this Regulation will generally improve clarity regarding its application. As such, the proposed amendment:

- to Regulation 6(1) is supported

- to Regulation 6(2) is supported subject to consideration being given to including disclosure of other types of confidential information related to any of the matters referred to in section 5.23(2) of the Act being prohibited
- to Regulation 6(3) is not supported as there is an inherent risk associated with the release of personal information even to the extent permitted by the informed consent of the person to whom the information relates, or a person nominated by them, or their legal guardian. Consent may be thought to be given when in actual fact no consent was actually forthcoming. There would need to be adequate record-keeping of such consent in these circumstances.

It is noted that the City of Joondalup's *Meeting Procedures Local Law 2013* contains provisions related to making public the resolution, including the details of any voting, of matters considered behind closed doors, following the meeting being reopened. It is considered that in the interests of accountability and transparency this should be standard practice and any amendment to the Act and Regulations is supported.

As detailed in the DLGC commentary, while not explicitly stated, Regulation 6 has been interpreted as referring to *deliberate disclosure* and has not been expanded to include correspondence sent between council members. It is agreed that much care needs to be taken with regard both sending and receiving correspondence about sensitive matters, and to regulate the prohibition of such would be difficult. As detailed by the DLGC council member training should include the importance of discretion in both sending and receiving correspondence about sensitive matters, of maintaining trust between council members, and of clearly marking correspondence that is confidential and not to be copied or forwarded.

Regulation 7 (gaining advantage or causing detriment) - Proposal 7.5 (page 36)

Proposed Amendment:

1. Amend regulation 7 to clearly define "improper use of office" in the context of the interpretation currently used by the SAT and the Panel, with reference to the local government's code of conduct and regulation 3 principles of behaviour.
2. Amend sub-regulation 7(1) to clarify that it applies only when the action is taken with the primary intent and belief that it will result in gaining an advantage or causing detriment.
3. In addition to the current exemptions, specify that sub-regulation 7(1) does not apply to:
 - a) advantage or detriment that is trivial, negligible or hypothetical
 - b) conduct of council members at council or committee meetings
 - c) a matter to which another Rule of Conduct in the Regulations applies
 - or
 - d) a remark, comment, statement or implication if:
 - (i) it was clearly expressed as the council member's personal opinion rather than as a statement of fact, and that opinion was based on factual material and related to a matter of public interest
 - or
 - (ii) the circumstances were such that no harm attributable to the conduct was likely to be sustained.

Comment:

It is considered that the discussion points raised by the DLGC in relation to this regulation will improve clarity regarding its application. As such, the proposed amendments to Regulation 7 are supported.

Regulation 8 (misuse of local government resources) - Proposal 7.6 (page 37)**Proposed Amendment:**

1. Define the term “resource” in Regulation 8 to cover tangible and intangible assets, services and other means of supporting the functions of the local government, and that are owned or paid for by the local government from public money, but excluding intangible concepts without monetary value (such as an address or title).
2. Define the term “use” to include both consumption and deriving a benefit not associated with consumption, including misrepresenting local government support for the purpose.
3. Clarify the term “any other purpose” in sub-regulation 8(2)(b) to refer to any purpose other than fulfilling the legal obligations and duties of the council member’s office.

Comment:

The proposed amendments to Regulation 8 are supported, subject to retaining the exemption for authorised use (being either the CEO or the Council) which provides a degree of flexibility recognising that any authorisation must be in accordance with legislative obligations and a local government’s governance responsibilities.

Regulation 9 (involvement in administration) - Proposal 7.7 (page 39)**Proposed Amendment:**

1. Define “administration” in Regulation 9 to mean the functions of the CEO as described in section 5.41 of the Act, CEO delegations under section 5.42 of the Act, the executive functions of local government as described in Part 3 Division 3 of the Act, and other functions specifically reserved to the CEO under the Act or any other written law.
2. Define “task” to exclude the transmittal of non-confidential information provided by the CEO, and to exclude the expression of an opinion, comment, objective or intent.
3. Extend the exemption in sub-regulation 9(2) to apply to tasks related to the legislated and undelegated functions of the council, in addition to tasks done as part of deliberations at a council or committee meeting.
4. Develop and publish an advisory standard to assist council members in determining the boundaries of their roles and the level of reporting that they may expect.

Comment:

It is considered that the discussion points raised by the DLGC in relation to this regulation will improve clarity regarding its application. As such, the proposed amendments to

Regulation 9 are supported, including the development of an Advisory Standard regarding elected member and CEO roles.

It is noted that the City of Joondalup's *Governance Framework* aims to assist elected members, employees and the community understand the separation of roles.

Regulation 10 (relations with local government employees) - Proposal 7.8 (page 46)

Proposed Amendment:

1. Amend sub-regulation 10(1) by:
 - a) In sub-regulation 10(1)(a), replacing "to do or not to do anything" with a reference to taking action related to local government functions such as enforcement of local laws, implementation of approved policies and procedures, or varying of decisions, priorities or resource allocation.
 - b) Providing for the CEO to authorise a limited exemption to subregulation 10(1)(a), at the CEO's discretion, for individual council members for specified operational purposes.
 - c) Adding a prohibition against behaving in an abusive or threatening manner towards any local government employee, including the CEO (the exemption for meetings is not to apply to this rule).
 - d) Adding a prohibition against making repeated or unreasonable demands for information or assistance from a local government employee to an extent that impairs the employee's capacity to complete their designated work responsibilities.
 - e) Adding a prohibition against attempting to influence the performance appraisal or dismissal of a CEO other than through an authorised process consistent with legal requirements and procedural fairness.
 - f) Adding a prohibition against personally chastising or reprimanding any local government employee for matters related to the administration of the local government.
2. For the purposes of sub-regulation 10(2) and other regulations where the term is used, "council or committee meeting" should be defined as a formally constituted meeting of the council or a committee established under section 5.8 of the Act. Informal meetings such as site meetings or information forums would not be included in the exemption.
3. Amend sub-regulation 10(3) by:
 - a) Replacing the condition "members of the public are present" with a condition specifying that the sub-regulation applies if any person other than council members and the CEO is present, or if the meeting or event is being broadcast, or if an audio or video record is being made of the meeting or event and that record will be publicly available.
 - b) Clarifying that the term "attending" covers the periods immediately before and after the meeting or event and during any period in which proceedings are suspended.
 - c) In sub-regulations 10(3)(a) and 10(3)(b), extending the protection to former local government employees for a period of 6 months after separation from the local government.
 - d) In sub-regulation 10(3)(a), replacing the current reference to "statement...is incompetent or dishonest" with a reference to disparaging or impugning the character of a local government employee or former local government employee. This to be

defined as stating or implying deficiency in the person's honesty, integrity, competence, diligence, impartiality or loyalty; or imputing dishonest or unethical motives to them in the performance of their duties.

- e) In sub-regulation 10(3)(b), replacing the term "offensive or objectionable expression" with "abusive or offensive language", defined as inflammatory words likely to incite ridicule or contempt and which would offend a reasonable adult applying contemporary community standards.
4. In sub-regulation 10(4), extend the exemption to statements made to an authority responsible for regulating the conduct of public officers and to statements made under oath or affirmation to a body authorised by Parliament to conduct an inquiry or during judicial proceedings.

Comment:

It is considered that the discussion points raised by the DLGC in relation to this regulation will improve clarity regarding its application. As such, the proposed amendments to Regulation 10 are generally supported, subject to:

- consideration being given to including the influencing of the decision-making process; and implementation of decisions, in Regulation 10 (1)(a) given that it is proposed to include a reference related to 'varying of decisions'
- consideration being given to rephrasing of Regulation 10 (1)(a) to being about "varying of operational decisions" as opposed to "varying decisions", which could be interpreted as the governing role of Council (see pp. 41 of consultation paper). This would be in line with the intent of the regulation
- consideration being given to the deletion of Regulation 10 (2) in its entirety rather than amending it, as the rules stated in sub-regulation (1) should apply in all situations an elected member is undertaking their role and performing their duties, including during the meeting deliberations of Council and any established committees.

New Regulation (public statements) - Proposal 7.9 (page 49)

Proposed Amendment:

Insert a new regulation that:

1. Requires a council member to notify the CEO in writing of any comments or written material that the council member provides to a representative of the mass or local media concerning the performance or administration of the local government, the actions or performance of local government employees, or a council decision.
2. Requires the CEO to maintain a register of media contact in which details of such notices are kept, and to make this register available for public inspection.
3. This regulation would not apply to anything that a council member does as a part of the deliberations at a council or committee meeting, or to any authorised communication by or on behalf of the mayor or president in their official capacity.

Comment:

It is considered that the discussion points raised by the DLGC in relation to this proposed new Regulation do not provide anything constructive to the *Local Government (Rules of Conduct) Regulations 2007* framework, and add an administrative burden on elected members and the CEO which is considered unnecessary.

The Act already provides clarity with regard who may speak on behalf of the local government, and there is the ability for elected members to express personal opinions. It is suggested that if clarity is required regarding who can make public statements and under what circumstances a guideline be developed.

It is noted that the City has developed social media guidelines for elected members and adopted an *Elected Member Communications Policy* that meets the intent of the proposed new Regulation. Further, other clauses within the *Local Government (Rules of Conduct) Regulations 2007* are considered to meet the intent of the proposed new Regulation.

As such, the proposed new Regulation is not supported.

New regulation (Interactions with council members) - Proposal 7.10 (page 50)

Proposed Amendment:

Insert a new regulation that:

1. Prohibits a council member from behaving in an abusive or threatening manner towards any other council member or the CEO.
2. Prohibits a council member from stating or implying that a council decision or decision process was incompetent, dishonest, corrupt, negligent or unlawful (but does not prohibit expressing disagreement with a decision).
3. Prohibits a council member, when attending a council or committee meeting or other organised event, and if any person other than council members, the CEO and an official record taker is present, or if the meeting or event is being broadcast, or if an audio or video record is being made of the meeting or event and that record will be publicly available, from:
 - a) disparaging or impugning the character of any council member (to be defined as stating or implying deficiency in the person's honesty, integrity, competence, diligence, impartiality or loyalty), or imputing dishonest or unethical motives to them in the performance of their duties.
 - b) Using abusive or offensive language to, or in reference to, any council member (to be defined as inflammatory words likely to incite ridicule or contempt or which would offend a reasonable adult applying contemporary community standards).
4. Requires a council member, when attending a council meeting or committee meeting, to:
 - a) Comply with a direction given by the presiding member at that meeting; and
 - b) Cease any conduct that has been ruled out of order by the presiding member, unless the majority of council members who are present vote to dissent from the presiding member's ruling.

5. Sub-regulation (2) is not to prevent a council member from reporting suspected dishonest, corrupt, negligent or unlawful council decisions or processes to a regulatory agency with responsibility for overseeing any aspect of the performance of local governments or the conduct of public officials.
6. This regulation is not to prevent a council member from making a statement under oath in a hearing conducted by Parliament, before a judicial body or as otherwise required by law.

Comment:

It is considered that the discussion points raised by the DLGC in relation to this proposed new regulation will improve clarity regarding interactions with elected members. As such, the proposed new regulation is supported.

Regulation 11 (disclosure of impartiality interests) - Proposal 7.11 (page 51)

Proposed Amendment:

1. Amend sub-regulation 11(1) to clearly restrict the definition of interest to one that could or could reasonably be expected to adversely affect impartiality of the person having the interest, deleting the “inclusions”.
2. Include examples of significant impartiality interests in an advisory standard rather than in the regulation.
3. Define “matter to be discussed” to mean substantive matters to be determined by council and exclude administrative matters where the effect is limited to the council itself.
4. Amend sub-regulation 11(3) to add a provision that Regulation 11 does not apply to trivial, negligible or non-current interests.
5. Add a sub-regulation permitting a disclosing member to elect to leave the meeting while the council discusses and makes a decision on the matter, but if the member elects not to leave the meeting, the council member must vote as required by under section 5.21(2) of the Act.
6. Add a sub-regulation providing for council members to register, at their discretion, enduring interests that may be perceived as affecting their impartiality.
 - a) Enduring interests may include, but are not limited to, familial relationships, employment or board membership, membership of associations, election commitments and public statements of position on specific matters.
 - b) The CEO is to maintain a register of enduring interests that is available for public inspection.
 - c) Council members may request the CEO to make amendments to their recorded enduring interests as necessary.
 - d) Sub-regulation 11(2) would not apply to interests that are recorded in the register of enduring interests.

Comment:

It is considered that the discussion points raised by the DLGC in relation to this regulation will not substantially improve clarity regarding its application. It is acknowledged that the definition of impartiality interests requires review, however, there are concerns with regard other proposed amendments including the following:

- Allowing disclosing members to elect to leave the meeting, and as such, allow discretion with regard voting on items before Council. It is considered to be an obligation of elected members to vote on matters before Council with the exception of matters in which a direct or indirect financial, non-financial; or proximity interest, as per the Act, is declared. Having an option to vote may have an unintended consequence of elected members declaring impartiality interests for sensitive or controversial items in order that they do not have to vote.
- Allowing for enduring interests. It is considered all interests should be individually considered and publicly declared at the meeting where the interest occurs to meet transparency and accountability obligations. It is not considered the proposed enduring interests proposal adequately provides for this. It also creates an administrative burden to ensure such enduring interests are appropriately recorded and maintained. It is an elected member's responsibility to ensure a declaration is made each and every time a matter of significance is discussed at a meeting as opposed to a standing declaration that no one may know about.

It is suggested that the proposed amendments to Regulation 10 not be supported other than reviewing the definition of what constitutes an impartiality interests, and further clarity also being provided through an Advisory Standard or Guideline regarding impartiality interests and when they should apply.

Regulation 12 (gifts) - Proposal 7.12 (page 57)**Proposed Amendment:**

1. Insert a new definition of "nominal gift" in Regulation 12(1), to include the following:
 - a) occasional hospitality of a modest nature received in the course of performing the role of council member, such as:
 - b) meetings to discuss official business concerning the local government,
 - c) information sharing and professional development events (such as forums, seminars or workshops),
 - d) an event at which the council member has been invited to speak or present,
 - e) social events organised by the council, a government body or a community group;
 - f) attendance at a function as an invited representative of the local government or council; or
 - g) single small promotional items of no commercial value; or
 - h) modest, "one-off" expressions of gratitude or appreciation such as confectionery, flowers or single bottles of moderately priced alcohol.
2. In subregulation 12(1), exclude nominal gifts from the definitions of "notifiable gift" and "prohibited gift".

3. In subregulation 12(2), add “financial or other contribution to travel” to the things that a council member must not accept from a person undertaking, seeking to undertake or likely to be intending to undertake an activity involving a local government discretion.
4. Insert a new subregulation to provide for the situation of council members who have accepted a gift in the belief that the giver was not undertaking, seeking to undertake or intending to undertake an activity involving local government discretion, and who become aware within six months of accepting the gift that their assumption was inaccurate. Council members would be required to rescind their acceptance (if the gift had not yet been received) or return (if practical) a prohibited gift or to notify the CEO of a notifiable gift or a non-returnable prohibited gift, as soon as practicable.
5. Provide for the CEO, at the request of a council member, to record declined or returned gifts.
6. Insert a new subregulation to clarify that this regulation does not apply to ceremonial gifts received by a council member on behalf of the council. A ceremonial gift is an item presented to the local government as a mark of respect, commemoration or appreciation, usually from another government entity or an organisation, and ownership is held by the local government.
7. Clarify that when a gift is presented to the council, and that gift or part of the gift is then provided to a council member for their personal benefit, it is to be treated as though the council member had accepted the gift directly from the giver. If the gift meets the definition of a notifiable gift, then Regulation 12(3) applies.

Comment:

It is considered that the discussion points raised by the DLGC in relation to this proposed new regulation will improve clarity regarding its application.

Two matters that are not considered to be addressed include:

- where a gift is received by an elected member or employee under and in accordance with the terms of a sponsorship or other commercial arrangement with the local government.
- why gift provisions are inconsistent between different spheres of government.

The proposed amendments to Regulation 12 are supported subject to:

- clarity regarding gifts provided with the terms of a sponsorship or other commercial arrangement with the local government
- review of value thresholds to be consistent between legislative requirements and different spheres of government
- clarity regarding the definition of travel and the limitations of who can, and cannot, contribute to travel, similar to the current provisions under section 5.83 of the Act.
- the definition of nominal gift, particularly around the part of “moderate acts of hospitality”. This could lead to wide interpretation and possible non-disclosure when disclosure would be appropriate. Moderate acts of hospitality could fall under the “notifiable gift” limit. It could be possible to raise the notifiable gift base level from \$50 to \$100
- review of Proposed Point 4 above which appears overly complicated and may be open to abuse. Further, it is considered such an amendment would unlikely improve disclosure.

Improving understanding of Rules of Conduct - Proposal 7.14 (page 60)

Proposal:

1. The Panel, with the assistance of the Department, is advised to publish advisory standards to assist in the interpretation of the Rules of Conduct and describe the types of conduct that would or would not be found to be a minor breach by way of examples drawn from Panel determinations.
2. Training materials for Complaints Officers need to be developed under the auspices of the Local Government Governance Roundtable (Department, Local Government Managers Association and WA Local Government Association), and offered to all local governments through existing training providers and products.

Comment:

It is considered that the discussion points raised by the DLGC in relation to improving understanding of the Rules of Conduct will improve clarity regarding its application. As such, the proposal is supported.

Improving processing times - Proposal 8.1 (page 62)

Proposal:

1. Provide mechanisms to help prospective complainants determine whether they have valid grounds for alleging a contravention resulting in a minor breach and guidance on describing a contravention.
2. Replace the current complaint form with a more structured version that requests the specific information needed to demonstrate the essential elements of a contravention for each regulation, and to advise the outcome of any dispute resolution processes undertaken. There is potential to regulate information requirements under section 5.107(2)(d) of the Act.
3. Provide guidance material to complaints officers.
4. Develop guidance for local governments concerning treatment of complaints that are not made in accordance with the Act.
5. Establish and enforce timeframes for receipt of responses of parties to information requests.
6. Introduce a prioritisation system for complaints received by the Panel, based on the significance of the potential consequences for local government, the extent to which the conduct indicates deliberate intent rather than poor judgement, and whether there has been a pattern of inappropriate behaviour and complaints made against that council member
7. Further simplify and streamline Panel reports on findings and decisions, consistent with the needs of the audience.

Comment:

It is considered that the discussion points raised by the DLGC in relation to improving processing times will improve clarity regarding its application. As such, the proposal is supported.

Improving efficiency - Proposal 8.2 (page 63)**Proposal:**

1. In the longer term, consider amending the Act to align the handling of minor breach complaints with the current serious breach complaint process to create a single pathway for receipt of breach complaints.
2. Under this model, complaints of minor breach would initially be sent by complaints officers to the CEO of the Department, who, on the advice of the Department, would decide whether to make an allegation of minor breach to the Standards Panel.

Comment:

It is considered that the discussion points raised by the DLGC in relation to improving efficiency will improve clarity regarding its application. As such, the proposal is supported.

With regard to the suggestion that a central, automated, on-line complaints lodgement and tracking process be developed, the proposal is supported.

Other issues related to efficiency:**Proposal:****1. Price signals to deter improper, unsound and trivial complaints**

An effective mechanism for managing demand is to apply a price signal – whether monetary or in terms of effort expended for reward obtained.

It has been suggested that people wishing to make minor breach complaints under section 5.107 could be charged an application fee for each allegation to discourage complaints made for improper purposes. Is there a risk that this would also discourage complaints about serious matters?

Comment:

It is considered that the proposal to implement an application fee for each allegation not be supported should:

- this become a deterrent in making a complaint that warrants investigation
- an elected member request that the CEO make the complaint on their behalf in order to avoid personal payment.

2. Automated centralised complaints lodgement process

It is proposed that the DLGC develop a central, automated, on-line complaints lodgement process, similar to that used by the State Administrative Tribunal. This would reduce administrative costs for local government and offer opportunities to avoid the lodgement of complaints about conduct to which the regulations are not applicable. It could automate notification to relevant parties and potentially be linked to a complaints tracking system.

Comment:

It is considered that the proposal to implement an automated centralised complaints lodgement process is supported, subject to consideration also being given to extending the on-line process to complaint tracking.

Improving transparency - Proposal 8.3 (page 64)

Proposal:

1. Publish standards panel procedures, practices and basis for making decisions, setting out or providing for:
 - a) The main objectives of the Panel: resolve complaints quickly, fairly, with as little formality and technicality as practicable and to minimise costs;
 - b) The ways in which the Panel will ensure procedural fairness, including timeframes for responses to requests for information;
 - c) The way in which the Panel will have regard to the general interests of local government in WA, and the matters it will take into account;
 - d) Criteria used to prioritise complaints;
 - e) The Panel's privacy policy;
 - f) The nature and weight of the evidence that the Panel requires from complainants to determine the standard of proof as required by section 5.106 of the Act;
 - g) How the Panel will treat frivolous, vexatious and trivial complaints;
 - h) Key regulatory terms and how the Panel interprets them in making its findings; and
 - i) Circumstances under which hearings will be held, and processes for requesting a hearing.

Comment:

It is considered that the discussion points raised by the DLGC in relation to improving transparency will improve clarity regarding its application. It is not considered necessary, however, to regulate the practices and procedures of the Panel. As such, the proposal is supported with this exception.

As referred to above it is considered that the tracking of complaints should be included in the development of an on-line complaints process.

Improving effectiveness - Proposal 8.4 (page 67)

Proposal:

1. Provide discretion for the local government to decide how to publish a public censure notice or public apology ordered by the Panel, within the parameters of reasonable public exposure and audience reach.
2. In future, consider amending the Act to provide the Panel with a greater range of actions following a finding that a minor breach was committed, including an option to impose no sanction.
3. The Standards Panel specifically make reference in its reports to how it has given regard to the interests of local government in its deliberations on minor breach allegations.

Comment:

It is considered that the discussion points raised by the DLGC in relation to improving effectiveness will improve clarity regarding its application. As such, the proposal is supported.

With regard the supplementary question as to whether a local government should be permitted to recoup the cost of implementing a sanction from the elected member on whom the sanction was imposed, it is considered that this should be permissible; however, it must be a reasonable recoup of cost, particularly if the local government is granted discretion to decide on how to publish a public censure notice or public apology, as is proposed.

Comment invited on other issues related to improving effectiveness:

1. Application of Rules of Conduct to candidates in local government elections (page 60)

The DLGC queries whether it is worth examining the merits of amending the Act to apply selected Rules of Conduct (particularly regulations 7, 10 and the proposed new regulation concerning relations with council members) to all local government election candidates during the campaign period.

It is queried whether complaints of minor breach should be able to be made against any candidate, but would be progressed only if the candidate was successful in being elected to the council.

Comment:

It is considered that there is much merit in further examining the application of relevant sections of the Rules of Conduct, or other regulatory mechanisms, to all local government election candidates during the campaign period whether or not they are successful in being elected, although it is questioned how such provisions would practically be enforced.

2. Complaints about commonplace behaviour (page 70)

The DLGC suggests it is aware of situations of some council members being the subject of minor breach complaints for conduct that other council members (perhaps in the same council) engage in freely. It is questioned whether this affects the organisational culture, sense of fairness and freedom of expression in local governments. Further, whether allegations of minor breach appropriate for behaviour that is, while unseemly, relatively common in the circumstances and of no real consequence?

It is queried whether a materiality threshold should be applied to minor breaches, and should this be linked to the significance of the effect of the conduct on the performance or reputation of the local government, and should the complainant provide evidence to demonstrate this impact?

Comment:

A local government's Code of Conduct, and the *Local Government (Rules of Conduct) 2007* establish the principles and standards of behaviour elected members, committee members and employees must observe when performing their duties and is intended to promote accountable and ethical decision-making. A poor culture should not be an excuse for poor behaviour.

It is considered that a materiality threshold not be applied to minor breaches and that the DLGC provide improved guidance in relation to building governance capacity.

3. Independent conduct review panels (page 72)

The DLGC is giving consideration to introducing a system to establish panels of independent investigators to advise councils on alleged breaches and appropriate action, along with legislated sanctions that councils may impose on councillors who breach the rules. The council's role would be to decide whether to accept the independent conduct reviewer's findings and implement their recommendations, a decision that must be made impartially.

This system, like those in other jurisdictions, would permit matters to be referred to the Standards Panel in cases where the council was unable to make a decision on the independent conduct reviewer's report, or the council member refused to comply with the orders made by the council.

Specified types of misconduct with serious consequences could still be referred directly to the Panel, but the State would not deal with trivial matters or those arising from personal disputes. This is a similar approach to that being taken by the Public Sector Commission in relation to minor misconduct of local government employees.

With appropriate legislative changes and training it is queried whether this would assist local governments to manage most forms of non-serious misconduct at a local level without the disadvantages and conflicts of conducting in-house investigations.

A crucial pre-requisite to the success of a locally-based system is that council members would need to have confidence that it would not be used for factional or retribution purposes and that all decision-makers were strictly impartial.

Comment:

It is considered that the discussion points raised by the DLGC in relation to independent conduct review panels would be of benefit. It is noted that the City of Joondalup has previously indicated its support for the referral of low-level complaints to a Peer Review Panel, however, this not include a Mayor or President. As such, the proposal is supported.

Further, it is suggested that the Minister for Local Government and Communities review the original disciplinary framework established in 2007 which proposed introducing a mediation and/or conciliation function as a preliminary step to attempt to resolve low-level misconduct complaints locally.

Improving educational value - Proposal 8.6 (page 70)**Proposal:**

1. A simple on-line searchable database of anonymised summaries of findings should be established, demonstrating common complaints, formatted as “frequently asked questions” or case studies, and keep it updated as new issues arise for use in training.
2. Establish a process to identify implications arising from Panel or SAT determinations of minor breach complaints involving common local government practices, and ensure that local government is alerted to those implications.

Comment:

It is considered that the discussion points raised by the DLGC in relation to improving educational value will improve clarity regarding its application. As such, the proposal is supported.

Mediation and conciliation - Proposal 9.2 (page 73)**Proposal:**

1. All local governments with access to professional mediation services are encouraged to offer mediation opportunities to people contemplating a complaint under the minor breach framework.
2. Amend the complaint form to require complainants to advise what action they have taken to resolve their concerns, and the outcome of that action, or alternatively to explain why they have not made use of alternative resolution processes.

Comment:

It is considered that the discussion points raised by the DLGC in relation to mediation and conciliation mechanisms being made available to elected members should assist in dealing with matters more promptly and professionally in a local context, with the objective of reaching a mutual resolution. The proposed requirement to demonstrate action taken to resolve complaints should mean complainants have heightened responsibility for taking action to resolve their issues, thereby reducing the ‘need’ to progress complaints to the Standards Panel. It is considered that individual local governments should bear some responsibility for trying to resolve matters through mediation prior to considering the formal complaints process. As such, the proposal is supported.

It is noted that the City of Joondalup's *Governance Framework* provides, among other things, guidance on the important aspects of elected member relationships which includes the Mayor being a source of assistance for Councillors and also having the responsibility for facilitating resolution of any disputes between Councillors.

Comment invited on a related issue: Panel option to order mediation as an alternative to making a finding (page 75)

Proposal:

The DLGC provide that a significant number of complaints of minor breach relate to a personal dispute between the complainant and a council member. Local governments have concerns about their power to direct the parties to mediate, but it has been suggested that if the direction came from the State, they would be happy to facilitate it.

Comment is invited on whether consideration should be given to amending the Act to provide the option of ordering mediation as an alternative to making a finding about whether a minor breach occurred. This order could be made by the Panel, or, if a single breach pathway is implemented, by the Departmental CEO on the advice of the Department.

Comment:

It is considered that the panel option to order mediation as an alternative to making a finding is appropriate. As such, the proposal is supported.

Time limit for minor breach complaints - Proposal 10.1 (page 77)

Proposal:

1. Amend sections 5.107(4) and 5.109(2) to reduce the time limit for complaints to be made from two years to three months after the alleged breach, with provision for extension at the Department CEO's discretion.
2. Amend s.5.108(3) to reduce the time limit to 12 months, to recognise that it may not be clear that the breach is minor rather than serious until an investigation has been undertaken.

Comment:

It is considered that the proposal to establish reduced time limits would be of benefit to the complaints process. The City has previously endorsed timeframes for all actions associated with complaints being made to ensure there is timeliness in assessing and concluding investigations. As such, the proposal is supported.

Other matters not addressed elsewhere in the review

1. Rules of Conduct and risk management (page 71)

Question:

To what extent do local governments consider the Rules of Conduct as part of their risk management process for operational practices, including the risk of inadvertently placing council members at risk of committing a minor breach?

Comment:

It is considered integral to local government risk management frameworks that risks related to the Rules of Conduct be incorporated.

It is noted that the City of Joondalup's *Risk Management Framework* identifies Rules of Conduct matters and misconduct in general as corporate risks and has ensured that risk controls are in place and assessed on a regular basis.

2. Comment invited on the issue of support for council members (page 76)

Question:

Comment is invited on whether there is a need to establish formalised support mechanisms for council members, similar to those available for employees, including access to confidential professional counselling and coaching services.

Could this reduce the incidence of dispute-related conduct currently leading to minor breach complaints against council members? If so, is this an initiative that the sector can undertake collaboratively or would it be more effective for individual local governments to extend the reach of systems already in place for their employees?

Comment:

It is considered that in order to assist elected members in performing their duties of office, the availability of support mechanisms, particularly in relation to access to mediation, may assist in the resolution of conflict and ensure their duties are able to be carried out effectively.

It is suggested that as the majority of local governments will have a policy or protocol related to elected member training and professional development, access to support mechanisms be included. While local governments should be encouraged to incorporate local counselling and support access in their policies it may be beneficial for WALGA or the DLGC to establish a professional counselling and coaching service which may be independently accessed by local government elected members (on a cost recovery basis).

It is noted that the City of Joondalup's *Governance Framework* and comprehensive *Elected Members' Entitlements Policy* provides for training and professional development that assists elected members in fulfilment of their roles.

3. Confidentiality (page 78)

Question:

Section 5.123(1) of the Act makes it an offence to disclose the existence of, or any detail about, a complaint made during a campaign period. Comment is invited on the benefits and risks of extending the effect of this provision to apply to complaints made at any time, including comment on the practical challenges and resource implications of enforcing such a requirement and prosecuting offences.

Comment:

It is considered that the extension of section 5.123(1) of the Act to apply to complaints made at any time is appropriate in order to protect an elected member's reputation while a complaint is being determined. With regard risks, if the DLGC and Standards Panel are able to determine complaints in a timelier manner then the perceived need to respond to confidentiality breaches would be reduced. It is not considered appropriate for either the local government or elected member against whom a complaint is made to respond publicly regarding the complaint during a complaints process.

4. Inappropriate conduct that is not a minor breach (page 80)

Question:

Comment is invited on options that could be considered for dealing with minor misconduct that does not constitute a minor breach under the Rules of Conduct Regulations.

Comment:

It is considered that the DLGC's comments that the Standards Panel is a disciplinary body, not a dispute resolution body; and a review of findings is unlikely to deliver a net public benefit, is a sound argument. As such, a review mechanism for minor breach decisions is not supported.

5. Improper use of information by former councillors or local government employees (page 80)

Question:

Comment is invited on the merits and risks of amending section 5.93 to extend its application to persons who were formerly council members, committee members or employees.

Comment:

It is considered that the proposed amendment to section 5.93 to extend its application to persons who were formerly elected members, committee members or employees, is appropriate as misuse of sensitive/confidential information may well be detrimental to the local government, however, it is queried how such a provision would be managed and any time limits that might apply. Given the significance of the matter, the proposal is supported.

6. Formal censure motions by councils (page 81)

Question:

Comment is invited on the merits of amending the Local Government Act 1995 to provide for a clear and consistent process to be followed by local government councils to resolve to formally censure a council member for misconduct, such as a significant contravention of the council's code of conduct, similar to section 440G of the NSW Local Government Act 1993. Would this encourage councils to use this mechanism to discipline their own members?

Comment:

It is considered that a consistent process to be followed by local government councils to resolve to formally censure an elected member for misconduct would be of benefit to the sector. There is nothing to currently prevent such practices occurring, however, an equitable and consistent process or guideline, rather than legislation, that might be followed would provide assistance. As such the proposal is supported.

7. Mandatory recording of council and committee meetings (page 82)

Question:

A number of minor breach complaints relate to incidents that occur at council meetings. Where the parties are in dispute about what was said or the manner in which it was said, the availability of an audio recording and verbatim transcript can be invaluable to establish the facts, with a video record providing additional depth through being able to see the body language of the participants.

Comment is invited on the merits, disadvantages and risks of mandating the electronic (video and/or audio) of council meetings and committee meetings, and establishing common standards for quality of product and for management and disclosure of the information.

Is it likely that the behaviour of individuals will be affected by the knowledge that a public recording is being made, and how might this influence overall standards of conduct at meetings?

Comment:

It is considered that the proposal to audio record (only) council meetings can be supported.

It is noted that the City of Joondalup has been broadcasting council meetings live online and recording its council meetings for many years to assist in ensuring transparency; accountability; and ease of access to the public, in the decision-making process.

Other Matters – City of Joondalup

It is suggested that the DLGC be requested to give consideration to the following matters in drafting a framework for the resolution of misconduct complaints at the local level:

- Development of a simple complaint handling procedure for assessment of complaints, which might include, but not be limited to:
 - how allegations are received and assessed
 - how to prepare, plan and undertake any investigation required to clarify allegations
 - documentation of allegations and recording of any investigation and findings
 - dealing with conflicts of interest.
- Ensuring all persons involved in investigations are aware of the principles of natural justice and are required to adhere to these principles.