PUBLIC SUBMISSION TO THE DEPARTMENT OF LOCAL GOVERNMENT, SPORT AND CULTURAL INDUSTRIES (DLGSC)

"LOCAL GOVERNMENT REFORM IN WESTERN AUSTRALIA" **February 2022**

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1. INTRODUCTION – SUBMISSION FOR LOCAL GOVERNMENT REFORM

It is encouraging to see the Minister for Local Government and the DLGSC have responded positively to the many hundreds of public submissions and official enquiries over many years and are planning positive change for progressive improvement.

It is hoped this submission will be of interest to those charged with reforming the local government system.

This submission is presented in response to the DLGSC invitation for public submission and comment upon its proposed reforms to the Local Government Act 1995, as expressed in its publication "Local Government Reform – Summary of Proposed Reforms".

It builds upon previous submissions to a series of formal official enquiries by Government into local government, and is based upon the premise that the local government system in Western Australia is dysfunctional, disconnected from the governed, lacks real openness, transparency and accountability, and is not and cannot be what it appears to be.

Previous submissions included the need for clarity in definition of the interaction between Council and its CEO/Body Corporate, whilst this submission focuses on the vital need for clear and concise Policy from Councils to guide and manage each of the divisions of the local government they lead and control.

Specifically, this submission responds to Proposed Reforms:

5.2.2 – *Council Role*

- ***Making significant decisions and determining policies through democratic deliberation at Council meetings***

and

5.2.3 – *Elected Member (Councillor Role)*

- ***Applying relevant law and policy in contributing to the decision-making of Council***

These objects create a necessity for documented **POLICY** in those roles to guide and clarify purpose and process for Council, Councillors, CEO, Managers, staff and the governed.

It is obvious from *5.2.3 – Elected Member (Councillor Role)* that individual Councillors cannot make Policy but collectively contribute to the decision-making of Policy by full Council.

That process requires formal organised management by Council in Council, drawing on independent external expertise and advice as required – such as professionally guided workshops.

When developing Policy at this level of legislative constitutional function, Council should not regard and relate to its employees as "partners", but as *stakeholders, advisors, contributors and instruments of corporate and community governance* – i.e. as *administrators of Council's Policies*.

2. INTRODUCTION – LOCAL GOVERNMENT REFORM

In its report – **"Local Government Reform – Summary of Proposed Reforms",** DLGSC, reiterating the WA Government's commitment to reform, says:

> ***Local government benefits all Western Australians.***
>
> ***It is critical that local government works with:***
>
> - ***a culture of openness to innovation and change***
> - ***continuous focus on the effective delivery of services***
> - ***respectful and constructive policy debate and democratic decision-making***
> - ***an environment of transparency and accountability to ensure effective public engagement on important community decisions.***

It is assumed the underlying objects of **"*openness, transparency and accountability*"** are intended to apply to all the above principles and local government functions.

3. THE NEED FOR LOCAL GOVERNMENT REFORM

Following a series of incremental minor amendments to the Local Government Act and Regulations since 1995, DLGSC is now proposing a set of improvements that are moving closer to creating a more efficient and effective system of local government, intended to improve the relevance and integrity of the sector.

However the proposals to date protect and preserve the existing status-quo in order to satisfy outdated entrenched ideologies and concepts held by participants and an ignorant broader community, who erroneously believe the system works for their best interests.

The trend for local governments to provide more and more "feelgood" services, activities, festivals, sporting facilities and events, grants, facilities, subsidies and partnerships that support sectional interests reveals that once they are commenced they become entrenched by default, adding to the ever-increasing public tax burden and LG employee numbers. They cannot be reversed by the ballot box and difficult to reverse by majority vote in Councils.

In June 2011 the Government appointed the independent *Metropolitan Local Government Review Panel* to identify and plan for then anticipated social, economic and environmental challenges facing Perth for the next 50 years. Ten of those 50 years have already passed. It appears that vision has been lost in the wash because the set of reforms currently proposed cannot solve the endemic problems.

That is to say the existing colonial era restrictive system of detached coercive authoritarian government in an all-care and no-responsibility environment is to be retained, but will be fine tuned into more complexity in an attempt to protect and preserve its core concepts and public persona.

The existing political representational concept assumes that a self-nominated jury of five to fifteen elected persons can accurately represent the needs, wants and aspirations of a community of one or two hundred thousand citizens – without collective reference to them. Many in the community have grown up with local government being an integral element in their political system of governance and, in ignorance of alternatives and a belief it positively contributes to their wellbeing and amenity, support its retention. Hence community sentiment suggests that approach may be the only politically viable methodology option – i.e. we are stuck with it.

However, for numerous reasons, the existing model cannot result in a system of local government capable of producing the core outcomes essential to public benefit in a liberal democracy – because the existing repressive arms-length system not only locks out public participation but actively works to discourage it.

Councils strenuously avoid face to face interaction their citizens. It is common to experience local laws and procedures that expressly limit, censor, constrain and prohibit public questions, petitions, deputations etc., and strategies to exclude or dismiss "vexatious persons", groups and any individual or organised constructive dissent or disagreement.

Councils refuse to reveal important public information by hiding behind pseudo legal terms such as "confidential", "legal matter", "commercial in-confidence", "contractual matter", "may harm a private individual", "may affect a member of staff", "contract matter", "may invade privacy" etc. etc.

Financial accounting for individual expenses can be hidden under departmental accounts or broad line-item descriptors in accounts to avoid public scrutiny of how public money is spent.

Manipulation of due process includes reckoning petitions or "planning objections" comprising hundreds of signatures as *one* "submission", imposing time limits on dialogue, and refusing preambles to questions to explain their basis.

Official Minutes are manipulated to exclude important detail or to change meaning.

"Public Statements" to Councils are rarely permitted. Written questions and requests submitted directly to the CEO administration more often than not result in polite non-committal gobbledegook responses.

Councils do not want to formally engage with their constituents. They do not want to be challenged.

Local governments behave like a diefied medieval Lord in a castle stronghold on a high mountain governing the peasants in the surrounding fields whilst taxing and exploiting them to support their secure lifestyle. Councils adopt an aloof posture not generally seen elsewhere in Australian society. They talk *down* and not *across* to those they claim to represent.

Local government has become remote government.

Local governments are monopoly enterprises perpetually defaulting to stagnation, delivering less for more. History shows us monopolies eventually self-destruct by ignoring the environment in which they operate and consequences of their actions or inactions – at some point a better alternative will always emerge. Local government must shape up or ship out.

Local Governments like the way things are so tend to resist change that might reduce their discretional power and control over their communities, hence their united opposition to the reform process.

The November 2021 submission to this enquiry by the influential statutory WA Local Government Association (WALGA) lobby organisation and formal Government Partner by official agreement, unites local governments in support of that attitude.

Given our starting point is compromise for mediocrity, our only option for real change is to focus on those elements that might be improved for positive benefit.

4. INTRODUCTION – THE AUSTRALIAN SYSTEM OF GOVERNMENT

The founding principles of Australian society and its chosen form of government are "Freedom, Democracy and the Rule of Law".

The Australian Prime Minister frequently reminds us that Australians live in a "liberal democracy under the Rule of Law". This a longstanding claim from our national leaders that most citizens would accept and believe as true.

For more than a century, Australia's wars have been waged under the banner of "freedom and democracy".

- **Freedom = Liberty = Human Rights**

  The freedom of the individual is paramount.

  "There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny."
  U.S. Supreme Court Justice Felix Frankfurter, United States v. United Mine Workers(1947)

  History tells us *"the price of Liberty is eternal vigilance"*

  "It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."
  Preamble to the Universal Declaration of Human Rights (1948)

- **Democracy**

  Government of the people, by the people, for the people. A system of representative self-government in which all persons, including the government, are accountable under the law

  There is need for first, an open and transparent system of making laws and second, laws that are applied predictably and uniformly. Openness and transparency are essential. If people are unable to know and understand what the law is, they cannot be expected to follow it.
  At the same time, people deserve to know why a particular law has been passed and why they are being asked to obey it.

- **The Rule of Law**

  "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."
  Article 39, Magna Carta (1215)

  "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

. . . [W]henever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government." Declaration of Independence (1776)

"I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law." Martin Luther King, Jr., "Letter from Birmingham Jail" (1963)

"[N]either laws nor the procedures used to create or implement them should be secret; and . . . the laws must not be arbitrary."
U.S. Court of Appeals Judge Diane Wood, "The Rule of Law in Times of Stress" (2003)

- **Restriction of Government Power and Control by the Elected Representative Parliament**

"If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." James Madison, Federalist Paper No. 51 (1788)

The Australian framework for government, known as "the separation of powers", is intended to ensure that no one person is able to gain absolute power and stand above the law. Each branch of our government has some level of control or oversight over the actions of the other branches.

"Due Process" with an inalienable Right of Appeal to a higher authority is mandatory to prevent abuse of power and restrict corruption - but under the present system a local government Council is the Elected Representative Parliament overseeing itself in its own role as the government

THE HIGH COURT OF AUSTRALIA has determined:

"The Australian Constitution limits the power of parliaments to impose burdens on freedom of communication on government and political matters.

No Australian parliament can validly enact a law which effectively burdens freedom of communication about those matters - unless the law is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government in Australia.

Freedom of speech is a common law freedom. It embraces freedom of communication concerning government and political matters. The common law has always attached a high value to the freedom and particularly in relation to the expression of concerns about government or political matters[114].

Lord Coleridge CJ in 1891 described what he called the right of free speech as "one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done". (end quote)

Source: High Court of` Australia: Monis v The Queen [2013] HCA 4 (27 February 2013)

It is incumbent on the Crown to inform our local governments of this and similar judgements, because they continue to deliberately ignore the constitutional civil and political rights of their constituents. The reason being there is no higher authority willing to keep them in line or bring them to account.

5. INTRODUCTION – THE WESTERN AUSTRALIAN SYSTEM OF GOVERNMENT

In 1996, the Parliament Of Western Australia, Joint Standing Committee On Delegated Legislation, declared:

"The system of government in Western Australia is that of a parliamentary democracy based on the rule of law."

Source: http://www.parliament.wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/783AB65DEB9BC334482578320034D824/$file/slguide1.pdf

Note: This declaration coincided with the introduction of the Local Government Act 1995 – an Act that voids hard won democratic principles and processes.

A fundamental and vital principle in a democratic society operating under The Rule of Law is a right for any citizen to ask questions of his or her government about their policies, practices, procedures, plans, decisions, actions, errors, omissions, motives and performance - that is, to ask who, what, how, when, where and why.

That principle is expressed as a RIGHT by the Western Australia Criminal Code

S3. Construction of statutes, statutory rules, and other instruments
The following rules shall, unless the context otherwise indicates, apply with respect to the construction of statutes, statutory rules, local laws, by-laws, and other instruments,

S4. Offences are only those in WA's statute law with some exceptions

S45. Acts excepted from s. 44

It is lawful for any person —

(a) To endeavour in good faith to show that the Sovereign has been mistaken in any of Her counsels; or

(b) To point out in good faith errors or defects in the Government or Constitution of the United Kingdom, or of the Commonwealth of Australia, or of Western Australia as by law established, or in legislation, or in the administration of justice, with a view to the reformation of such errors or defects; or

(c) To excite in good faith Her Majesty's subjects to attempt to procure by lawful means the alteration of any matter in the State as by law established; or

(d) To point out in good faith in order to their removal any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of Her Majesty's subjects.

S5. No civil action for lawful acts; saving

When, by the Code, any act is declared to be lawful, no action can be brought in respect thereof.

Furthermore, S75 the *Western Australia Criminal Code Part VII, Chapter X — Offences against political liberty* prescribes:

75. Interfering with political liberty
Any person who by violence, or by threats or intimidation of any kind, hinders or interferes with the free exercise of any political right by another person, is guilty of a crime, and is liable to imprisonment for 3 years.

Summary conviction penalty: imprisonment for 12 months and a fine of $12 000.

Note the term *"intimidation of any kind".*

The above civil and political rights are also enshrined in Commonwealth law.

Notwithstanding a local government is "a natural person" in law the local government system thrives on intimidation with impunity – i.e. "do as we say or else".

Surely coercive Councils and their Administrations who deliberately and systematically prevent political enquiry and critique "*by threats or intimidation" (*such as being declared *"vexatious"* for

seeking responses to matters of community concern) constitute a breach of S44 and S75 above – or if not, surely a failing by design to uphold the principles enshrined in them ?

The mandatory 2021 Local Government (Model Code of Conduct) Regulations do not uphold them.

Local Law Standing Orders do not uphold them.

Policies, Procedures, Practices and Processes that limit openness, transparency, access and accountability do not.

The Freedom of Information Act 1992 incorporates complexities of language and process that enable a CEO to lawfully protect the Council, CEO and Officers from public scrutiny – particularly when attempting to expose corruption.

By not only allowing, but enabling, local governments to openly serially ignore or breach S44 and/or S75 of the *Western Australia Criminal Code*, the Western Australia Department of Local Government and its successive Ministers have determined it is not a system defect to be remedied.

6. CONSTITUTIONAL FRAMEWORK

The constitutional framework of the system of **elected local government** in Western Australia is maintained as required by Part IIIB of the Western Australia Constitution Act 1889.

Local governments are constituted jointly under the Western Australia Local Government Act 1995 and the Western Australia Local Government Act 1960 – retitled Local Government (Miscellaneous Provisions) Act 1960. This duality is administratively convenient for Parliament but creates confusion.

The Interpretation Act 1984 also applies but is administered separately by the Attorney-General's Department of Justice, so is largely ignored by local governments. It was clearly ignored by the drafters of the Local Government Act 1995.

These primary constitutional Acts are supplemented by an interconnected cross-linked matrix of more than one hundred ancillary stand-alone Acts granting equal powers to local governments that have become the bread and butter of local government administrations as the hand of bureaucracy squeezes tighter and tighter over peoples' lives.

The most influential of these laws that affect local governments is the Planning and Development Act 2005, administered by the Department of Planning, Lands and Heritage.

This department serves four Ministers, being Planning, Heritage, Aboriginal Affairs and Lands. This structure for government is further complicated by the Western Australia Planning Commission, Aboriginal Affairs Planning Authority, Heritage Council of WA, Metropolitan Redevelopment Authority, plus a suite of statutory boards and committees – and the ubiquitous Development Assessment Panels.

The WA Planning Commission Explanatory Booklet – "Introduction to the Western Australian Planning System" – explains the role of local government.

2.4

Local government

Local governments are involved in planning for local communities by ensuring appropriate planning controls exist for land use and development. They do this by, amongst other things, preparing and administering their local planning schemes and strategies.

Local planning schemes contain planning controls such as designation of appropriate land-uses, residential densities and development standards. Local governments must base their planning decisions on the provisions and controls in their local planning scheme.

All local government planning schemes and policies are required to be consistent with State Government planning objectives and requirements.

In the Perth region and other areas subject to region planning schemes, local governments are required to ensure their local planning schemes are consistent with the relevant region planning scheme.

*The **WAPC has delegated** to local government the power to determine most development applications under the region schemes.*

In addition to their role in development control and local planning policy setting, local government authorities are invited by the WAPC to provide comment on proposals for subdivision and amale, gamation of any land within their jurisdiction."

Of note from the above is that an appointed "commission" and its "commissioner" are superior to an elected local government legislature.

There are also similar arrangements for main roads, water, sewerage, drainage, gas and electric power utilities, environment, waste management, bushfire management, animal control and other agencies in the mix.

Local governments also interface with Commonwealth law in relation to airports, ports and telecommunication authorities.

In addition, under a completely separate regime, local governments are heavily dependent upon grants and subsidies from State and Commonwealth agencies, thereby providing opportunity for coercive relationships beneficial to the grantor – such as project terms and conditions that unreasonably bind the local government or commit the local government to long-term liabilities.

All of these agencies interface with local governments in a superior controlling complex matrix hierarchical relationship.

None are elected.

In other words, independent autonomous local governments are actually subordinate to a string of State and Commonwealth government departments and agencies that operate outside the scope of the Local Government Act 1995.

It is significant to this submission that elected Councillors are not required by their constituting Acts to possess any knowledge or expertise in any functional areas, so must wholly rely upon advice from their administrative officers and external agencies to assist decisions making.

However, notwithstanding the Local Government Act 1995 also lacks a requirement for Contracted CEO's and officers to posses adequate expertise in those functions, Councils are still required to rely upon officer advice for their decision making and cannot commission independent external advice.

For expediency, much of the advice becomes subjective.

Furthermore, in critical functions such as town planning, a local government is likely to employ only one or two officers expert in that field so personal bias will become entrenched as policy by default.

7. SUBSIDIARY LEGISLATION

In addition to the constituting Acts, the functions and powers granted by Parliament directly to local governments are supported by a further suite of Regulations, Codes, Standards, Directions, Notices, Orders and other Disallowable Instruments.

Parliament has also directly granted powers to local governments enabling them to discretionally make subsidiary legislation, including Local Laws and Town Planning Schemes, Directions, Notices and Orders, that further enhance the powers provided by the above Acts.

These powers are set out in the Act in the following terms:

> ***3.5. Legislative power of local governments***
> *(1) A local government **may** make local laws under this Act prescribing all matters that are required or permitted to be prescribed by a local law, **or are necessary or convenient** to be so prescribed, for it **to perform any of its functions under this Act.***
> *(2) A local law made under this Act does not apply outside the local government's district unless it is made to apply outside the district under section 3.6.*
> *(3) The power conferred on a local government by subsection (1) **is in addition to any power to make local laws conferred on it by any other Act.***
> *(4A) Nothing in the Building Act 2011 prevents a local government from making local laws under this Act about building work, demolition work, a standard for the construction or demolition of buildings or incidental structures, or the use and maintenance of, and requirements in relation to, existing buildings or incidental structures, as those terms are defined in section 3 of that Act.*
> *(4B) Nothing in the Health (Miscellaneous Provisions) Act 1911 or the Public Health Act 2016 prevents a local government from making local laws under this Act about matters relating to public health (as defined in the Public Health Act 2016 section 4(1)).*
> *(4) Regulations may set out —*
> *(a) matters about which, or purposes for which, local laws are not to be made; or*
> *(b) kinds of local laws that are not to be made, and a local government cannot make a local law about such a matter, or for such a purpose or of such a kind.*

In addition, explanatory documents and notices are issued by the Minister for Local Government and other relevant Ministers to Councils and administrative staff from time to time to assist interpretation and application.

The above statutory constitutional framework provides a very broad range of discretional powers that are beyond the capability of most individuals to challenge.

However, notwithstanding the existing broad powers available to local governments, they now seek further powers of "general competence" to enable unrestricted power over their subjects.

Consequently most people find it easier to submit rather than question, dissent or oppose.

Fear of recrimination is a strong motivator for compliant silence.

All of the above creates the illusion that elected Councils of local governments actually make a constructive improvement to government of the state.

In reality they are the lowest level of the state bureaucracy who vigorously enforce their limited powers to justify their existence. This trait can be shown through their prosecution activity and

discretional conditions imposed upon anyone who does not comply or wants to do anything that means change.

The socialist “we know what is best for you” ideology prevails.

Meanwhile the State props up local government as it is by continuously granting concessions to it to cover up its mediocrity and accommodate its shortcomings, hence it is clear the State wants local government to survive and prosper – regardless of its contribution to society.

8. THE WESTERN AUSTRALIA LOCAL GOVERNMENT ACT 1995

The core law that establishes, constitutes and legitimises local governments is the Western Australia Local Government Act 1995, which prescribes:

> ***2.5. Local governments created as bodies corporate***
> *(1) When an area of the State becomes a district, a local government is established for the district.*
> *(2) The local government is a body corporate with perpetual succession and a common seal.*
> *(3) The local government has the legal capacity of a natural person.*

It is this section that creates much confusion in the minds of participants at Council, administrative and public level because as one reads the various applicable Acts and Regulations it becomes clear that the term “local government” may apply to all or any of the Council, the contractor CEO, or officers, or contractors, or agents when performing functions.

It is obvious neither Council, Committees, Councillors, the CEO, nor individual officers are a body corporate, yet they stand and declare they are “the local government”.

Furthermore if the local government is the prescribed *“natural person”*, another natural person cannot be it.

At best all or any of the above can only be an authorised agent of the local government, possessing powers limited to lawfully legitimised, documented and registered delegated functions and authorities.

Experience shows that this core constitutional specification is faulty and needs clarity.

9. AUTONOMY OF LOCAL GOVERNMENT

The above constitution creates a structure whereby each of the 139 local governments (plus unspecified Regional Local Governments (S3.61,3.66 and 3.69) plus WALGA (S9.58) is an independent entity under the Crown, reporting directly to the Governor, sitting alongside State Public Sector agencies and bypassing the Minister for Local Government.

Local governments govern on behalf of the Crown but do not bind the Crown.

The Minister for Local Government has some roles essentially of a monitoring, supervisory and advisory nature, including making generic Regulations and issuing Governance Bulletins, advisory guides etc, however Ministers of other portfolios such as lands, main roads and

planning have far greater control over local government activities than the responsible LG Minister.

The Minister for Local Government cannot cancel, amend, or set aside a decision of a local government, or interfere with the operation of a local government (the corporation), consequently local governments operate in a statutory environment of all-care and no-responsibility.

The only real accountability mechanism is that the Minister for Local Government may suspend or dismiss a Council or Councillors – a power exercised only in extreme circumstances – but not the local government itself or its independently contracted employees.

Quite clearly, if a Council is bound to accept the advice of its officers in good faith and ignorance, then it is the officers, employed as independent contractors, who should bear responsibility for shortcomings and failures.

The irrelevant "Standards Panel" system (S5.122) of token disciplinary measures provides no assurance to the public for openness, transparency and accountability in local government decision making or conduct behind closed doors. The Standards Panel system suppresses political debate, discourages critique in Council, and turns Councillors into neuted robots afraid to speak for fear of reprisal.

The proposed *Chief Inspector of Local Government* whose role will include overseeing complaints relating to local government CEO's (Proposed Reform 1.1) and the supporting *Panel of Local Government Monitors* (Proposed Reform 1.2), not only subverts the power of a Council to discipline its only employee, but also will require evidence to support a complaint.

Note this proposal voids the independence of local government by enabling State Government scrutiny and correction of local government issues.

Given the CEO is the holder of all evidence internal to the body corporate and Councillors and the public are prevented from looking in the window, it follows that complaints will be mostly impotent, a mere nuisance and yet another lengthy process designed to deliver "natural justice" to the CEO.

Because local governments have constitutional autonomy and operate in a generally unsupervised environment they are free to do or not do whatever they choose.

To underscore the point of no accountability, local governments may insure against reckless indifference, criminal negligence, injurious affection, injury to persons, damage to property, misfeasance, malfeasance, non-feasance and payment of court imposed costs and fines resulting from criminal prosecution.

Their constituents, who pay for it all, can only hope for the best.

10. PURPOSE AND SOCIAL FUNCTION OF LOCAL GOVERNMENT

The Western Australia Local Government Act 1995 prescribes:

> ***3.1. General function***
>
> *(1) The general function of a local government is to* ***provide for the good government of persons in its district.***

(2) The scope of the general function of a local government is to be construed in the context of its other functions under this Act or any other written law and any constraints imposed by this Act or any other written law on the performance of its functions.

(3) A liberal approach is to be taken to the construction of the scope of the general function of a local government.

3.2. Relationship to State Government

The scope of the general function of a local government in relation to its district is not limited by reason only that the Government of the State performs or may perform functions of a like nature.

In other words, a local government can lawfully do more or less what it wants to do or not do in the name of "government".

When given "the power of general competence", local governments are free to step outside the boundaries of a liberal democracy state and become totalitarian enterprises.

Notwithstanding S3.1 (1) refers only to "persons", it is clear local governments extend that power to property and infrastructure.

Further constitutional definition of function and purpose are provided by Sections 2.6, 2.7 and 3.4:-

2.6. Local governments to be run by elected councils

(1) Each local government is to have an elected council as its governing body.

2.7. Role of council

(1) The council —

(a) governs the local government's affairs; and

(b) is responsible for the performance of the local government's functions.

3.4. Functions may be legislative or executive

The general function of a local government includes legislative and executive functions

2.7. Role of council

(2) Without limiting subsection (1), the council is to —

(a) oversee the allocation of the local government's finances and resources; and

(b) determine the local government's POLICIES.

Sections 2.6, 2.7 and 3.4 are explicit in referring to *"the local government".*

Section 2.7 (2)(b) is explicit in prescribing:

the council is to determine the local government's POLICIES.

Consequently Parliament has prescribed it is **Council alone who is to determine the functions and policies to be applied to both itself and its administration.**

In addition, the Local Government Rules of Conduct Regulations 2021 prescribe:

8. Personal integrity

(2) A council member or committee member —

(b) must comply with all POLICIES, procedures and resolutions of the local government.

Note: Under S5.42 S5.43 – "Delegation of some powers and duties to the CEO", a council member or committee member (b) must comply with all POLICIES, procedures and resolutions of the local government made by the CEO, being the local government

9. Relationship with others

A council member, committee member or candidate—
(b) must deal with the media in a positive and appropriate manner and in accordance with any relevant POLICY of the local government; and

Consequent to Sections 2.6, 2.7 and 3.4, it can be concluded from the above that the general function of a local government for the good government of persons in its district includes legislative and executive functions UNDER A FRAMEWORK OF POLICY

11. THE BODY CORPORATE

The conceptual model for the present system of local government in WA is defined in the Local Government Act 1995 - ***S2.5. Local governments created as bodies corporate***.

Thereby the 1995 Act created a unique stand-alone public sector incorporated entity to replace the former traditional "Municipal Government" model inaugurally constituted by the Local Government Act 1960.

Each local government corporation is notionally owned by itself and is notionally self-governing within limits determined by Parliament and the State Government of the day.

The corporation owns and controls *in its own name* all of the public assets held in the Municipal Fund and Trust accounts, as well as investments, freehold lands and improvements thereon.

It also holds and manages assets such as roads, drains, waterways, reserves owned by the Crown.

Prior to 1995, the Municipal Fund, Trusts and public assets were directly owned by the Inhabitants of the Municipality. Now they are wholly owned by the corporation on behalf of the inhabitants – a subtle but important difference because individual citizens have been made third-parties, no longer having direct "shareholding" in their District.

Freehold lands owned by the body corporate are not Crown lands – i.e. public lands, so use, lease or disposal is discretional upon the local government's option.

The corporation is governed by a Council of Member Councillors, elected by the people of the local government District to independently govern the corporation on their behalf.

The Council employs a CEO under a civil contract of employment, to independently manage the corporation on its behalf under an arms-length relationship.

The CEO in turn employs whatever human, physical and financial resources he or she determines are necessary to govern the District. Council's role is to watch and listen to their CEO as their CEO decides and acts on its behalf.

The term "govern" is not defined by the Act hence its interpretation and effect is "open-ended".

For convenience, the organisation so created is often described as "The Administration".

12. THE DOWNSIDE

Despite the best intentions of S2.6, 2.7 and 3.4 of the Act, Parliament has not provided for a system of "select committees" as used in State and Federal Parliaments to oversee and scrutinise the administration of Council's policies and laws.

There is no provision for Councils to perform the functions prescribed by S2.6, 2.7 and 3.4, because only the Mayor or President may interface and engage with the CEO.

If the Mayor or President is a weak persona and the CEO strong, or if the Mayor or President is unfamiliar with law and/or detail of the body corporate's operations, or if the Mayor or President have a close friendly relationship with the CEO, then Council can only watch helplessly and powerlessly as it is manipulated.

Council also involves itself in the administration of the local government by virtue of S3.4 – *executive functions.*

Thus there is no independent body who has the power and functional authority to independently oversee the efficiency and effectiveness of Council's executive activities.

This is a great defect in the system.

Noting that Council is a political entity there should be sufficient practical dissent within Council's ranks to form an effective scrutinising select committee system.

13. POLICY

In Western Australia, the WA Constitution prescribes that it is the Parliament who determines primary core public policy for the government of the state.

It is the Parliament who determines what discrete laws are required to give effect to its core policies to be *administered* by the various departments and agencies.

Giving effect to its policy re local government, the Parliament has determined that local governments shall be constituted as independent autonomous entities with each granted the power to govern their prescribed District and its inhabitants within discrete limits prescribed by Parliament.

Those powers include a power and a duty to make POLICY as an instrument of governance.

"POLICY" is one of the primary elements in the suite of constitutional administrative functions of government.

It can be shown by real world examples that a profound defect in the existing system is the absence of formalised high-level "POLICY" in local governments generally and, in particular, the absence of specific policy to support discrete functional elements of administration.

POLICY is the foundation stone of local government because it is POLICY that defines the scope and depth of a local government functions, powers, responsibilities and thereby accountabilities.

POLICY defines the what, when, where, how and why a function will be LAWFULLY performed and who will perform it.

POLICY serves to define how a local government will serve its community and simultaneously define how a community is to be subject to policy.

Notwithstanding POLICY is the precursor to, and basis for legislation, it is disappointing to see DLGSC, representing the Minister, Executive Council and Cabinet, in its report – "Local Government Reform – Summary of Proposed Reforms", gives POLICY in local government only fleeting mention – despite policy being fundamental to government.

The absence of a clear focus on what "Policy" is and what its proper role should be in the system of government, leaves local governments to figure out the answer themselves in the best way they can – which is what they have always done and a core reason why the local government system is dysfunctional.

Without defined policy, Parliament's expectations and intent are unrealistic and unachievable.

Without defined policy, the community is uninformed, so remains ignorant of what its local government intends for them when interacting with it.

14. POLICY DEFINITION

If it was simply an agent of the State Government (representing the Crown), local government's role would be limited to administering State government policy and laws in a similar manner to a government department. It would not have to think for itself.

In some functional areas it does this already as a routine process.

However, given the broad range of discrete functions and activities local government is required to perform and discretionally chooses to perform (sometimes numbering in the hundreds), it is not possible for a local government to posses the range of expertise and experience essential to performing all statutory and further optional self-created functional responsibilities efficiently and effectively.

The result can only be mediocre performance and inevitable prioritising of functional responsibilities, lowering of performance standards, delayed and incompleted processes and projects, supported by an ever-increasing rates and charges burden to the resident and business operator as local government struggles to realise its visions for itself.

It also creates a bias towards populist projects designed to attract votes.
The ultimate consequence is a society that is uncompetitive in the national and international arenas.

15. PUBLIC POLICY

It is vitally important to understand that in the Commonwealth and State Government spheres, Ministers are allocated portfolios that implement Government POLICY.

Those POLICIES are discreet, mostly assigned to one Minister to devise and administer.

Traditionally, Ministers are advised by their Departments – codified in law by S29 (1)(b) of the Public Sector Management Act 1994.

Collectively they represent GOVERNMENT POLICY agreed and endorsed at Cabinet (Executive Council) level. Thus Ministers speak with one voice on Policy.

Ministers independently employ professional Policy Advisers on their personal staff to assist in policy development. They also take policy advice from industry and professional bodies and lobbyists.

But in Local Government there is no equivalent, because each Councillor has no power to do much other than bring Elector concerns to the local government in the hope of stimulating action, and to assist in making COLLECTIVE decisions.

Individual Councillors are not empowered to devise policies binding the local government, so can do nothing on their own.

Hence POLICY is the domain of FULL COUNCIL - not any one individual Councillor or cohort of Councillors.

Unlike the Commonwealth and State Government political spheres, local government policy cannot be determined BEFORE an election – however following an election the previous Council's Policies prevail unless and until modified or withdrawn.

Therefore, if we disregard the wink and a nod system of communication, the only way POLICY can be devised by Council is for Council to formally sit around the table and thrash it out.

There is neither provision nor requirement or power in the Act for that to happen.

The Act assumes POLICY magically appears out of the sky for Council endorsement and enforcement.

A quick glance at any local government's Local Law Standing Orders for meetings of Council and its Committees shows Policy Development under that regime is impossible.

Committees comprising Councillors have no powers to look into the body corporate organisation to investigate, research, ask questions, view documents or interact with staff for the purpose of policy development – Councillors are neuted.

So the practical solution is for Council to delegate the task to its friendly CEO, who will devise policies designed to advantage his or her function and grant to those functions as many discretionary powers as possible.

This approach inevitably leads to Council becoming a powerless bystander.

Of course the Act still notionally places full responsibility and accountability to Council, so the CEO gets a free run under policies endorsed by Council against itself.

The result is neither Council nor the CEO are responsible and accountable in law for their actions, inactions, errors, omissions or negligence.

16. ADMINISTRATION

The Local Government Act 1995 prescribes:

> **5.2. Administration of local governments**
> The council of a local government is to ensure that there is an appropriate structure for *administering* the local government.

Administration of the local government is effected by the contractor employee CEO, who is responsible for a range of prescribed functions set out in S5.41

> ***5.41. Functions of CEO***
> *The CEO's functions are to —*
> *(a) advise the council in relation to the functions of a local government under this Act and other written laws; and*
> *(b) ensure that advice and information is available to the council so that informed decisions can be made; and*
> *(c) cause council decisions to be implemented; and*
> ***(d) manage the day to day operations of the local government;*** *and*
> *(e) liaise with the mayor or president on the local government's affairs and the performance of the local government's functions; and*
> *(f) speak on behalf of the local government if the mayor or president agrees; and*
> *(g) be responsible for the employment, management supervision, direction and dismissal of other employees (subject to section 5.37(2) in relation to senior employees); and*
> *(h) ensure that records and documents of the local government are properly kept for the purposes of this Act and any other written law; and*
> *(i) perform any other function specified or delegated by the local government or imposed under this Act or any other written law as a function to be performed by the CEO.*

The prescribed functions of the CEO DO NOT include complying with or implementing Council's Policies.

The prescribed functions of the CEO DO NOT include devising Policy, because pursuant to S2.7 (2)(b) POLICY is the domain of Council

However thanks to some clever wordsmithing, *"S5.42 Delegation of some powers and duties to the CEO"* authorises Council to flick-pass its policy making responsibility to its CEO.

Furthermore, S5.44 enables the CEO to flick-pass that power on to a subordinate employee.

The limitations imposed by S5.43 are not applicable because policy making by Council under S2.7 is not considered important enough to require an *absolute majority* decision.

This may be a deliberate strategy in the Act because:

> ***1.9. Decisions by absolute majority***
> *The footnote* ***Absolute majority required****, applying to a power conferred in this Act, means that —*
> *(a) if the power is conferred on a local government, it can only be exercised by or in accordance with, a decision of an absolute majority of the council; or*
> *(b) if the power is conferred on any other body, it can only be exercised by or in accordance with, a decision of an absolute majority of that body*

However, the CEO is not *"any other body",* because the CEO is a natural person holding office. That office is not a "body".

The CEO is not the *"body corporate"* but an authorised office having sole responsibility for its management. It is impossible to make "*a decision of an absolute majority of that body".*

> Note: One bizarre policy exception is the 2019 addition to the Act, that prescribes in S5.128 Council is not only to have a mandatory policy for professional development of its Members but must revise it after each ordinary election. That section requires a unique absolute majority vote notwithstanding that generic policy making under S2.7 does not.
>
> It is curious that the professional development programme is discretional via Council's Policy but the mandatory training course prescribed by Regulations under S126 carries penalties for non-compliance. Perhaps Parliament envisages overseas study tours, attendance at interstate and overseas conferences, association memberships and even sponsorship of university degree courses as legitimate personal professional development for Councillors.
>
> It is also curious that the selection and appointment of a CEO is not governed by mandatory Policy UNLESS S5.39C applies.

It is important to note that the contract of employment between the local government (body corporate) and the CEO is a civil contract that cannot lawfully void or diminish statutory functions, duties, responsibilities and accountabilities for that office.

Council is the master and the CEO is the servant. That is the LAW.

Notwithstanding the importance of POLICY as a core element in Council functions, S5.41 is deficient insofaras it fails to require the CEO to adhere to and implement Council Policy in all aspects of the CEO's functions.

In contrast, the Public Sector Management Act 1992 prescribes:

> ***7. Public administration and management principles***
> *The principles of public administration and management to be observed in and in relation to the Public Sector are that —*
>
> *(b) the Public Sector is to be so structured and organised as to achieve and maintain operational responsiveness and flexibility, thus enabling it to adapt quickly and effectively to changes in government policies and priorities;*

The current Act assumes the CEO is provided with the necessary human, financial and physical resources essential to fulfil the prescribed functions.

Note also the Act does not prescribe if it is Council or the CEO who is responsible for creating/providing the financial resources held in the Municipal Fund and Trust Fund pursuant to S6.6. 6.7 and 6.9

It can be readily seen that unless and until a Council provides a clear set of Policies to guide its CEO and "administration", the existing dysfunction and confusion of roles will prevail.

However in the real world, in order to fulfil personal contractual obligations under S5.41, a proactive CEO will make Policy on the run to address issues as they arise, whereas a passive CEO will consult Council and not act until Council provides direction.

Either approach entails risk. The necessity for Council to perform is clear.

A REAL WORLD EXAMPLE

The City of Armadale, an award winning local government, has a comprehensive *Policy Manual (270 pages as at 08/09/2021)* and a comprehensive detailed *Delegations Register* of 209 pages (of which only Part 1 – 112 pages is publically available).

The *Policy Manual* was periodically reviewed over the years, but recently withdrawn to be completely re-written. It is now a shell of its former self with only a handful of Policies now reviewed, approved and in force.

Taking the new Policy: ***"Communication between Elected Members and City employees"*** as a starting point, the POLICY is:-

> *"Elected members must direct requests for, or concerns about resources or services to the Chief Executive Officer, or where the Chief Executive Officer determines (either case by case or generally), the relevant Executive Director."*

The key terms are ***"request"*** and ***"must"***

Of extreme importance to this submission, this Policy LIMITS enquiries to "*requests for, or concerns about resources or services".*

Outside that scope there is no Policy. That's it.

Clearly the CEO and/or the *relevant Executive Director* are in total control over communications between Elected Members and the body corporate – in both directions.

The Policy does not require any person to respond, or any time frame for response.

Councillors are muzzled – yet they formally endorsed and approved this crazy arrangement that voids their capacity to govern.

When we look at the City's ***Delegations Register*** we find numerous delegations not supported by POLICY.

In many cases the delegation instrument expresses itself as a "policy".

Taking the "Introduction" as an example, it says:- "The local government may also delegate the exercise of any of its powers to Committees pursuant to section 5.16, other than those under Section 5.17(1)."

There is no Council POLICY for that delegation and again we run into the issue of "who is the local government?"

17. POLICY AND LAW

To be lawful, Policies must be supported by enabling legislation.

Discretional policy without legitimising legislation is unlawful. This principle must be communicated to Councillors and Officers.

Political policy *precedes* law whereas administrative policy comes *after* legitimising law.

Policies are ALWAYS discretional and may be ignored or modified on a case by case basis by those empowered to so do.

Policy should be as generic as practicable and limited to guidance for behavioural and decision making principles in prescribed circumstances.

Policies are not RULES – but can be translated into rules.

Policies are not LAW and must not be seen as a device to replace, manipulate or set aside law.

However the Local Government Acts 1960 and 1995 and their Regulations include much policy, expressed as laws, practices, processes, procedures or rules. In these cases policy has been predetermined by the state and is mandatory.

Historically, local governments have preferred to make policy on the run to avoid being locked into, or constrained by, predetermined positions on issues. The absence of a formal policy for an issue enables Councils to make determinations on a case by case basis that appear to be based upon precedent, fairness, equity, standards and justice – because there is no comparative standard.

That approach ignores the statutory reality that Councils of local governments are executive decision making bodies created to administer the laws of the state as agents of the Crown – i.e. Councils are not free to make new public policy on the run to suit their vested interest – or to support legalised preferential bias or to legitimise unlawful acts.

There has been considerable confusion in this aspect of Council function, so clarity is essential to bring local government attitudes back to their prescribed statutory role and function.

Their predisposition to acquiring more power (the quest for "general competence") and discretion in decision making processes and outcomes, under minimal scrutiny, has led them to habitually exceed their scope and authorities, creating an environment conducive to manipulation of due process and corruption.

The Local Government Act 1995 prescribes at Section 2.7:

> ***2.7. Role of council***
>
> *(1) The council —*
>
> *(a) governs the local government's affairs; and*
>
> *(b) is responsible for the performance of the local government's FUNCTIONS.*
>
> *(2) Without limiting subsection (1), the council is to —*
>
> *(a) oversee the allocation of the local government's finances and resources; and*
>
> *(b) determine the local government's POLICIES.*

This mandatory requirement is not specific as to what constitutes "policy", its scope, interpretation, or how it is to be applied, leaving Councils to discretionally determine their policy paths.

Policy must be devised and documented before the event – not after it. It's purpose is to guide and inform.

It is at this point in the concept that local government has run off the rails and lost its way. The reason local government has proven dysfunctional is that it has not understood its role in the overall system of government.

18. POLICY APPLICATION

Policy in a local government must be developed and applied in the separate streams of function – Council and Administrative as explained above.

ALL Policies must be documented and issued as "controlled documents", containing their authorisation by Council, issue date and revision status.

Superseded versions should be removed from circulation.

ALL Policies should be displayed on the Local Government's website for public information and advice, to support the concepts of "openness and transparency" and to stimulate public input to improve government.

Without public scrutiny, local governments become secret societies.

19. POLICY DEFINITION

Defining and understanding the generic term "POLICY" is challenging because it is one of those terms that everyone knows well but do not really know what it means. Its definition is wide and varying depending upon one's defining source and the policy intent. The widespread use of "Policies" for insurance that are just complex legal contracts, does not help understanding *"public policy", " government policy"* and organisational *"corporate governance"* policy.

For the purposes of the Local Government system, Policy may be defined as a formalised "attitude" or "approach" to issues, matters or situations.

Policy evolves through an incremental sequential process comprising the following elements:

- perception - the way we see situations, matters, conditions or need
- attitude or opinion - how we react to those
- ideology - formalised attitude and priority
- policy development - the process of creating policy
- definition - expression of agreed formal organisational policy
- legislation - codification of ideology into law
- communication - communication to those required to comply
- administration - execution
- enforcement - supervision and remedial action for non-compliance
- review and revision - continuous improvement process

Policy describes HOW an organisation will respond to a particular situation or circumstance, and will define the scope of application and conditions for compliance.

Policy must be relevant and contemporary hence must be reviewed and revised in an environment of a commitment to continuous improvement.

Local Government Policy may be internally organisationally focused (the body corporate) or externally to the broader community (the governed).

20. POLICY DEFINITION BY FUNCTION

Definition and clarity of **POLICY** are essential to the five core functional areas aligned with the statutory functions of local government as expressed in the Local Government Act 1995;

- "legislative policies" to inform and guide the Council when performing its statutory and discretional functions and duties as a legislation making body

- "executive decision making policies" to inform and guide the Council when performing its statutory and discretional functions and duties as an executive decision making body

- "administrative" or "functional" or "organisational governance" or "governance" policies to inform and guide the CEO and key decision makers in their internal operation and management of the local government organisation, as well as their interpretation and application in service of the community

- "community government policies" to inform and guide the community in understanding their rights, responsibilities, remedies and accountabilities in compliance with the above and legislated requirements

- "communication policies" to inform and guide the Council and its administration in how to communicate with their citizens ("the governed") and conversely, how citizens can communicate with their elected Members, Council and its administration.

  Given issues or matters can only be brought to Council by either a Councillor or the CEO, the division of function must be clarified for effective political representation on behalf of the electorate – i.e. if a matter is presented by writing to the CEO it, by default, bypasses the political representation process and may never be brought to the attention of Council.

  To give effect to *S2.10. Role of councillors*, to ensure Councillors are aware of community concerns it could be constructive for the CEO to formally provide a copy of correspondence to relevant Ward Councillors, or if no wards, all Councillors.

The Local Government Act 1995 does not prescribe how often Policies should be reviewed and updated to suit a changing social environment, or in response to the attitudes, preferences and influences of new incoming Council Members resulting from elections every two years (S4.5).

Importantly, POLICY has different meaning and effect at different levels in the higherarchical system of government.

Policy is often undocumented and conveyed orally by word of mouth, particularly where the subject matter of the policy is contentious – such as not employing or preferring certain classes of person, not using or preferring certain contractors or suppliers, manipulation of land zoning or land use classifications, not supporting new infrastructure or parks in certain Wards etc. This class of covert policy never sees the light of day in Council or Committee Minutes.

Undocumented planning policy often appears when a development application is for a land use that is not defined in an existing category – such as childcare centres in residential zonings or non-retail/commercial uses in a retail precinct.

21. COUNCIL POLICIES

Council should develop and comply with policies designed to provide its Members with guidelines for the efficient and effective function of Council as a legislature, and requirements for governance of the body corporate for which it is responsible.

The object of such policies are “lawful legitimisation”, “order” and “conduct”.

Council policies may effectively include extracts from relevant Acts and Regulations.

Policies for “governance” of the body corporate are required to give effect to S2.7 (1) of the Act. Noting there is a statutory division between Council and its CEO/officers, this class of policies belongs in the exclusive domain of Council and should not be confused with operational policies made to give effect to S5.41.

Because Operational Policies affect individual citizens when discretionally interpreted and applied by Officers, to prevent excessive discretional powers being granted to Officers it is essential Operational Policies be approved by Council.

It is implied in the Local Government Act 1995 that the CEO will provide administrative support to Council. This is too vague and should be codified in law.

The present arrangement is that the WALGA pro-forma CEO contract requires the CEO to execute decisions (S5.41c) and policies (not required by S5.41) of Council – as a contractual commitment. Obviously if said Policies do not exist then compliance cannot occur. This vital requirement should be enshrined in the LG Act itself as a mandatory duty.

The present arrangements place Council in a position wholly dependent upon the CEO for the provision of advice, information in and records out.

Councils should be free to engage consultants and specialist advisers as needed to address specific issues where it feels the CEO and/or Executive Directors are not providing competent advice or attempting to mislead Council.

Councils should be free to seek independent legal advice to clarify its intended actions.

The present structure puts Council entirely in the hands of the CEO, to be manipulated at will.

Clearly expressed policies can help Councils confidently deal with issues beyond their scope of experience or expertise.

22. ADMINISTRATION POLICIES

This set of policies is required for the administration of the body corporate and for community government.

They are of particular relevance to executing the delegated powers of the CEO.

Policies for “governance” of the body corporate are required to give effect to S5.41 of the Act.

Pursuant to S2.7 these policies must be devised by Council.

All Policies should be documented and include the issue date, revision status, and reference to legitimising legislation and the approving Council meeting.

23. COMMUNITY GOVERNMENT POLICIES

This set of policies is required to guide the community in understanding their rights, responsibilities, remedies and accountabilities in compliance with the above

24. COMMUNICATION POLICIES

This set of policies is required to guide the Council and its administration in how to communicate with their citizens (“the governed”) and how citizens can communicate with their elected Members, Council and its administration.

25. HISTORIC DEFAULT TYPICAL POLICY EXPRESSION

The Local Government (Model Code of Conduct) Regulations 2021 replace the Local Government (Rules of Conduct) Regulations 2007 and took effect from May 2021.

Division 2 sets out the general principles to guide the behaviour of Council Members, Committee Members and Candidates. Division 2 is a codified expression of POLICY and POLICY OBJECTIVES.

Divisions 3 and 4 become RULES by expressing requirements under the term “MUST”.

These Regulations are set out as MODEL Rules, specifying the MINIMUM standard for conduct by Councillors, Committee Members and Candidates for local government election.

Committees can comprise:

- Council Members only.
- Council Members and employees.
- Council Members, employees and other persons.
- Council Members and other persons.
- Employees and other persons.
- Other persons only

Hence the Code of Conduct can bring employees and *“other persons”* such as contractors and volunteers into the net of compliance, accountability and disciplinary action.

This devise is also used to bring the PUBLIC into the jurisdiction of Council Policies for Public Question Time, Petitions and Deputations to enable control over scope and content – a denial of democratic representation to government and freedom of speech.

26. REAL-WORLD POLICY

Given POLICIES are one of Council's core functions, it is reasonable to assume that since Reg 8 prescribes that every Council Member, employee and other persons, *as-applicable,* **must** comply with Council's POLICIES or suffer potential penalty, then to protect its own self-interest, Council is likely to ensure its policies:

(a) do not define how Council will go about its business

(b) do not require objective measurable performance from Council
One strategy in this approach is to proclaim Council's KPI's are the same as those set by Council for its CEO – however the CEO's KPI's are contract confidential so Council's KPI's remain confidential. This is not an expression of the principles of *openness and transparency.*

(c) enable Council to isolate one or more Councillors from Council's decisions and actions when Council is exposed to external scrutiny and accountability

(d) are general in scope and application

(e) are non-specific

(f) will be focused not on Council itself but directed to in-house governance and operational functions, processes and standards by employees, contractors and volunteers (i.e. the administrative organisation) and not to the electorate (i.e. the governed) who are not so easily controlled.

(f) to protect the controlling cabal, and cover up shortcomings and mistakes, will prevent individual Councillors from speaking publically against Council decisions – even when that Councillor has vigorously opposed a decision before the event and has the support of community groups as their nominated representative to Council.

Noting there are is no formal political party involvement in WA local government, this strategy ensures minority Councillors who oppose or vote against a proposal are forced into silence to suffer and support Council's decisions, potentially against the expressed will of their constituents. Minority Councillors cannot draw attention to deficiencies and are forced to support overt corruption and malpractice supported by the controlling cabal

Standing Orders – an expression of Policy, may include provisions suffering money penalty to prevent Councillors from *"speaking adversely"* about Council, Councillors and officers and/or their actions or inactions

This concept is also the foundation for the "vexatious persons" strategy to shut dissenters out

(h) ensure a power for discretional decision making is enshrined in policy authorisations

(i) will be generic where practicable, to enable discretionary interpretation and application by officers at will

27. HOW MANY POLICIES ?

Simple logic tells us that each and every **function** that a local government chooses to perform must be supported by a relevant – preferably discrete – documented policy.

This could easily result in a set of a hundred or more policies for Councillors and officers to digest, comply with and implement in their day to day activities – in addition to all of the applicable Acts and Regulations.

However this is the only option for an organised approach to using Policy as an effective management tool.

The practical effect is not as daunting as first appears, because policies can be classified into streams of organisational functions and activities in directorates or sub-committees of Council – e.g planning, governance, technical, community, audit, roads, parks and reserves, drainage, volunteering, bushfire brigades etc.

Officers generally only need to know those policies that pertain to their roles.

In the case of *delegated powers* officers need to understand they are not Council.

28. PROCEDURES

Policies that are not supported by adequate human, financial and physical resources and documented procedures are nothing more than meaningless symbolic showpiece documents providing lip-service to good government.

They will fail or be ignored.

If a local government organisation is designed for efficient and effective functioning, both senior and rank and file officers need not know policies unless a policy is essential to the performance of their duties.

A well designed management system will be expressed in documented procedures that clearly and simply set out how each function and process will be performed.

Procedures will define the what, when, where, how and why a function (process) will be LAWFULLY performed and who will perform it.

Where delegated authorities are required for defined functions both delegate and delegating authority should be specified.

Procedures will define any output documents from the process described.

Procedures must be controlled documents, containing their issue date and revision status.

Procedures should be issued by the most senior responsible executive, typically an Executive Director, who should remain responsible for relevance, accuracy, scope, content and revision.

Procedures should reference the relevant policy document and, where applicable, relevant Acts and Regulations requirements.

It should be noted that the Local Government Acts and Regulations and other legislation are partly written in the form of procedures. In those cases the applicable policy has been pre-determined by Parliament but may be usefully incorporated into in-house procedures.

Although Officers at Director and Manager level would be able to reliably interpret relevant legislation, Officers performing low level routine functions should perform their role under the LG's procedures rather than an Act or Regulation.

This then requires the local government's corporate governance unit to ensure all procedures comply with current legislation as amended.

29. RECOMMENDATIONS

29.1 To clarify Parliament's intent, MINIMUM requirements for development, expression, documentation and publication of Policy be clearly defined in the Local Government Act

29.2 Noting Councils are political entities, Policy requirements for Councils be defined separately to those for their independently contracted administrations

29.3 Policy for Council's legislative functions be defined separately to those for Council's executive functions

29.4 Policies for community *government* be defined separately to those for corporate *governance*

Note: Political ideology and supporting Policy comes before legislation, whereas administrative Policy executes existing administrative law.

This is confusing in local government because most of a Council's business is executive administration of existing law and policy – both State and Local.

Care is needed to differentiate between the two classes of Policy.

29.5 Policy documents to declare their empowering legislation, date of issue, authorising Council resolution and date of authorising Council meeting, revision status

29.6 Revisions or amendments to Policies to be authorised by Council resolution.

Note one way to ensure all policies reflect the views of current Council is for them to bear the signature of the current Mayor. To show they are highest ranking official, incoming Mayors would want to see their name on such documents.

29.7 EVERY policy to be supported by documented Procedures that define the processes to be applied when performing the functions covered by that Policy.

29.8 Master generic POLICY issued to define the extent discretional variations may be made when applying individual Policies.

29.9 Policy and Procedure preparation, distribution and maintenance to be managed by a corporate management unit under the authority and supervision of the CEO.

29.10 Policy and Procedure preparation, authorisation, distribution and maintenance to be defined in a Regulation – "Mandatory Model Local Law for the preparation, authorisation, distribution and maintenance of Local Government Policies and Procedures"

29.11 Policy and procedure review to be performed at a *maximum* interval of eight years - as is the case for Local Laws.

Reviews to be supported by a review of *effectiveness and performance* and report of findings and recommended changes from the CEO to Council.

Such a process will automatically maintain the organisation's management system at an efficient and effective level.

29.12 To prevent a stream of cases to the Supreme Court, the term "POLICY" be defined in law and enshrined in the definitions of S1.4 of the Local Government Act 1995.

29.13 To improve the State system of local government, DLGSC should publish mandated generic Policies that cover as many functions as are practicable to be applied to all local governments.

29.14 Insert mandatory requirements for a CEO to implement, comply with and administer all Council Policies. This should be in the Act – i.e. not by Regulation – and underscored by mandatory inclusion in every CEO contract.

29.15 Insert mandatory requirements for a CEO to report to Council at regular prescribed intervals on the relevance, efficiency and effectiveness of its Policies as an element of a continuous improvement Policy

29.16 Insert mandatory requirements for a CEO to serve the Council *"as directed"* with rights of appeal to a higher authority where dissidence, or objection, or refusal to comply where a direction is believed by the CEO to be contrary to the lawful duties and obligations of the local government

29.17 Insert a new Section in the Act that defines *"as directed by Council"* and how Directions are constituted – e.g. by resolution/decision, by absolute majority decision etc and how that Direction is to be communicated – e.g. by minutes, by letter, by a formal Notice etc.

25.18 Prohibit the use of the term "received" in relation to CEO and Committee Reports to Council because that term does not indicate any form of action. A Council has a *duty* to address matters presented to it. When a report is simply "received" it indicates that Council, as a decision making body, intends to do nothing at all because there is no defined process or procedure for following up Reports and Recommendations not actioned. Hence when a CEO or Committee Report is "received" ALL matters in that Report are pigeon holed and lapse until some undefined later date – if ever

29.19 Require Councils to record Minuted reasons for not dealing with or deferring issues, matters and business

29.20 Noting that Council is an **EXECUTIVE ADMINISTRATIVE BODY**, rrequire Councils to establish a ***standing select committee*** body having the power and functional authority to independently audit and review the *efficiency and effectiveness* of Council's **EXECUTIVE** activities and to report findings to Council for Council's formal consideration and remedial action.

29.21 Noting that Council is a **POLITICAL ENTITY**, require Councils to establish a ***standing select committee*** body having the power and functional authority to independently audit and review the relevance, efficiency and effectiveness of Council's **LEGISLATIVE**

activities and to report findings to Council for Council's formal consideration and remedial action.

29.22 Noting that Council is a **GOVERNMENT**, require Councils to establish a ***standing select committee*** body having the power and functional authority to independently audit and review the relevance, efficiency and effectiveness of Council's **PUBLIC POLICIES** and to report findings to Council for Council's formal consideration and remedial action.

29.23 Noting the IT (Information Technology) unit in a local government corporation – be it employees or contractors – has direct access to all personal email correspondence between constituents and Councillors– and between Councillors - it follows that such correspondence should be exempt from legal liabilities relating to LIBEL, because without such protection constituents may be exposed to legal action if private correspondence is released without their knowledge or authorisation

29.24 Noting the IT (Information Technology) unit in a local government corporation – be it employees or contractors – has direct access to all personal email correspondence between constituents and Councillors – and between Councillors - it follows that a CEO or other officers may gain covert access to confidential information intended for Council alone, thereby compromising Council's independence and integrity – particularly in a dispute situation between Council and its CEO.

29.25 Consequently, to support fair political dialogue and debate, the Act should provide legal protection to individuals in the above circumstances AND to prohibit release or onforwarding or copying of correspondence without the author's express written permission.

29.26 To clarify the relationship between Council and its CEO, amend the Act to include S29-32 inclusive of the Public Sector Management Act 1994

29.27 Policies intended to **REGULATE** the community – e.g. town planning and development, land use, building, cats and dogs, keeping of livestock, swimming pools, vehicle parking, signage, business operation, firebreaks, festivals and events, care and use of verges, revenue collection, etc. should be expressed in clear unambiguous common language designed to be read by the public and provide direct reference to any applicable laws, codes, standards, and **OPTIONS FOR APPEAL**.

29.28 Policies intended for the provision of a **SERVICE** to the community – e.g. rubbish and waste collection and disposal, recycling collection and disposal, swimming pool use, sporting facilities hire/use, halls hire/use, libraries, driveway construction, inspections etc. should be expressed in clear unambiguous common language designed to be read by the public and provide direct reference to any applicable laws, codes, standards and **CONDITIONS OF SERVICE**.

Such services should not be regarded as a benevolent provision by the local government but a contract carrying obligations to the provider.

End of Submission.