Local Government Reform: Minister Knoll's Discussion Paper – Reform Area 1

Our recent LG Alert provided a 'high-level' overview of the "*Reforming Local Government in South Australia Discussion Paper*" that was released by Minister Knoll ("the Paper"). That overview is here.

The Paper identifies four areas of proposed local government reform:

Reform Area 1: Stronger Council Member Capacity and Better Conduct
Reform Area 2: Lower Costs and Enhanced Financial Accountability
Reform Area 3: Efficient and Transparent Local Government Representation
Reform Area 4: Simpler Regulation

This Alert addresses Reform Area 1. Further Alerts will address the balance of the Reform Areas and will be released over the next few weeks.

Our approach in preparing our Alerts is not to repeat the entirety of the matters raised in the Paper but, instead, to focus on 'key issues' from a 'thought-leadership' perspective to assist councils in considering and responding to the Paper by Friday 1 November 2019. It is important to note that the Reform Areas and submissions received will be considered by the Government in preparing a Local Government Bill for release in early 2020.

Reform Area 1: Stronger Council Member Capacity and Better Conduct

This Reform Area has its genesis in asserted high community expectations about the conduct of council members and ideals of community leadership. Amongst other things, it recognises integrity standards and issues of corporate and individual reputational damage from the behaviours of a few. The articulated concerns and expectations are, of course, compounded by the frustrations (real or perceived) from the ineffectiveness or the difficulties in utilising the tools and procedures of the current integrity framework.

A summary of the Reform proposals, as prepared and published by the Department of Planning, Transport and Infrastructure, are an **Attachment** to this Alert.

The key Reform proposals and considerations that we wish to identify for councils are as follows:

1. Conduct

   The Paper suggests that there is community support for a review of the current integrity system, to create a clear, simple, strong and well-defined conduct management framework. The Paper suggests that there should be a recognised separation between low level behavioural matters (which it proposes be dealt with by the council, very much in the same manner that Part 2 of the current Code of Conduct is dealt with by individual councils) and the more serious integrity matters that, similar to Part 3 of the current Code of Conduct, should be investigated and dealt with at arms-length from and independent of the council.

   The Paper identifies three models for the purpose of a council member conduct framework whilst recognising that any elements of the three could be incorporated into a single, final model. The first model is simply a clarification of the current framework but with recognition that bullying and harassment matters must be referred independently of the council. The Ombudsman is the proposed recipient of such referrals. A new feature of this model is to mandate that councils report on conduct matters in the annual report.

The second model is a mandated council-specific governance committee which, amongst other things, would have a role in relation to council member conduct. It would be an independent body that, in addition to conduct matters, would advise the council on a range of governance issues. It would have similar structural features to that of a mandated, but enhanced, audit committee. The key considerations would be the composition of the committee and whether it has powers vested by legislation or whether individual councils would be required to delegate certain matters to it, in much the same manner as the evolution of the current CAP model in local planning assessment.

The third model would be an additional independent integrity body, with responsibility to oversee all aspects of council member conduct. As with any such model, the detail is critical and it is necessary to see and consider the powers proposed to be conferred on it. The question of its funding source for both establishment and ongoing operation is also a critical consideration. The proposition is that, at least in part, this model would be funded by the recovery of fees for the provision of services. It would have benefits in relieving the Ombudsman of the current multitude of behavioural matters that regularly befall his office and, possibly, might avoid the need for referral of the most serious behavioural issues to the SACAT. Until the detail is available, the role, function, responsibilities and powers of this type of body, any commentary at this time, is necessarily speculative only.

In the meantime, some critical considerations in relation to an office of a conduct commissioner include whether hearings would be undertaken in public or in private and if there would be publication of reports and findings, in particular in respect of adverse conduct and with a view to publication having an educational objective.

In addition to any and, possibly, all of the above, it is necessary to have regard to the form and content of the code of conduct that would exist to set the standards and framework for council member conduct that would be subject to the chosen model (as above). In this regard, it is to be noted that there are many code of conduct models available internationally which could be considered for the purposes of revising, reforming and simplifying that which currently exists in South Australia. As below, one simple but effective refinement, would be for the code to have an effective role in terms of non-statutory conflict of interest requirements.

2. <u>Improved Conflict of Interest Provisions</u>

It is, probably, common ground that the conflict of interest provisions as they currently exist in the Local Government Act and which provide for three categories of interest (material, actual and perceived), are extremely difficult to comprehend and confusing to work with in a practical sense. We have seen many instances where council members, in seeking to “do the right thing” in compliance with these provisions, instead, fall foul of them and, on occasion, are subject to reports to and investigation by, the Ombudsman. In many respects, whilst the predecessor conflict of interest provisions were somewhat dated and not too easy to work with, they were, by contrast, an improved model on what currently exists.

The conflict of interest provisions are fundamental to any local government integrity framework. The Paper and the consequent consultation process, in our view, presents an opportunity to ‘start again’, to go back to basics to review current standards and expectations in this area for the purpose of implementing modern, progressive and simple conflict of interest requirements.

Whilst this Alert does not provide us with the opportunity to canvas all or a significant number of alternative conflict options, including best practice improvements, one model

that is of attraction to us, is that legislation deals with only financial interests for council members (and prescribed persons who are closely associated with them) whilst all other interests (whether personal or otherwise and whether direct or indirect) are left to a new and evolved code of conduct for council members. Thereafter the compliance processes can be as simple as any financial interest (as prescribed in legislation) is required to be publicly declared and the member is prohibited from participating in any part of the council decision making process. By contrast, all other 'code of conduct conflict interests' require only a declaration and the member is then able to fully participate in the decision-making in giving effect to their elected representative functions, at the meeting.

The current complications in terms of the extensive list of ordinary business and the application of the provisions to committees and subsidiaries would also be easily and readily addressed under such a revised model. Further, it should be clarified that the conflict provisions apply only to decision makers and then only in respect of actual decision making which legally binds the council.

3. Mandatory Training

Current mandatory training requirements are considered by many to be a manifestation of an idea which had merit, whilst in its subsequent implementation, has been something less than what was anticipated. The Paper proposes the establishment (re-establishment?) of a mandatory training scheme within regulations complemented by a mandatory training and development policy.

In our view, the way in which to 'raise the bar' for council member knowledge, participation and understandings through training requirements is, in reality, quite simple. It need be no more than a requirement that all newly elected council members (to include any returning council member who has not been a member of a council for the last term), is required to undertake mandatory training. This obligation would also extend to any member elected at a supplementary election, if they were not a member of the council during the previous term. The mandatory training should not be as prescriptive as is currently the case, but built around a number of key principles, the details which is then left to the individual council to prescribe within their mandatory policy.

Further, mandatory training should not be able to be undertaken over one day (currently we have seen training occur over one day comprising of 7 – 7.5 hours of continuous training) and should not be subject to any time prescription (in terms of hours to undertake the training). The quality assurance in this regard is a matter for individual councils, possibly, for the officer responsible for governance or the independent governance committee of the council, if established.

Every council member (noting that some would not be subject to mandatory training, as above) should, nevertheless, be required to undertake 'refresher training' on at least two occasions during the four-year term of office. All members who are subject to the mandatory training would also be required to undertake refresher training on one occasion at the midpoint of their term of office. The refresher training being, of course, much less prescriptive and less intensive than the mandatory training. A failure of a council member to undertake mandatory training should be linked to the provisions at section 54 of the Local Government Act which, similar to a failure to provide a return, would, ultimately, see the member lose office. For any other breach of these provisions (for example, a failure to undertake refresher training or any other breach of the policy), it would be sufficient for it to be a breach of the code of conduct and dealt with, at least in the first instance, by the council, as a low-level behavioural issue. However, such

breaches should also be able to be escalated to a more serious integrity issue, where there is continuing failure to comply.

4. Principal Member Leadership

The proposal to further clarify roles and responsibilities in the Act will not, in our view, operate of themselves, to improve the issues of concern that the Paper identifies and some of which are addressed above.

The principal member is required to preside at meetings of the council when he/she is present at the meeting. It is our experience that good principal members already do what the Paper refers to in providing support for their council members, including guidance and counsel as to the separation of responsibilities between the elected body and administration, provide leadership in resolving differences in the elected body and also guidance, as required.

The Paper proposes that the presiding member of a meeting (as above, usually the principal member) be provided with enhanced powers to manage disruptive behaviour. The current arrangement is that under regulation 29 of the 'Meeting Regulations' where a presiding member has concerns about such behaviours at a meeting, it is necessary for him/her to be supported by a resolution of the meeting if the misbehaving or disruptive member is to be censured or excluded for all or part of the balance of the meeting. We concur with the proposal to provide the presiding member with enhanced powers in this regard, in a manner which would see them exercise these powers in much the same way as the chairperson of a non-public sector entity may at a meeting of his or her board.

In this regard, guidance and clarification about misbehaviour and/or disruptive behaviour at council meetings is to be welcomed, not least in order to assist the presiding member to better understand when his or her powers of exclusion (or censure) should and are able to be invoked. It might be that individual council expectations in this regard can be articulated within the council's code of conduct, thereby providing the presiding member with a document and a basis to rely upon if he/she decides it is appropriate to exercise the power of exclusion or censure.

As with any powers conferred on a public officer to address misuse or abuse of powers, a presiding member who fails to exercise such powers in an appropriate and proper manner should, themselves, stand to be investigated and sanctioned for such an act of disenfranchisement.

5. Chief Executive Officer ("CEO")

The Paper raises the issue of roles and relationships between council members, as the governing body of the council and the CEO. It articulates a perceived imbalance of power between the governing body and individual council members in being overly reliant upon the administration, particularly the CEO, in decision making.

We find this to be a particularly interesting perception and somewhat concerning insofar as it raises an issue which is common across local government world-wide. The administration will always have a role of supporting, advising, guiding and preparing expert reports for decision making by the governing body. The governing body, in turn, has a responsibility to be sufficiently informed to make responsible decisions, to be accountable to its community for those decisions and to ensure its decision making is lawful. The CEO and the administration provide guidance in performing that role, they do not usurp it or otherwise should not be able to improperly influence it and the manner in which this is most appropriately achieved is through an 'educated' (from training)

elected body that is operating in accordance with the high-ideals of election to public office.

When regard is had to other aspects of this Reform Area 1, the combination of improved conduct, an effective integrity framework together with mandatory and other training, council members should have all of the critical skills they require to read, understand and question administration reports and to require further information to assist in decision making. Therefore, this is not, in our view, an issue of a power imbalance.

The Paper also raises concerns about a CEO having disproportionate advantage in negotiating their contractual conditions with the council members. We find it difficult to envisage circumstances where, having regard to all of the proposals above being actioned, any council charged with negotiating a contract with its current or prospective CEO or the content of a remuneration package or otherwise the conduct of an annual performance review, would fail to engage the services of an independent professional expert to assist with the process. Further, current, modern management practices dictate that a rigorous annual performance review be undertaken and best practice considerations support that the performance review process be revisited at least once between performance reviews.

The issue of imbalance, if there is one, is more likely to be for a CEO who finds him/herself at the whim of a political objective, usually following an election, to remove him/her from office. This is separate to a dismissal for serious/wilful misconduct and sometimes occurs in circumstances where a CEO is adequately performing functions of office but, simply, is not a 'fit' for the current governing body, not having been appointed by that body. This is a level of power imbalance which is something that the Minister should give careful consideration to, to ensure that livelihoods and reputations are not unfairly or improperly damaged through political rather than performance imperatives.

The Paper canvasses that the independent Remuneration Tribunal may have a role in determining appropriate CEO remuneration. It is to be noted that the Tribunal does not have any such role in terms of setting the remuneration of the CEOs of public service departments. In circumstances where a council, as a sovereign independent and separate corporate entity, undertakes a recruitment process and determines to make an offer of employment to fill a CEO position, that same council must also be charged with, responsibly, determining the remuneration package of their chosen candidate. In this regard, it is our position that whilst the Tribunal may have a role in recommending financial parameters of the package, it is for the council to determine the final package within those parameters.

6. <u>Other matters</u>

6.1 Consideration should also be given to the proposed mandated annual performance reviews by a council being undertaken by a panel rather than a council committee. A panel arrangement is already recognised in the Local Government Act for the purpose of CEO recruitment, but many councils, mistakenly, establish the panel as a section 41 committee. It is our position that a recruitment panel and a subsequent performance review panel, should be established as panels and not as section 41 committees, thereby avoiding all of the unnecessary regulatory and accountability requirements that are attached to committees but which do not apply to panels.

A council that does not undertake a performance review before determining to grant its CEO a new contract (often referred to as an extension of the contract) without obtaining independent advice about remuneration, the contract conditions,

performance issues and, in a worst case scenario, dismissal, is failing to operate in accordance with current, management standards.

6.2 A further thought in terms of the conspectus of Reform Area 1 and the role of the CEO which is not addressed by the Paper, is the role of the CEO in relation to the integrity framework and conduct issues – but in circumstances where the CEO is absolutely protected in relation to their employment status.

International jurisdictions have a recognised role of "monitoring officer". This role has a statutory responsibility to report on matters that are or likely to be illegal or amount to misconduct or maladministration, has responsibilities for conduct issues of both council members and officers and, in the UK, a responsibility for the operation of the individual council constitution. The monitoring officer, is, therefore, a statutory appointment under local government legislation with duties to report to the governing body. The statutory duty is personal and cannot be delegated, unless he/she is absent or otherwise unable to act. Report of the monitoring officer to the governing body must be received, considered and subject to decision within a stipulated timeframe. The monitoring officer also has duties to report certain matters to external bodies, whether that be the Minister, the Ombudsman or, if established, in accordance with the proposal in the Paper, the Local Government Commissioner.

This Alert is not the place to fully explore and consider this option. It is, nevertheless, a modern and progressive development which is worthy of consideration within the framework of the matters raised by the Paper.

6.3 Finally, it is to be observed that in other jurisdictions, there are alternative governance models including a 'council cabinet model' and the development by councils of their own constitution within the establishing local government legislation.

In the cabinet model, high-level decision-making occurs by a few council members, including the principal member of the council. The issues considered above, in particular those of training to achieve certain standards, would be relevant in terms of additional imposts upon any member who wished to be a part of the council cabinet. Each 'cabinet member' would have a specific area of responsibility and the cabinet would make decisions about council policies, governance and service delivery in a manner than binds the council.

The 'constitutional issue' would see individual councils prepare a mandatory written legal document that describes the council framework, what it can and cannot do, the framework within which officers and council members work and that decision-making is efficient, honest, accountable and lawful.

As above, however, this Alert is not the opportunity to fully explain and to consider the pros and cons of these alternative governance opportunities within local government democracy – rather, it simply 'points' our readers to 'bigger picture' considerations as part of the current SA review process.

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