



**SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT**

**REPORT OF THE JOINT STANDING COMMITTEE  
ON DELEGATED LEGISLATION**

**IN RELATION TO THE**

***CITY OF PERTH CODE OF CONDUCT LOCAL LAW***

**Presented by Ms Margaret Quirk MLA (Chairman)**

**and**

**Hon Ray Halligan MLC (Deputy Chairman)**

**Report 4  
September 2002**

## DELEGATED LEGISLATION COMMITTEE

### Date first appointed:

June 28 2001

### Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing orders:

#### **"6. Delegated Legislation Committee**

- 6.1 A *Delegated Legislation Committee* is established.
- 6.2 The Committee consists of 8 members, 4 of whom are appointed from each House. The Chairman must be a member of the Committee who supports the Government.
- 6.3 A quorum is 4 members of whom at least 1 is a member of the Council and 1 a member of the Assembly.
- 6.4 A report of the Committee is to be presented to each House by a member of each House appointed for the purpose by the Committee.
- 6.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 6.6 In its consideration of an instrument, the Committee is to inquire whether the instrument –
- (a) is authorized or contemplated by the empowering enactment;
  - (b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;
  - (c) ousts or modifies the rules of fairness; or
  - (d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review; or
  - (e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable;
  - (f) contains provisions that, for any reason, would be more appropriately contained in an Act.
- 6.7 In this clause –
- “adverse effect” includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;
- “instrument” means –
- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
  - (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;
- “subsidiary legislation” has the meaning given to it by section 5 of the *Interpretation Act 1984*.”

### Members as at the time of this inquiry:

Hon Margaret Quirk MLA (Chairman)  
Hon Ray Halligan MLC (Deputy Chairman)  
Hon Ljiljanna Ravlich MLC  
Hon Robin Chapple MLC

Hon Alan Cadby MLC  
Mr Rod Sweetman MLA  
Mr Peter Watson MLA  
Mr Terry Waldron MLA

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## **Government Response**

This Report is subject to Standing Order 337:

*After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.*

The four-month period commences on the date of tabling.



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**EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE**  
**REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION**  
**IN RELATION TO THE**  
***CITY OF PERTH CODE OF CONDUCT LOCAL LAW***

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**EXECUTIVE SUMMARY**

- 1 The Committee is of the opinion that the *City of Perth Code of Conduct Local Law* is not authorised or contemplated by the *Local Government Act 1995*. This is because, amongst other things, the scheme of the Act does not permit a local government to make a local law under section 3.5(1) to set up a disciplinary tribunal to impose sanctions for breaches of a code of conduct made under section 5.103 of the Act.
- 2 The Legislative Council disallowed the *City of Perth Code of Conduct Local Law* on June 28 2002 at approximately 1:05am at which time it ceased to have effect.
- 3 Given its finding as to the absence of a power in the Act to enable the City of Perth to enforce its Code of Conduct and disallowance by the Legislative Council of the *City of Perth Code of Conduct Local Law*, the Committee makes the following recommendations:
  - 3.1 That a code of conduct be incorporated into the *Local Government Act 1995* to establish uniform minimum standards of behaviour for elected officials and local government staff of all 144 local governments in Western Australia.
  - 3.2 That a tribunal be established by amending the *Local Government Act 1995* and that such a tribunal should:
    - deal with breaches of a uniform code of conduct and any other specified behaviour;
    - not have jurisdiction to inquire into offences under the Act or other matters that would properly be within the jurisdiction of a court;
    - be informal and not be bound by the rules of evidence and to the extent that it is consistent with the former to be bound by the rules of procedural fairness;
    - deal only with matters referred to it by the Executive Director or the Minister so as to avoid the tribunal having to deal with trivial and vexatious matters;

- have the power to fine and suspend councillors and to withdraw the entitlement to reimbursement of expenses and payment of allowances under the Act;
  - have the power to make recommendations to councils in respect of suspension of any privileges granted by the local government to a councillor; and
  - have the power to make recommendations to the local government regarding the disciplining of staff including the CEO for breaches of the code of conduct.
- 3.3 That any amendments to the *Local Government Act 1995* should be made in a manner that will make the tribunal one that is conducive to being incorporated into the proposed State Administrative Tribunal.
- 3.4 The Committee acknowledge that prior to the disallowance of the Local Law the Minister for Local Government and Regional Development, Hon Tom Stephens MLC established an inter-agency working group with representatives from the Western Australian Local Government Association and the Department of Local Government and Regional Development to explore the establishment of a tribunal. By establishing a tribunal and setting uniform minimum standards of behaviour in a code of conduct for the guidance of councillors and local government staff the principal purpose of the Act to provide good government will be strengthened.



# REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

## IN RELATION TO THE

### *CITY OF PERTH CODE OF CONDUCT LOCAL LAW*

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## 1 INTRODUCTION

1.1 In exercising the scrutiny function delegated to it by Parliament the Joint Standing Committee on Delegated Legislation (“Committee”) is to consider whether an instrument is, amongst other things, “authorised or contemplated by the empowering enactment.”

1.2 Under its terms of reference “instruments” defined as :

*subsidiary legislation in the form in which, and with the content it has, when it is published; and*

*an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law.*

stand referred to the Committee for inquiry.<sup>1</sup>

1.3 Pursuant to its function, the Committee resolved to inquire into and report to Parliament on the *City of Perth Code of Conduct Local Law*.

1.4 The *City of Perth Code of Conduct Local Law* was published in the *Government Gazette* on March 15 2002 and tabled in the Parliament on March 19 2002. It became operative 14 days after gazettal on March 29 2002 in accordance with section 3.14 of the *Local Government Act 1995* (“Act”).

1.5 As a result of several concerns with the Local Law the Committee commenced an inquiry and held two public hearings on May 8 and 15 2002. The following witnesses gave evidence:

- Mr Tim Fowler, Principal Legislation Officer, Department of Local Government and Regional Development;

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<sup>1</sup> Subsidiary legislation means any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, town planning scheme, resolution, or other instrument, made under any written law and having legislative effect. See section 5 of the *Interpretation Act 1984*.

- Ms Ricky Burges, Chief Executive Officer and Councillor Clive Robartson Deputy President, Western Australian Local Government Association;
  - Ms Noelene Jennings, Director Corporate Services and Mr Jamie Parry, Manager Corporate Support, City of Perth; and
  - Mr Neil Douglas, Partner, Minter Ellison Lawyers, acting for the City of Perth.
- 1.6 The Committee thanks the witnesses for their cooperation in providing evidence and information to assist the Committee in its inquiry. Several written submissions were also received and are listed in the schedule of submissions and tabled documents in “Appendix 3” of this report.
- 1.7 The Legislative Council disallowed the *City of Perth Code of Conduct Local Law* on Friday, June 28 2002 at approximately 1:05am. It ceased to have operation as from that time pursuant to section 42(2) of the *Interpretation Act 1984*.
- 1.8 In this report the City of Perth Code of Conduct is referred to as the “Code of Conduct” or “Code” to distinguish it from the *City of Perth Code of Conduct Local Law* which is referred to either by its full title or as the “Local Law”.
- 1.9 The Local Law and the Code of Conduct are attached to this report as “Appendix 1” and “Appendix 2” respectively.
- 2 SOURCES OF POWER TO MAKE LOCAL LAWS AND CODES OF CONDUCT AND THEIR ENFORCEMENT**
- 2.1 The Local Law was made under the power contained in section 3.5(1) of the *Local Government Act 1995* (“Act”) which provides:

**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.*

- 2.2 Local laws can be enforced by reason of section 3.10 of the Act. This states:

**3.10. *Creating offences and prescribing penalties***

- (1) *A local law made under this Act may provide that contravention of a provision of the local law is an offence, and may provide for the*

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*offence to be punishable on conviction by a penalty not exceeding a fine of \$5 000.*

- 2.3 The Act also permits the issue of infringement notices and modified penalties of up to \$500 which provides an alleged offender with the option of electing not to have the alleged offence heard and determined by a court.<sup>2</sup>
- 2.4 Codes of conduct are dealt with in Part 5, Division 9 of the Act. All local governments are required under section 5.103 of the Act to make a code of conduct. Section 5.103 provides:

**5.103. Codes of conduct**

- (1) *Every local government is to prepare or adopt a code of conduct to be observed by council members, committee members and employees.*
- (2) *A local government is to review its code of conduct within 12 months after each ordinary elections day and make such changes to the code as it considers appropriate.*
- (3) *Regulations may prescribe the content of, and matters in relation to, codes of conduct and any code of conduct or provision of a code of conduct applying to a local government is of effect only to the extent to which it is not inconsistent with regulations.*

- 2.5 Before taking office all councillors are required by section 2.29 of the Act to make a declaration in the prescribed form that they "...will observe the code of conduct adopted by the [local government] under section 5.103..."<sup>3</sup>.
- 2.6 Section 2.29 creates an offence if a person acts in an office contrary to the section and imposes a penalty of \$5 000 or imprisonment for one year. This penalty applies to a person who fails to comply with the section by not taking oath or affirmation and making the declaration. It does not apply to a person who, once having complied with the section by stating that they will observe the code of conduct, subsequently

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<sup>2</sup> See subdivision 2 of Division 2 of Part 9. Section 9.16(2) provides that a power to issue an infringement notice including a modified penalty should only be contained in a local law when: (a) the commission of the offence would be a relatively minor matter; and (b) only straightforward issues of law and fact would be involved in determining whether the offence was committed, and the facts in issue would be readily ascertainable.

<sup>3</sup> Regulation 13 and Form 7 of the *Local Government (Constitution) Regulations 1996*

breaches the code of conduct.<sup>4</sup> No declaration is required to be made by employees of local governments despite the fact that section 5.103 requires employees to “observe” the code of conduct.

- 2.7 The *Local Government (Administration) Regulations 1996* prescribes certain matters that must be dealt with in codes of conduct<sup>5</sup> but the regulations contain no penalties if a council member, committee member or employee breaches a code of conduct. Unlike the power to make local laws, the requirement under the Act to make a code of conduct does not bring with it any sanction for non-compliance. There is no offence created or penalty prescribed by the Act or its regulations for breach of the requirement that a code of conduct “be observed”.
- 2.8 The majority of local governments have used the model code of conduct developed by the Western Australian Municipal Association<sup>6</sup> as the basis for their codes. Mr Tim Fowler from the Department of Local Government and Regional Development explained the origins of section 5.103 and codes of conduct in evidence before the Committee. He said:

*In the 1990s some local governments off their own bat started to adopt codes; however, some did not. The Western Australian Local Government Association - previously called the Western Australian Municipal Association - produced its own code and councils were encouraged by the department to adopt it. However, some councils at the time dragged their feet a bit and did not adopt it. It was decided when the new Act was put together that we would include a provision to require all local governments to adopt the code. The view at the time was that we would give the head of power for regulations to provide for a uniform code, but for the time being allow local governments to adopt the WALGA code or other variations that they believed were appropriate to their own circumstances. That is how the concept of section 5.103 came to be in the Act. The approach at that stage was fairly low key to require them to have a code but essentially to leave the content at that stage to local governments.<sup>7</sup>*

- 2.9 The Department of Local Government and Regional Development has yet to produce a uniform code of conduct. Other than the matters that are prescribed by regulation, local governments are free to include any matter in a code of conduct.

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<sup>4</sup> Opinion Crown Solicitor’s Office to the Department of Local Government dated November 10 1997.

<sup>5</sup> Regulation 34B (token gifts) and regulation 34C (disclosure of interests affecting impartiality).

<sup>6</sup> Now the Western Australian Local Government Association (WALGA).

<sup>7</sup> Transcript of Evidence, May 8 2002, p. 2.

- 2.10 The impetus for the City of Perth Local Law arose from an alleged breach of the Code by Councillor Bert Tudori for behaviour at a post Council meeting meal function held at Council House on July 27 1999. In the absence of any sanction for breach of a code of conduct contained in the Act or its regulations, the Council resolved at its special meeting on July 30 1999 to censure Councillor Tudori. At the same special meeting it also resolved to have its Chief Executive Officer "...investigate the creation of a local law to enable the Council to take disciplinary action in respect of breaches of the Code of Conduct."<sup>8</sup>
- 2.11 The source of the power to make the Local Law is the legislative power of local governments contained in section 3.5(1) of the Act when read with the code making power in section 5.103. In addition the City of Perth relies on what are termed the "general competence powers" of local governments embodied in the general function of local governments. This general function includes both the legislative and executive functions of local governments.

### **3 OPERATION OF THE LOCAL LAW**

- 3.1 The Local Law establishes a mechanism by which councillors, members of committees of Council, the Chief Executive Officer ("CEO") and local government employees can be disciplined by the Council or CEO for breaches of the City's Code of Conduct.
- 3.2 The Local Law does this by providing for investigation of complaints made against persons for alleged breach of the rules and standards of behaviour set by the Code of Conduct. The CEO is empowered to investigate complaints made against employees of the local government (other than the CEO) and in the event that the complaint is substantiated to impose disciplinary sanctions.<sup>9</sup> A CEO and Members Investigation Committees are established to investigate complaints against the CEO and members of Council or Committees of the Council.<sup>10</sup>
- 3.3 Membership of the CEO and Members Investigation Committees each comprise three persons who are independent of membership of Council and the City of Perth. When investigating complaints the Local Law requires that the CEO and Members Investigation Committees act in accordance with the rules of procedural fairness as does the CEO when he or she investigates complaints against employees.

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<sup>8</sup> Minutes of Special Meeting of the Council of the City of Perth on Friday, July 30 2002, pp 1079-1080.

<sup>9</sup> This accords with the function of the CEO under section 5.41(g) of the Act in which the CEO is responsible for the employment, management supervision, direction and dismissal of other employees (subject to section 5.37(2) in relation to senior employees).

<sup>10</sup> "Member" is defined in clause 1.4 of the Local Law to mean "a person who is a member of a committee, whether or not the person is a Councillor or an employee." It is strange that this definition appears to have been intended to be exhaustive by using the word "means" rather than "includes". By making the definition exhaustive councillors who are not members of a committee of the Council are not defined as "Members" under the Local Law.

- 3.4 When the investigation is completed, the CEO and Members Investigation Committees have the power to dismiss the complaint or if they find that the complaint has been substantiated “must” make a recommendation to Council. This recommendation can be that no action be taken or alternatively that one or more of several disciplinary sanctions contained in the Local Law be imposed. The Council may either accept or reject a recommendation from an investigation committee via simple majority resolution. If the resolution is carried, the Council puts into place the disciplinary action recommended by the investigation committee subject to the general appeal right to the Minister under Part 9 of the Act. Under the Local Law the Council has no capacity to impose its own findings or penalty. It can only agree or disagree with the recommendation made to it by the relevant investigation committee.
- 3.5 The disciplinary sanctions that can be recommended by an investigative committee are set out in clause 6.2(4) of the Local Law. These include:
- withdrawal of privileges being:
    - a) use of dining room, use of Council’s equipment or other resources;
    - b) payment of any allowances; and
    - c) reimbursement of expenses.
  - penalty not exceeding \$5 000; and
  - that the councillor be prohibited from taking part in the debate (other than by recording of his or her vote) in any specified meeting or meetings of the Council or a committee.
- 3.6 Disciplinary action available to the Council following a recommendation of the CEO Investigation Committee or to the CEO when he or she finds a complaint substantiated against an employee include:
- reprimand that, in the case of an employee who is not a CEO, can constitute a formal warning under disciplinary procedures applying to employees;
  - that a specific course of education or professional or personal development be undertaken;
  - that one or more privileges be withdrawn for a specified period of time; and
  - dismissal.

#### **4 INTERRELATIONSHIP BETWEEN THE CODE AND THE LOCAL LAW**

- 4.1 As a stand-alone document, the Code of Conduct is an administrative document that has no legal effect. How then does the Local Law seek to give the rules and standards

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contained in the Code of Conduct legal force? This is provided for in clause 2.4 of the Local Law. This provides that until a (new) Code is made under Part 2 of the Local Law, the Code of Conduct adopted by the City on October 23 2001 is to be taken as having been made as a “policy” under that Part.

- 4.2 The Code of Conduct itself has not been made and gazetted as a local law in accordance with the provisions of the Act. Local law making is a grave and serious matter and accordingly the Parliament has provided in section 3.12 of the Act detailed requirements that must be followed as preconditions for the valid making of a local law. These include statewide and local publication of the intention to make a local law and summary of its purpose and effect, a six-week minimum period of community consultation, councils having to make the local law with a special majority and further publication once the local law is made and gazetted. These procedures apply to the making of a new local law and the repeal or amendment of existing laws. The procedures do not apply to the Code of Conduct because by itself it is not a law and is not intended to have legislative effect.
- 4.3 Under the Local Law, the Code of Conduct is made, amended and revoked in a manner very different from a local law. Clause 2.2 of the Local Law provides a form of community consultation by requiring any proposed amendments to the Code of Conduct (or a new Code) to be advertised for objections and comments<sup>11</sup> pursuant to a “local public notice”.<sup>12</sup> After reviewing any such comments or objections, the Council may amend the Code of Conduct (by simple majority), and the amendments become effective when the Council gives notice of them through a further local public notice stating the effect of the amendments.
- 4.4 As a matter of substance, the Local Law clearly seeks to give effect to the rules and standards contained in the Code of Conduct, and to give them legal status by providing that sanctions may be imposed under the Local Law for “breach” of the Code of Conduct.<sup>13</sup> There are also penalty provisions in the Local Law that deal with breaches of the provisions of the Local Law itself.<sup>14</sup> For example, there is an offence created under clause 7.5(1)(a) for a person who “fails to do anything required or directed to be done under [the] Local Law.” This would appear to apply for instance to failures of persons under investigation to attend hearings or to “comply with any reasonable request or direction given by” the relevant investigator or investigation committee.<sup>15</sup> The complaints to be investigated and adjudicated upon by the

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<sup>11</sup> If the Code is revoked, it would appear that only notice of revocation itself (and not notice of the intention to revoke) need to be given: clause 2.3(3) of the Local Law.

<sup>12</sup> See section 1.7 of the Act for the meaning of such notice (essentially: notice given in a newspaper circulating in the district of the local authority, and on notice boards in local libraries and at the Council offices).

<sup>13</sup> See notably clauses 1.3(2), 4.1(1), 5.1(1), 6.1(1) and 7.3(3) of the Local Law.

<sup>14</sup> See clause 7.5 of the Local Law.

<sup>15</sup> See each of the three Schedules to the Local Law, under “Proceedings”.

investigator or relevant investigation committee include complaints relating to breaches of the Local Law itself. The offences created by the Local Law are to ensure that persons who do not cooperate with the relevant investigation can be subject to penalty under the Local Law so as to encourage compliance. The penalty for non-compliance provided for in clause 7.5(2) is \$5000. This is the maximum penalty under the Act.

## **5 THE COMMITTEE'S CONCERNS**

### **5.1 The Committee had the following concerns with the Local Law:**

- 5.1.1 the threshold issue of whether there is power under the Act to make a local law to enforce rules and standards of behaviour contained in a code of conduct;
- 5.1.2 whether the Code of Conduct had been effectively incorporated by reference into the Local Law so as to give it legislative effect;
- 5.1.3 that several of the disciplinary sanctions and penalties appeared to:
  - be inconsistent with or go beyond the power authorised by the Act;
  - offend the implied freedom of political communication in the Commonwealth Constitution; and
  - impose sanctions when there would otherwise be a complete defence in defamation proceedings either under the common law or statutory defences applicable in Western Australia.
- 5.1.4 the capacity of the City of Perth to repeal, replace or amend its Code of Conduct by simple majority resolution and a public consultation period without changes to the Code of Conduct coming before the Parliament or being submitted to the Minister for Local Government and Regional Development for scrutiny.
- 5.1.5 the Committee also explored with witnesses whether:
  - a single uniform code of conduct prescribing the minimum standards of behaviour for councillors and council staff should be included in the Act or Regulations with sanctions for breach; and
  - a tribunal should be established under the Act to deal with complaints of breaches of a uniform code of conduct and to impose sanctions in place of (potentially) 144 local governments enacting a code of conduct local law establishing investigation committees.



- 5.2 The Committee instructed Dr Hannes Schoombee, a Barrister at the Independent Bar, to provide it with an opinion on the issues raised in paragraph 5.1.4 above.
- 5.3 On May 8 2001, the Committee also gave notice of motion in the Legislative Council to disallow the Local Law. The motion moved on May 15 2001. The purpose of giving the notice of motion was to preserve the power of the Legislative Council to disallow the Local Law. In the absence of giving such a notice this power to disallow would have been lost.<sup>16</sup>
- 5.4 This report will consider the issues raised in paragraph 5.1 and other issues raised by Dr Schoombee in his opinion under headings corresponding with the Committee's terms of reference.

**6 ASPECTS OF THE COMBINED EFFECT OF LOCAL LAW AND CODE THAT ARE NOT AUTHORISED OR NOT CONTEMPLATED BY THE EMPOWERING ENACTMENT**

- 6.1 This term of reference involves the question of whether the parent Act, in this case the *Local Government Act 1995*, grants the power to make the instrument of delegated legislation. The concept includes the legal doctrine of *ultra vires* which means "beyond power".
- 6.2 There are two legislative provisions that are relevant to this term of reference. Firstly, section 3.7 of the Act provides the following:

**3.7. *Inconsistency with written laws***

*A local law made under this Act is inoperative to the extent that it is inconsistent with this Act or any other written law.*

- 6.3 The effect of this provision is that in the event that a local law is inconsistent with the Act, any other statute or any other piece of subsidiary legislation whether made under the Act or any other statute then it is inoperative.
- 6.4 Section 43(1) of the *Interpretation Act 1984* states:

**43. *General provisions regarding power to make subsidiary legislation***

*(1) Subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made, or of any Act, and subsidiary legislation shall be void to the extent of any such inconsistency.*

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<sup>16</sup> Section 42(2) *Interpretation Act 1984* requires that a notice of resolution to disallow a regulation be given in either House of Parliament within 14 sitting days of the regulations being tabled.

- 6.5 Section 3.7 of the Act has a broader application on the operation of local laws than the requirement of the *Interpretation Act 1984* because it results in local laws being inoperative to the extent that they are inconsistent with “any other written law”. The term “written law” is defined in the *Interpretation Act 1984* as meaning “all Acts for the time being in force and all subsidiary legislation for the time being in force.”<sup>17</sup> A local law that is inconsistent with another instrument of subsidiary legislation will therefore be inoperative.
- 6.6 There is also a common law doctrine that subsidiary legislation (which includes local laws) is void if “repugnant” to a law of a higher legislative status, such as an Act of Parliament operative in the same jurisdiction.<sup>18</sup>

### **Codes of Conduct are not meant to be legally enforceable**

- 6.7 The threshold question for the Committee was whether the Local Law was to any extent inconsistent with the Act or any other statute or instrument of delegated legislation. The City of Perth sought to give itself the power to discipline councillors and staff for breach of its Code of Conduct by making a local law under section 3.5(1) of the Act. This directly raised the issue of whether such a local law is “required or permitted to be prescribed by a local law” or is “necessary or convenient to be so prescribed, for [the City of Perth] to perform any of its functions under [the] Act.”
- 6.8 The general function of a local government “...is to provide for the good government of persons in its district.”<sup>19</sup> The general function of a local government includes legislative and executive functions.<sup>20</sup> The legislative function is to make local laws. The executive function includes administering those local laws and “...all other things that are necessary or convenient to be done for, or in connection with, performing its functions under this Act.” The scope of the general function is to be interpreted “liberally”<sup>21</sup>.
- 6.9 It can be argued that in order to fulfil its function of providing “...good government of persons in its district” that both councillors and local government staff should act in accordance with the highest ethical standards. This is the rationale for the Local Law.<sup>22</sup> The Committee agrees that councillors and local government staff should act ethically and in accordance with the law. However, the issue to be determined by the Committee under this term of reference is whether the Act authorises or contemplates

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<sup>17</sup> Section 5 *Interpretation Act 1984*.

<sup>18</sup> See Pearce & Argument *Delegated Legislation in Australia* (Second Edition; 1999) (“Pearce & Argument”), Chapter 19.

<sup>19</sup> Section 3.1(1).

<sup>20</sup> Section 3.4.

<sup>21</sup> Section 3.1(3).

<sup>22</sup> Explanatory Memorandum from the City of Perth to the Committee.

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a local law being made to enforce a code of conduct. This is a question of statutory interpretation, of object and purpose, not of need.

- 6.10 The approach to be taken to interpreting any Act of Parliament is dictated by section 18 of the *Interpretation Act 1984*. This requires that “...a construction that would promote the purpose or object underlying the written law (whether or not the purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.” In relation to the question as to whether a local law has been validly made under the power contained in the parent Act regard must be had not only to the empowering words in section 3.5(1) but also the scope and object of the whole statute.<sup>23</sup>
- 6.11 The four objects of the Act provided for in section 1.3. are:
- (a) *better decision-making by local governments;*
  - (b) *greater community participation in the decisions and affairs of local governments;*
  - (c) *greater accountability of local governments to their communities; and*
  - (d) *more efficient and effective local government.*
- 6.12 There are express provisions in the Act that limit the capacity of a local government to make local laws. Under section 3.5(4) of the Act, 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.*
- 6.13 No regulations have been made prohibiting local governments from making local laws about their codes of conduct. Other sections of the Act expressly provide that a local law is not to be made about certain matters. For example, section 6.15(2) provides that a local government cannot make a local law “...providing for the receipt of revenue or income by the local government from a source not contemplated by or under this Act.” There is no similar express prohibition contained in Part 5 prohibiting a local law being made about a code of conduct.
- 6.14 However, the requirement in section 5.103 is that the code of conduct “be observed”. This expression is important. Codes of conduct generally do not contain legally

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<sup>23</sup> See the discussion by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391. Although this case dealt specifically with the distinction between mandatory and directory provisions it is an example of the general approach to be taken when interpreting legislation.

enforceable rights or obligations and that is not their intent or purpose. They are often narrative in format and imprecise in language to the extent that enforcement of their provisions is problematic. Many clauses of the City of Perth's Code are in this form (See Part 1).<sup>24</sup> This seems to be the reason for the requirement of the Act that codes of conduct "be observed" and the absence of any offence and penalty provisions in Part 5 of the Act or in the regulations that would facilitate enforcement.

- 6.15 The power to make a local law to enforce provisions of a code of conduct is supported by the Department of Local Government and Regional Development. In its publication "The Complete Guide to the Local Government Act 1995" the Department advises:

*"It would seem that a local government could establish an offence for breach of the code of conduct through making a local law to this effect, but this would almost certainly mean tightening the wording of existing codes, if they are to be interpreted by a court of law."*<sup>25</sup>

- 6.16 The wording of existing codes of conduct have been tightened to the extent that codes of conduct are required to contain those two matters prescribed by the *Local Government (Administration) Regulations 1996* in respect of token gifts<sup>26</sup> and disclosure of interests affecting impartiality<sup>27</sup>. Many codes of conduct also mirror sections from the Act, for example, the provisions about improper use of information in section 5.93 of the Act is repeated in the City of Perth's Code.
- 6.17 It is interesting to note that the Department's view is that the ultimate determination as to whether there had been a breach of a code of conduct would be a court. This implies that any local law made to enforce a code of conduct would create an offence and prescribe a penalty in the nature of a fine under the powers contained in section 3.10 of the Act. In circumstances where the alleged offender disputed the charge a court rather than the council of the local government would determine the matter.
- 6.18 The Local Law does not create a criminal sanction for breach of the Code of Conduct. No offence is created for breach of the Code. The disciplinary sanctions, other than the fine of \$5000 in clause 6.2(4)(d), do not involve imposing a monetary penalty and the ultimate arbiter of the sanction imposed by Council for transgression of the Code is the Minister under the appeal mechanisms in Part 9 of the Act. The decision

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<sup>24</sup> A model code of conduct was first developed and adopted in June 1996 by the Executive of the then Western Australian Municipal Association upon which the majority of local government codes of conduct are based. The model code of conduct is contained in "The Complete Guide to the Local Government Act 1995", December 2000, Forms and Proformas, at 5.103.A.1. The model preamble provides that the Code "...provides a guide and as a basis of expectations for elected members and staff."

<sup>25</sup> The Complete Guide to the Local Government Act 1995, December 2000, Practice Notes, at 5.103.5 (See Appendix 10.15).

<sup>26</sup> Regulation 34B

<sup>27</sup> Regulation 34C

appealed against in these circumstances is the “determination” made by Council imposing one or more of the disciplinary sanctions recommended by the relevant investigation committee. None of the options available to the Minister in Part 9 gives him the capacity to quash or alter a finding of the investigation committee or CEO as the case may be, only the “determination” made by Council that imposes the sanction. Under the Local Law the only option available to a person the subject of an adverse finding by an investigation committee would be to seek to have the finding quashed by the Supreme Court.<sup>28</sup>

- 6.19 The Committee’s view is that by setting up what is effectively an internal tribunal, and using this to enforce its Code of Conduct, the City of Perth is attempting to widen the purposes of the Act by adding a new and different means of carrying into effect what is enacted in the statute.<sup>29</sup> In this particular case, the Local Law does not create an offence for breach of the Code of Conduct but seeks to provide the legal authority for the procedures that enable the investigating and disciplining of staff and councillors for breach of a policy (the Code) of the local government. By contrast, under the scheme of the Act, enforcement of behaviour required in local laws is achieved by granting local governments the power to make local laws that create offences and prescribe penalties. These penalties are a fine of up to \$5000 where there is a breach of a requirement of a local law. A penalty according to Blackburn J in *R v Smith*<sup>30</sup>, is generally defined as:

*“a punishment, most often in the form of a payment of a sum of money, although case law has it that the word is large enough to mean, is intended to mean, and does mean, any punishment, whether by imprisonment, pecuniary penalty or otherwise”.*

- 6.20 The disciplinary sanctions in the Local Law include dismissal, withdrawal of privileges and “a penalty not exceeding a sum of \$5000...”. All appear to fall within the definition of penalty but the Local Law does not expressly create an offence for breaching the Code. It is only by the creation of a criminal offence that the penalties permitted by the Act can be imposed. The Act contemplates that penalties in local laws be in the nature of a fine of up to \$5000 or \$500 if the offence is one that is conducive to the application of a modified penalty. It does not appear to contemplate other forms of penalty such as the range of disciplinary sanctions available under the Local Law. The Act requires a nexus between the creation of an offence and the imposition of a penalty. It is difficult to see how a “penalty” of \$5000 or other sanction can be lawfully imposed against a councillor who has transgressed the Code of Conduct when no discrete offence has been created under the Local Law for breach of the Code.

<sup>28</sup> This would require the issue of a writ of *certiorari*.

<sup>29</sup> *Shanahan v Scott* (1956) 96 CLR 245

<sup>30</sup> (1862) Le & Ca 131, 138 CCR

- 6.21 In Dr Schoombee's opinion, the Act does not contemplate that local laws can be made to enforce rules or standards of behaviour set out in a code of conduct because this is not contemplated by the scheme of the Act. He said:

*The Local Law does not validly or effectively make the provisions of the Code enforceable by sanctions, as it purports to do. Given the provisions of s 5.103 of the Act, such enforcement of a code of conduct is not within the contemplation of the Act.*<sup>31</sup>

**The Local Law has not been enacted in accordance with the Act**

- 6.22 The Local Law has not been validly enacted, given its purpose of making the Code enforceable, because:

- 6.22.1 the Code has not been validly incorporated into, or adopted by, the Local Law under section 3.8 of the Act, section 43(8) of the *Interpretation Act*, or under any general doctrine applying to incorporation by reference in subsidiary legislation;
- 6.22.2 the provisions of the Act dealing with the procedural requirements for the enactment of a valid local law (section. 3.12), have not been followed in respect of the Code; and
- 6.22.3 the requirements of publication in the *Government Gazette* and tabling before both Houses of Parliament have not been followed in respect of the Code.

- 6.23 These matters are discussed in detail in 11 and 12 below.

**A local law cannot set up a tribunal to rival or parallel the criminal courts**

- 6.24 In Dr Schoombee's opinion the power to make a local law under the Act does not encompass the setting up of an internal tribunal mechanism to parallel the function of criminal courts. The Local Law seeks to do this by permitting the offences in clause 7.5 of the Local Law to also be the basis of a complaint of breach of the Code of Conduct. This could result in a person who commits an offence under the Local Law being convicted of that offence by a court and then (or prior to conviction) also being subject to the disciplinary sanctions under the Local Law. Dr Schoombee said:

*The Local Law creates criminal offences in clause 7.5 in respect of breaches of the Local Law itself (rather than the Code). The Local Law further allows any breach of the Local Law to be the subject of a complaint against a Councillor, pursuant to clause 6.1. Such complaint is to be ruled upon by a combination of the investigative*

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<sup>31</sup> Legal opinion of Dr Hannes Schoombee to the Committee dated June 28 2002 ("Schoombee Opinion") p. 5.

*committee (which investigates and makes a recommendation) and the Council which decides whether or not to accept the recommendation. The Local Law thus in effect sets up a two tier tribunal that can impose penalties of up to \$ 5,000 for breaches of the Local Law. The Act does not contemplate the setting up of such a tribunal by a local authority to adjudicate upon offences, as a parallel to the ordinary criminal courts. A further, specific point can also be made. Under the Schedules to the Local Law, "any person...must attend a hearing of which he or she has been given notice". This provision is backed by the criminal sanctions of s 7.5. So the Local Law seeks to provide for some subpoena procedure to apply to "any person". There is no justification for that in the Act.<sup>32</sup>*

6.25 The Committee agrees with Dr Schoombee's view on this matter.

#### **A number of Code provisions are so uncertain as to be unenforceable at law**

6.26 The Committee was concerned that many of the provisions of the Code that the Local Law sought to enforce were worded in a manner that did not make them conducive to enforcement action. Dr Schoombee confirmed the Committee's concerns. He said:

*A number of the provisions of the Code are so vague and uncertain, so as to be outside the scope of a local law properly made under the Act, in terms of decisions of the High Court such as King Gee Clothing Co Pty Ltd v The Commonwealth<sup>33</sup>. A number of examples can be given. When is there a breach of the obligation in the Code to "treat members of the community honestly and fairly"? What is covered by "improper influence" in clause 2.4.2 of the Code? How does one determine the limits of "conduct ... which may cause any person unwarranted offence or embarrassment" (emphasis supplied), prohibited by clause 3.1.1.4 of the Code?<sup>34</sup>*

#### **The Local Law exceeds the territorial limits to the legislative power of the City of Perth**

6.27 An issue raised by Dr Schoombee in his opinion was the inconsistency between the intended scope of the Code and the Local Law and section 3.6 of the Act. Section 3.6 provides that a local government cannot make a local law that extends its operation beyond the district's boundaries unless "...the Governor' approval has been first obtained." Dr Schoombee states:

<sup>32</sup> Schoombee opinion p. 6.

<sup>33</sup> (1945) 71 CLR 184. See generally Pearce & Argument, chapter 29.

<sup>34</sup> Schoombee opinion pp. 6-7.

*The Local Law and Code do not by their terms or by necessary implication apply only within the district of Perth. The offending conduct proscribed by the Local Law and Code is not limited to the district of Perth. Action can be taken under the Local Law if Councillor X criticises say the Mayor at a local government conference held in Sydney or in some other Perth district, or in a letter to the West Australian, or on TV or radio news. This is contrary to the territorial limit to the application of local laws contained in s 3.6 of the Act. And offence can be given under the Code to any person and members of the public - they are not confined to those within the district of Perth.*<sup>35</sup>

6.28 The Committee agrees with Dr Schoombee's view on this matter.

### **Sanctions in the Local Law are inconsistent with Councillors' role in governance**

6.29 One of the Committee's principal concerns was that disciplinary action under the Code was inconsistent with the participatory intent of the Act when balanced against the need to ensure appropriate standards of behaviour by councillors and employees. This includes appropriate behaviour in council meetings so that the business of council can be transacted.

6.30 Clause 6.2(4)(e) of the Local Law permits the Council to make a determination prohibiting a councillor from "...taking part in the debate (other than by recording his or her vote) in any specified meeting or meetings of the Council or a committee."

6.31 The attempt to prevent participation by a councillor in debate before the Council appeared to be contrary to the role of a councillor as set out in section 2.10 of the Act. This provides:

#### ***2.10. The role of councillors***

*A councillor —*

- (a) represents the interests of electors, ratepayers and residents of the district;*
- (b) provides leadership and guidance to the community in the district;*
- (c) facilitates communication between the community and the council;*

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<sup>35</sup> Schoombee opinion p. 7.



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(d) *participates in the local government's decision-making processes at council and committee meetings; and*

(e) *performs such other functions as are given to a councillor by this Act or any other written law.*

- 6.32 How can a councillor perform the roles set out in (a) – (d) above if he or she is prohibited from participating in the debate? The Committee acknowledges that section 2.10 of the Act must be balanced by the need of any law making body to maintain order during meetings so that business can be transacted. The Local Law does not prohibit councillors from voting because the Act expressly provides in section 5.21 that councillors each have one vote. Such a penalty would clearly be *ultra vires* the Act. However, the Act is silent on a councillor's right to participate in the debate.
- 6.33 The Local Law does not limit the number of meetings in which a councillor can be prohibited from participation in debate. This is not at the discretion of the majority of councillors because the Local Law is structured in such a way that the Council can only accept or reject a recommendation from the relevant investigation committee. The meetings must be "specified" in the recommendation but this could encompass any number of things from particular issues to be debated to merely a period of time in which a councillor can be "sin binned".
- 6.34 The Act contemplates exclusion of councillors and committee members from debate in three ways. Firstly, by exclusion from a meeting of council or a committee of council under section 5.67 where a councillor or committee member has disclosed an "interest" in a matter before council. These interests include a direct or indirect financial interest either held personally or by a person with whom the councillor is closely associated.<sup>36</sup> Secondly, exclusion from a meeting by regulations made under section 5.25(1)(h) of the Act. Thirdly, by preventing a person participating in debate as a device in the hands of a presiding officer to control behaviour at meetings.
- 6.35 Section 5.25(1)(h) of the Act might support a view that there is no power to make a local law that prevents a councillor from participation in debate by council resolution. This section contains the head of power for regulations to be made by the Governor that permit councillors to be excluded from meetings, or participation in meetings of the Council or committee. To date no regulations have been made. As a result, there is no direct inconsistency between the Local Law and regulations because none have been made under section 5.25 dealing with this subject matter. However, there seems to be an inconsistency with the scheme of the Act resulting in the provisions being inoperative under section 3.7.

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<sup>36</sup> Interests to be disclosed also include a "proximity interest" held by the councillor or a closely associated person. A proximity interest is where a decision of council relating to changes to its planning scheme, zoning or development application will affect land that adjoins a councillor's land or the land of a closely associated person.

- 6.36 There is no express provision in section 5.25 to make it clear that the power to make regulations does not prevent a local law being made on the same subject matter.<sup>37</sup> In the absence of such a provision the scheme of the Act is to deal with these matters under section 5.67, by regulations made by the Governor or by the inherent powers of presiding officers or the elected body by resolution to maintain order at meetings.<sup>38</sup>
- 6.37 The Governor has published a model local law under section 3.9 of the Act in respect of standing orders for local governments that incorporates many of the requirements of the Act and regulations and in part deals with keeping order during meetings of council. This model has been included in the Western Australian Local Government Association Local Laws Manual with a view to having local governments adopt the model gazetted by the Governor under section 3.9 of the Act.
- 6.38 Part 8 of the Governor's model local law deals with conduct of persons and Part 15 deals with maintenance of order during debates and provides for effective non participation of a member in a matter as follows:

### ***15.2 Demand for Withdrawal***

*A member at a meeting of the Council or a committee may be required by the person presiding, or by a decision of the Council or committee, to apologise and unreservedly withdraw any expression which is considered to reflect offensively on another member or an employee, and if the member declines or neglects to do so, the person presiding may refuse to hear the member further upon the matter then under discussion and call upon the next speaker.*

- 6.39 A similar device is used in the *City of Perth Standing Orders Local Law 1999*<sup>39</sup> to control behaviour at Council Meetings but goes further than the Governor's Model. The presiding officer may "...direct that member to refrain from taking part in any further part in the meeting other than by recording his or her vote."<sup>40</sup> The non-participation clause is not confined to the matter under discussion, as is the case with the Governor's model local law. The *City of Perth Code of Conduct Local Law* goes even further than the City's standing orders local law by permitting the prohibition to extend to any number of specified meetings of Council or Committee as recommended by the investigation committee. This is not exercised under the inherent power of a presiding officer to keep order during a meeting but by resolution of the council on the recommendation of the investigation committee.

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<sup>37</sup> Section 9.60(6) provides that "The existence of a power to make regulations under this section in respect of a matter does not imply that a local law cannot be made in respect of the matter."

<sup>38</sup> *Shanahan v Scott* (1956) 96 CLR 245 but see the Governor's model standing orders local law, cl 15.2 which prevents a councillor from being called on to speak if out of order.

<sup>39</sup> Published in the *Government Gazette* No. 216 Special on November 16 1999.

<sup>40</sup> *City of Perth Standing Orders Local Law 1999*, clause 7.6(1)(b).

- 6.40 In Dr Schoombee's opinion the scope of the prohibition in clause 6.2(4)(e) goes beyond what is necessary to control behaviour in a meeting of Council and so is inconsistent with the participatory intent of the Act. He states:

*Under the Local Law an offending Councillor can be prohibited from taking part in the debate "in any specified meeting or meetings of the Council or a committee". This is contrary to the Act, which envisages in s 2.10(d) that a Councillor will participate "in the local government's decision-making processes at council and committee meetings". This must carry with it the right to participate in debate. If a Councillor is silenced for unruly behaviour at a meeting in terms of the standing orders, that can be justified to protect the proper conduct of the meeting. It is a very different matter to say that a Councillor which may have misbehaved at one meeting cannot participate in any debate for say the next six meetings.<sup>41</sup>*

- 6.41 The Committee is aware that in other jurisdictions, councils, by resolution, have prevented participation of councillors at successive meetings for failing to apologise for offensive remarks against a fellow councillor.<sup>42</sup> However, as noted above, no regulations have been made under section 5.25 to prevent participation of councillors. Other than to protect the proper conduct of a meeting of council under its standing orders, when a member declares an interest or as a result of suspension of a council by the Minister, there appears to be no power to make a local law that prevents councillor participation in debate. The Local Law seeks to authorise this prohibition on participation for a series of meetings. Such a power is inconsistent with the clear participatory intent of the Act.
- 6.42 The Committee is of the view that other than to maintain order during a meeting of council or where otherwise specified by the Act or its regulations, the right to vote granted to each councillor necessarily brings with it the right to participate in the debate on matters before council.

#### *Implied freedom of political communication*

- 6.43 Another issue considered by the Committee in relation to preventing participation of councillors in debate was whether the prohibition on participation arising from a council resolution could in certain circumstances be a breach of the implied freedom of political communication in the Commonwealth Constitution. This implied freedom has most commonly been used as a defence to defamation proceedings. However, the first two cases in which this implied freedom was established dealt with Commonwealth legislation that was found by the High Court of Australia ("High Court") to be invalid as a result of the immunity granted by the implied freedom.

<sup>41</sup> Schoombee opinion p. 7.

<sup>42</sup> *Styles v Woodondilly Shire Council* [2002] unreported NSWSC, CA 40152/0,1 BC200200788.

- 6.44 In *Nationwide News Pty Limited v Wills*<sup>43</sup> a section of the *Industrial Relations Act 1988* (Cth) was found to be invalid as it prohibited justifiable criticism of a government institution. Similarly, in *Australian Capital Television and Ors and the State of New South Wales v Commonwealth of Australia and Anor*<sup>44</sup> regulations prohibiting electoral advertising were struck down as unconstitutional. The High Court has determined that the implied freedom extends to State and even local government legislative action.<sup>45</sup>
- 6.45 The prohibition in the Local Law does not prevent communication between the councillor and his or her constituents but prevents the councillor from expressing and communicating those views to the Council. One of the roles of councillors in section 2.10(e) is to facilitate communication between the community and the council. If a prohibition on participation goes beyond that required to maintain order at any one meeting of council or is otherwise authorised by the Act, it would appear to contravene the implied freedom. In these circumstances it would be both inoperative under section 3.7 and invalid as an unconstitutional fetter on the implied freedom of political communication.
- 6.46 The freedom of political communication is not absolute but is protected from restrictions that cannot be justified as reasonable regulation of a legitimate public purpose. The restriction must be “reasonably appropriate and adapted” to achieve this legitimate public purpose. In *Levy v Victoria* <sup>46</sup>the High Court accepted that limitations of access to hunting areas and bans on unlicensed persons approaching hunters affected the freedom of speech of protesters against duck shooting. The legislative ban in that case was however upheld as reasonably appropriate and adapted to a legitimate public purpose, namely public safety.
- 6.47 With the City of Perth, the public purpose is to provide good government to the District by ensuring that councillors adhere to the standards of behaviour set in the Code of Conduct. However, there is no necessary relationship in the Local Law between the sanction in clause 6.2(4)(f) of being prohibited from participation and the behaviour of councillors in meetings of the council or a committee. The Local Law leaves open the possibility that Council could, for example, make a determination that prohibits participation in debate for a breach of the Code not related to behaviour at a council meeting or a meeting of a committee of council.
- 6.48 For example a councillor may use offensive language to another councillor during a council meeting but refuse to apologise. The investigation committee makes a recommendation, accepted by Council making a determination, that until an apology

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<sup>43</sup> (1992) 177 CLR 1

<sup>44</sup> (1992) 177 CLR 106.

<sup>45</sup> *Lange v ABC* (1997) 189 CLR 520 at 565.

<sup>46</sup> (1997) 189 CLR 579

is received the councillor be denied participation in debate in every meeting of Council or committee of which the councillor is a member.<sup>47</sup> However, what if the offensive language was used during a council briefing session such as regularly occur at the City of Perth before council meetings, or at a post meeting meal function? The Local Law leaves open the possibility that a prohibition on participation at council meetings will occur for breach of the Code not related to behaviour at a Council meeting or at a committee meeting. Such a prohibition would not only be contrary to the intent of the Act but would not be reasonably appropriate and adapted to achieve the legitimate public purpose of achieving good government.

- 6.49 The impact of the implied freedom of political communication is further discussed at 7 below in relation the Committee's term of reference 6.6(b) "has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment."

**Sanctions in the Local Law to take away the "privileges" of Councillors that are inconsistent with their statutory entitlements**

- 6.50 Clause 6.2(4) of the Local Law specifies the types of privileges that could be withdrawn for a specific time if a complaint is proven against a councillor. In particular, clause 6.2(4) gives power to the Council to make a determination withdrawing:

*(iii) the payment of any allowance; and*

*(iv) reimbursement of expenses.*

*Withdrawal of Expenses*

- 6.51 Reimbursement of expenses is dealt with by section 5.98 of the Act. It states that:

*(2) A council member who incurs an expense of a kind prescribed as being an expense -*

*(a) to be reimbursed by all local governments; or*

*(b) which may be approved by any local government for reimbursement by the local government and which has been approved by the local government for reimbursement,*

*is entitled to be reimbursed for the expense in accordance with subsection (3).*

<sup>47</sup>

Although the implied freedom of political communication was not raised in argument a similar factual situation occurred in *Styles v Woodondilly Shire Council* [2002] unreported NSWSC, CA 40152/0,1 BC200200788.

(3) *A council member to whom subsection (2) applies is to be reimbursed for the expense —*

*(a) where the minimum extent of reimbursement for the expense has been prescribed, to that extent; or*

*(b) where the local government has set the extent to which the expense can be reimbursed and that extent is within the prescribed range (if any) of reimbursement, to that extent.*

*(4) If an expense is of a kind that may be approved by a local government for reimbursement, then the local government may approve reimbursement of the expense either generally or in a particular case but nothing in this subsection limits the application of subsection (3) where the local government has approved reimbursement of the expense in a particular case.*

6.52 Section 5.98(2)(a) does not import a discretion whereas paragraph (b) does.

6.53 The *Local Government (Administration) Regulations 1996* specifies the types of expenses to be reimbursed by local governments. Regulation 31(2) includes:

*(a) rental charges incurred by a council member in relation to one telephone and one facsimile machine; and*

*(b) child care and travel costs incurred by a council member because of the member's attendance at a council meeting or a meeting of a committee of which he or she is also a member.*

6.54 The local law does not make any distinction between expenses that must be reimbursed pursuant to a statutory right and those which may be reimbursed under the discretion. The right to reimbursement of expenses contained in section 5.98(2)(a) is a right accorded by the Act and any local law that seeks to withdraw this right will be *ultra vires* the Act. An argument could be raised that because the clause refers to the withdrawal of “privileges” it is not intended to include those expenses that are subject to a statutory entitlement and is only intended to capture those expenses that the Council has a discretion to reimburse. The Committee’s view is that the clause cannot be narrowly interpreted so as to maintain the validity of the clause.

6.55 This view is supported by Dr Schoombee’s opinion where he states in relation to the expenses in section 5.98(2)(a):

*The local government has no discretion whether or not to pay these.  
The provisions of the Local Law purporting to allow the withdrawal*

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*of such expenses for breaches of the Code are inconsistent with the above Regulations, and thus void.*<sup>48</sup>

- 6.56 Regulation 32 of the *Local Government (Administration) Regulations 1996* specifies the types of expenses in section 5.98(2)(b) that “may” be approved by any local government for reimbursement and include:

*(a) an expense incurred by a council member in performing a function under the express authority of the local government;*

*(b) an expense incurred by a council member to whom paragraph (a) applies by reason of the council member being accompanied by not more than one other person while performing the function if, having regard to the nature of the function, the local government considers that it is appropriate for the council member to be accompanied by that other person; and*

*(c) an expense incurred by a council member in performing a function in his or her capacity as a council member.*

- 6.57 The question in relation to section 5.98(2)(b) is what is the breadth of the discretion granted to local governments as to whether it will or will not grant reimbursement of an expense? Is this discretion absolute or is the discretion limited? Can the discretion be used for disciplinary purposes so that reimbursement is not made notwithstanding the fact that the local government is satisfied that the expense is one that otherwise ought to qualify for reimbursement? Is a breach of the Code of Conduct (not related to the expense) a relevant consideration when determining whether to grant reimbursement of an expense?

- 6.58 Neither the Act nor the regulations appear to contemplate that once the local government is satisfied that the expense has been reasonably and properly incurred and otherwise ought to be reimbursed, the Council can then refuse to make the reimbursement for disciplinary purposes unrelated to the expense. For example, a councillor might make prior arrangement with the Council that in carrying out duties “expressly authorised” by the local government (reg. 32(1)(a) *Local Government (Administration) Regulations 1996*) the councillor will be reimbursed travel expenses. Subsequent to the agreement the councillor is found by the investigation committee to have breached the code of conduct for a matter unrelated to the expenditure. Can the Council validly resolve to accept a recommendation of the investigation committee to refuse to reimburse these travel expenses?

- 6.59 Dr Schoombee is of the opinion that clause 6.2(4)(c)(iv) of the Local Law is also beyond the power of the Act to make. He says:

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<sup>48</sup>

Schoombee opinion p. 8.

*The second category of expenses that may be repaid under s 5.98, are those where the power to approve payment have been left to the local authority under s 5.98(2)(b) of the Act. Such expenses are repayable if approved by the Council in question, eg in a policy or by resolution. Under regulation 32 of the Local Government (Administration) Regulations, categories of such expenses that may be approved by the local authority have been specified, eg “an expense incurred by a council member in performing a function under the express authority of the local government.” Regulation 32 envisages that categories of expenses will be approved prospectively, eg payment at a certain rate for carrying out certain specified duties. Once such a category has been determined, and a councillor has become entitled to payment thereunder, there is no power to deprive him or her of such statutory entitlement. Yet this is what the Local Law is seeking to authorise.<sup>49</sup>*

6.60 The Committee agrees with Dr Schoombee’s view on this matter.

#### *Withdrawal of Allowances*

6.61 There are three types of allowances payable under the Act. They are:

- entertainment allowance for the president or mayor (s. 5.98(5)) (min \$500, max \$60 000p/a)
- allowance for deputy mayor and deputy president (s. 5.98A) (max 25% of mayor or president = max of \$15 000p/a); and
- allowance for council members in lieu of reimbursement of expenses under section 5.98(2). This may include an allowance in lieu of telecommunication expenses reimbursement (s. 5.99A(b)) (max \$ 2000p/a).

6.62 The allowance under section 5.98(5) is described as an allowance to which the mayor or president is “entitled” in addition to the entitlements under sub-clauses (1) (meeting fee) and (2) (reimbursement of expenses). The meeting fee and the reimbursement of expenses to which the councillor has a statutory right are certainly entitlements under the Act. When section 5.98(5) speaks of “entitlements” this might also be according a statutory right to payment of either the minimum allowance prescribed by the regulations or the allowance as set by the local government up to the maximum prescribed by the Act. If payment of the allowance is a statutory right then an attempt to withdraw this payment in the local law will be *ultra vires* the Act. The same

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<sup>49</sup> Schoombee opinion p. 8.



considerations apply to the allowance for the deputy mayor and deputy president under section 5.98A.<sup>50</sup>

- 6.63 Under the Act, allowances may be paid that incorporate expenses that would otherwise be subject to reimbursement under section 5.98(2).<sup>51</sup> These expenses may include those that must be reimbursed pursuant to the statutory entitlement in section 5.98(2)(a). A determination of Council withdrawing an allowance that incorporates these expenses can effectively prevent payment of expenses to which there is a statutory right under section 5.98(2)(a). The Committee is of the view that because the clause can operate to prevent payment of expenses to which there is a statutory right, it is inconsistent with the Act and therefore inoperative under section 3.7. It is also void under section 43(1) of the *Interpretation Act 1984*.

**The Local Law purports to tap into appeal provisions in the Local Government Act in a way not contemplated by the relevant part of that Act**

- 6.64 The Local Law purports to grant appeal rights to a person penalised after a complaint against him or her has been substantiated. It does so<sup>52</sup> by providing that such a decision is a decision to which Division 1 of Part 9 of the Act applies and that the person penalised is an “affected person” for the purposes of that Division. Under section 9.1(1) of the Act, that Division applies to decisions concerning the grant, renewal, variation or cancellation of an authorisation. This is defined in section 9.2 to mean “...a licence, permit, approval, or other means of authorizing a person to do anything, other than one that has been excluded by regulations...”. The appeal lies to a Local Court or the Minister. The Local Law clearly seeks to rely on s 9.3(3) of the Act which provides that the relevant Division of the Act also applies whenever a local law, or regulation that is to operate as if it were a local law, states that a decision under it is one to which this Division applies and that a person specified in it is an affected person for the purposes of this Division.
- 6.65 However, the Committee notes that imposing penalties like \$5000 under the Local Law is far removed from cancelling a permit, licence or approval and the like which is the subject matter of the appeal mechanism. In the Committee’s view, the “determination” made by the Council which imposes the disciplinary sanctions under the Local Law is not one that is contemplated by the appeal mechanism of the Act under Part 9, Division 1. This view is supported by Dr Schoombee’s opinion. He says:

*In my view the attempt in the Local Law to cotton on to Division 1 of Part 9 of the Local Government Act is ineffectual. The High Court*

<sup>50</sup> A special majority is required for the payment of this allowance whereas under the Local Law a simple majority of Council can make a determination that withdraws this allowance.

<sup>51</sup> See section 599A *Local Government Act 1995*.

<sup>52</sup> Local Law clauses 4.4, 5.4 and 6.4.

*has held that even a general power to make subsidiary legislation will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.<sup>53</sup> The Local Law seeks to utilise the appeal rights under the Act for a purpose they were never intended for. This is further borne out when the procedural provisions of Division 1 of Part 9 of the Act are considered. S 9.5 provides that an aggrieved person may first object to the local authority before appealing to the Local Court or the Minister. Under s 9.6, the objection has to be decided upon by the council or a committee of the council. This makes sense where say a planner of a council or a building inspector has refused a permit - but not where under the Local Law the very Council has itself made the decision to accept the report of the investigative committee.<sup>54</sup>*

**7 THE COMBINED EFFECT OF LOCAL LAW AND CODE HAS AN ADVERSE EFFECT ON EXISTING RIGHTS, INTERESTS, OR LEGITIMATE EXPECTATIONS BEYOND GIVING EFFECT TO A PURPOSE AUTHORISED OR CONTEMPLATED BY THE EMPOWERING ENACTMENT.**

**The Local Law and Code are unwarranted curtailments of the common law of defamation**

7.1 Clause 3.1.1.4 of the Code<sup>55</sup> is inconsistent with the common law of defamation in Western Australia. You cannot successfully be sued in Western Australia for a defamatory statement if you can prove that it is true. In this State<sup>56</sup> there is no additional requirement that the statement should be “in the public interest”. Where a defamatory allegation concerns matters of opinion rather than fact, the defence of fair comment can be raised. This defence involves different considerations than mere truth and public interest.<sup>57</sup> Such a defence may well be available to a councillor

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<sup>53</sup> *Shanahan v Scott* (1956) 96 CLR 245 at 250.

<sup>54</sup> Schoombee opinion p. 9.

<sup>55</sup> 3.1.1 Members and employees must: 3.1.1.4 Make no allegations which are improper or derogatory and refrain from any form of conduct, in the performance of their official or professional duties, which may cause any person unwarranted offence or embarrassment, unless they are true and in the public interest;

<sup>56</sup> Contrast for example NSW.

<sup>57</sup> Under this defence, a statement of opinion is protected provided that:

- (a) it relates to a matter of public interest;
- (b) the facts upon which the opinion was based, are contained within the publication or known to or readily ascertainable by the reader, and were true;
- (c) the comments were warranted, in the sense that an honest person might bona fide hold these views - the comment need not however, be "reasonable"; and
- (d) the person who expressed the opinion was not actuated by malice - to defeat the defence, malice must be established by the person who sues on the statement.

See Tobin & Sexton *Australian Defamation Law & Practice* [13,001] and further.

attacking, for example, a fellow councillor's conduct, whether in a Council meeting or otherwise. Other defences such as qualified privilege<sup>58</sup> may also be available to a local government employee or councillor who has made a defamatory statement, and again the elements of this defence cannot be equated with truth and public interest. Inconsistency between subsidiary legislation like the Local Law and important principles or common law doctrines, is a recognised ground for striking down the subsidiary legislation.<sup>59</sup> In the Committee's opinion inconsistencies between the Code and the common law of defamation are such to render the former unenforceable.

**The Local Law and Code bring about unwarranted infringements of freedom of speech at common law.**

- 7.2 At common law there is no "right" to freedom of expression.<sup>60</sup> However the common law does recognise a limited freedom through the development of the law of qualified privilege. This has been recognised by the High Court<sup>61</sup> and a leading text<sup>62</sup> on defamation which states in relation to the reason for the defence of qualified privilege:

*It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of some (self or) common interest. In such cases no matter how harsh, hasty, untrue, libellous the publication would be but for the circumstances, the law declares it privileged because the amount of public inconvenience from the restriction of freedom of speech or writing would far out-balance that arising from the infliction of a private injury.*

- 7.3 On the basis of common law freedom of speech, it was held by the New South Wales Court of Appeal in *Council of the Shire of Ballina v Ringland*<sup>63</sup> that a local government council, comprised of elected members, could not as a body sue in defamation.

<sup>58</sup> The Code refers in clause 3.9 under the heading "Defamation" to qualified privilege. The summary given of the law relating to qualified privilege in clause 3.9 appears inaccurate. It is not clear what the purpose of clause 3.9 is or how it interrelates with clause 3.1.1.4.

<sup>59</sup> See Pearce & Argument pp. 137, 198, 214-218.

<sup>60</sup> *Attorney-General v. Guardian Newspapers (No 2)* (1990) 1 AC 109 at 283.

<sup>61</sup> *Lange v ABC* (1997) 189 CLR 520 at 565.

<sup>62</sup> Gatley on Libel and Slander (9<sup>th</sup> ed) paragraph 14.2.

<sup>63</sup> (1994) 33 NSWLR 680.

- 7.4 By seeking to penalise councillors, members of council committees and local government staff in circumstances where the common law protects them from defamation proceedings, the Code goes beyond what the legislature intended when granting local governments the power to make local laws. In the Committee's opinion, in the absence of clear words or by necessary intendment, there is no power to make a local law that would subject a person to sanction in circumstances where that person would be protected by qualified privilege.<sup>64</sup> The necessary and convenient power contained in section 3.5(1) of the Act is not sufficient for this purpose.

### **The Local Law and Code infringe the implied constitutional freedom of speech**

- 7.5 Australian law recognises an implied constitutional freedom of political communication. This applies at federal, state and local government<sup>65</sup> level. Its source is representative government, as derived from the Federal and State constitutions.<sup>66</sup> It must be respected by law-making bodies at all levels, and by the executive, for example in formulating policies. This immunity attaches itself to basic common law freedoms such as freedom of speech and movement, and protects them against disproportionate interference primarily by legislatures, but also at the hand of the executive or by reason of incompatible common law doctrines. Any law, policy or doctrine incompatible with the constitutional immunity is inoperative at law.
- 7.6 In the Committee's view, clause 3.1.1.4 of the Code, discussed in paragraph 7.1 above infringes this constitutional freedom. The same is true of the widely worded clause 2.1.4, prohibiting employees from "local government political activities which could cast doubt on their neutrality and impartiality in acting in their professional capacity", and clause 3.7.3. This clause prohibits Councillors from "publicly criticising employees in a way that casts aspersions on their professional competence and credibility", but what if the employee is acting incompetently and endangering lives?
- 7.7 Also incompatible with the constitutional freedom is clause 3.1.1.5 of the Code which requires employees and Councillors to always act in accordance with their obligations to the City of Perth and in line with relevant policies and procedures. In the same category is clause 3.4 of the Code. This provides that members and employees must give "effect" to policies of the City of Perth, whether or not they agree with or approve of them. This seems to inhibit criticism of such policies (which are not legally binding in their own right) and this clause, particularly in relation to elected officials, may also be inconsistent with the implied constitutional freedom of political communication.

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<sup>64</sup> See *Coco v R* (1994) 120 ALR 415.

<sup>65</sup> *Lange v ABC* (1997) 189 CLR 520 at 571.

<sup>66</sup> In relation to Western Australia see *Stephens and Ors v West Australian Newspapers Ltd* (1994) 182 CLR 211.

- 7.8 The implied constitutional right of freedom of political expression operates as an immunity or freedom. The immunity has also been applied to modify the common law to bring it in harmony with the constitutional immunity, for example, by recognising a qualified privilege in law of defamation based on political communication, as was settled in *Lange v ABC*<sup>67</sup> (“*Lange*”). In this case, in a rare joint judgment, all seven members of the High Court stated as follows:

*Accordingly, this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion - the giving and receiving of information - about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. Consequently, those categories now must be recognised as protecting a communication made to the public on a government or political matter. It may be that, in some respects, the common law defence as so extended goes beyond what is required for the common law of defamation to be compatible with the freedom of communication required by the Constitution. For example, as discussion of matters concerning the United Nations or other countries may be protected by the extended defence of qualified privilege, even if those discussions cannot illuminate the choice for electors at federal elections or in amending the Constitution or cannot throw light on the administration of federal government.*

*Similarly, discussion of government or politics at State or Territory level and even at local government level is amenable to protection by the extended category of qualified privilege, whether or not it bears on matters at the federal level. Of course, the discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their departments. The existence of national political parties operating at federal, State, Territory or local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia this conclusion inevitable. Thus, the extended category of common law*

<sup>67</sup> (1997) 189 CLR 520.

*qualified privilege ensures conformity with the requirements of the Constitution.*<sup>68</sup>

- 7.9 In the Committee's opinion, the restrictions on freedom of speech, including political speech identified above and imposed by the combined effect of the Local Law and the Code cannot be justified as being reasonably appropriate and adapted to some legitimate public purpose. The *Lange* case itself makes it clear that political speech cannot be subject to a "truth and public interest" requirement, yet the Code purports to do just that. As noted in paragraphs 6.43 – 6.49 above, under the Local Law a Councillor may be banished from debate at any number of Council meetings, and may be banished for a contravention of the Code not related, or directly related, to his or her impugned behaviour at any meeting.

## **8 THE LOCAL LAW MODIFIES THE RULES OF FAIRNESS**

### **Contents of the right to be heard subject to the discretion of the investigators**

- 8.1 The Schedules to the Local Law provide that investigations are to be carried out in accordance with the principles of procedural fairness.<sup>69</sup> However, it is not entirely clear that the accused person has a right to be present during the whole of the hearing. He or she must be notified of the hearing, and must attend the hearing.<sup>70</sup> But under Schedules 2 and 3 "no-one is entitled to be present during any part of the proceedings"<sup>71</sup> without permission of the investigation committee. What about the accused person? Can he or she for instance be excluded from part of the hearing? Under the Local Law, basic procedural rights such as the right to legal representation, to give evidence yourself, to provide the evidence of others and to question opposing witnesses, "may" be accorded to the accused person. However, the Local Law does not grant these basic entitlements to accused persons, presumably to allow for flexibility on the part of investigators and the fact that the requirements of procedural fairness will vary with the particular circumstances of the case.<sup>72</sup>
- 8.2 In the Committee's opinion it is disturbing that these rights are left to the discretion of the investigators rather than being spelt out in the Local Law. The Committee appreciates that the requirements of procedural fairness can vary with the circumstances of each case and that this might present some difficulties with defining in the Local Law what these rights should be. However, some of the basic rights listed above should be specified.

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<sup>68</sup> *Lange v ABC*(1997) 189 CLR 520 at p. x.

<sup>69</sup> Schedule 1, cl 3(1); Schedules 2 and 3, cl 2(1).

<sup>70</sup> See eg Schedule 3, clause 5 and 7(a).

<sup>71</sup> Clause 6(2).

<sup>72</sup> Factors such as the nature and importance of the subject matter, the power being exercised and the consequences of the exercise of power adverse to the affected person may affect the procedural entitlements to which the affected person is accorded.

### **Independence and competence of the investigators are left unresolved**

- 8.3 Clause 3.2 seeks to “appoint” as members of the Members Investigation Committee, the President of the WA Local Government Association, the President of the WA Law Society, and the President of the Institute of Company Directors (WA Division) or their “representatives”. It is assumed that these organisations have somehow irrevocably agreed to have their presidents serve. It is not quite clear what specific competence or willingness say the President of the Institute of Company Directors (WA Division) has to serve on the investigation committee. This applies all the more to “his or her representative” - this may be anybody. Under the Schedules 2 and 3, a person is not to be a member of the investigation committee if he or she has an “actual or apparent<sup>73</sup> conflict of interest relevant to the determination of that complaint”. However, it is not clear that those serving on the investigation committee would necessarily have the skills or knowledge to determine this (often quite difficult) question. The Act, by comparison, contains elaborate provisions dealing with conflicts of interest in respect of local authority councillors.<sup>74</sup> The Committee further notes that “conflict of interest” is a narrower test than bias.<sup>75</sup> The usual position in relation to statutory tribunals is also that members may be removed, for example for misconduct. There is no such provision in the Local Law.

### **Lack of proper subpoena procedure to require attendance of a witness or the production of evidence**

- 8.4 Modern statutory tribunals usually have the power to issue subpoenas requiring persons to give evidence, or to produce documents, for example, having to produce records under their control. The Schedules to the Local Law provide that “any person...must attend a hearing of which he or she has been given notice”. This provision is backed by the criminal sanctions of clause 7.5. However, as discussed in paragraph 6.24 above, this provision is, in the Committee’s view, *ultra vires* the Act. The Act does not provide or contemplate that every local authority in Western Australia can set up its own tribunal issuing subpoenas to people who may have nothing to do with the Council, and who may live in a different district but may have had an involvement with the conduct under investigation.

<sup>73</sup> Dr Schoombee notes that this is a curious and unfortunate term, because “apparent” can mean, amongst other things, “manifest” or “seeming”. The term is presumably used because the usual form of *bias* in issue in administrative tribunals, is *apparent bias*, as contrasted with actual bias. The common law test for apparent bias is whether a reasonable apprehension of bias would be held by the hypothetical objective observer with knowledge of the material facts.

<sup>74</sup> See Division 6 of Part 5 of the Act in relation to the obligations of members and employees to disclose interests.

<sup>75</sup> The Schedules to the Local Law provide that investigations are to be carried out in accordance with the principles of procedural fairness. This should make the general rule against bias applicable. However, Dr Schoombee notes that the specificity of the provision dealing with conflicts of interest may be misleading, suggesting that only a conflict of interest and not the broader notion of bias is relevant.

**Inconsistency between the requirement of investigator to give written reasons as between investigations of employees and the CEO and Members**

8.5 The Committee notes that in relation to an investigation of a complaint against an employee the Local Law requires in clause 5 of Schedule 1 that the investigator provide a written report to the CEO setting out:

- 8.5.1 a summary of the investigation;
- 8.5.2 the names of, and information given by, any person who was interviewed or who provided information;
- 8.5.3 the major relevant documents;
- 8.5.4 the findings of material questions of fact and the recommendations made;
- 8.5.5 the reasons for those findings and recommendations; and
- 8.5.6 the material and other information on which those findings and recommendations were based.

8.6 Equivalent requirements for an investigation committee to provide a written report to Council is absent from the Schedules of the Local Law dealing with investigation of complaints against the CEO or members of Council or a committee of Council. This appears to be a significant omission. The Committee raised this matter with Mr Douglas at the hearing as follows:

*Mr Douglas: .... It is contemplated that there will be reasons for findings. In relation to the CEO it is quite clear in schedule 1 item 5.*

*In relation to employees other than the CEO, the report should contain details of the investigation that may be relevant to the findings, the reasons for that and so on.*

*The CHAIRMAN: That is in schedule 1. What is the case with members? If it is different, why is it different?*

*Mr Douglas: It certainly should not be different. There is no intention for it to be different.*

*The CHAIRMAN: Do you agree that that is a fairly significant omission?*

*Mr Douglas: It may well be. Perhaps I can provide the committee with an answer to that later. It has been some time since this was drafted. The intention was that there would be - and there may well be - a provision incorporating that which occurs in relation to the*



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*other two categories; that is, the investigation of a CEO and the members.*<sup>76</sup>

- 8.7 The Committee observes that if an adverse finding is made against a CEO, councillor or committee member, the Local Law requires the investigation committee to make a recommendation. Clauses 5.3(3) & (4) and 6.3(3) & (4) dealing with determinations of Council require a “report” be made by a member of the relevant investigation committee by that person formally presenting the committee’s findings and recommendations. That person is also available to answer questions. No written report is required by the Local Law in relation to determinations of Council. There is no requirement that the investigation committee is to set out the matters required of a report to a CEO in relation to an investigation of an employee.
- 8.8 Clauses 6(6) of the Second and Third Schedules require the CEO or Member to be given an opportunity to be heard in relation to information upon which an adverse finding might be made by the relevant investigation committee. This accords with the rules of procedural fairness. However, there is no requirement for a written report for consideration by Council. If an impugned CEO, councillor or committee member wishes to challenge a finding or determination, a written report is not available, only the minutes of the Council meeting and those of the relevant investigation committee.

**9 THE LOCAL LAW AND CODE MAY DEPRIVE A PERSON AGGRIEVED BY DISCIPLINARY DECISIONS OF THE ABILITY TO OBTAIN REVIEW OF THE MERITS OF THAT DECISION, OR MAY NOT GRANT AN EFFECTIVE, JUDICIAL REMEDY**

**The grant of appeal rights in the Local Law may be ineffectual**

- 9.1 The Committee has discussed this matter in paragraphs 6.64 – 6.65 above.

**Even if the Local Law grants appeal rights, the appeal will probably only be to the Minister**

- 9.2 Under section 9.8 of Division 1 of Part 9 of the *Local Government Act*, an appellant has a choice to appeal to a Local Court or the Minister - but only if the decision affects his or her business or livelihood. Disciplinary decisions under the Local Law are unlikely to fall into this category. Otherwise the appeal lies only to the Minister. This is hardly satisfactory, given the type of decision in issue under the Local Law, and the serious repercussions that may flow from it. Where action is taken against a Councillor, it may occur in the context of a political dispute. It is not appropriate that a Minister should have the ultimate say on such a matter. The Committee notes that there has been a shift away from Ministerial appeals in planning law.<sup>77</sup>

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<sup>76</sup> Transcript of Evidence May 15 2002, pp. 5-6.

<sup>77</sup> See *Planning Appeals Amendment Act 2002*.

**10 THE LOCAL LAW AND CODE CONTAIN PROVISIONS THAT FOR A NUMBER OF REASONS WOULD BE MORE APPROPRIATELY CONTAINED IN AN ACT OF PARLIAMENT**

- 10.1 Given the objections discussed above, the Committee is of the view that the vexed issue of enforcement of behavioural standards in codes of conduct should not be dealt with in an *ad hoc* manner by individual local governments but by amending the *Local Government Act 1995*.
- 10.2 Any amendments to the Act dealing with the topic may be drafted to fit in with general developments, such as the foreshadowed State Administrative Tribunal.
- 10.3 Amendments to the Act will also overcome the undesirable scenario of many of the 144 local governments in Western Australia each making their own code of conduct (not subject to Parliamentary disallowance under the *Interpretation Act 1984* or repeal under the Act) enforceable by using local investigative committees.
- 10.4 This is explored more fully in 14 below.

**11 WHETHER SUBSIDIARY LEGISLATION LIKE A LOCAL LAW CAN VALIDLY INCORPORATE BY REFERENCE AN EXTERNAL DOCUMENT LIKE A CODE OF CONDUCT, NOT ITSELF CONFORMING WITH THE PROCEDURAL REQUIREMENTS FOR A VALID LOCAL LAW**

- 11.1 The purpose of a local law is to create and/or enforce legal obligations and rights within a geographical limit - the district of a local government.
- 11.2 Many bodies discipline their members by internal rules governing behaviour such as the codes of conduct operating in various professional bodies. There is no intent that the rules governing these disciplinary procedures or the sanctions imposed are to have legislative effect. They are administrative in nature and arise from contract<sup>78</sup> or consensus. An example is incorporated associations in which members agree as a condition of their continued membership to be bound by a code of conduct or other rules of the association. Another is where continued membership of a professional body, which grants the privilege of practising within a self-regulating profession, is dependent upon adhering to a code of professional practice. In disciplining members the bodies are exercising an administrative rather than a legislative power. The purpose of a local law is very different from bodies exercising administrative powers.
- 11.3 There is no contractual or consensual nexus in this case between all of the persons subject to the Local Law. The local government staff, CEO or councillors as individuals (other than the 5 members who voted in favour of making the local law) have not expressly or impliedly agreed to be bound by the Local Law. In relation to the Code itself, local government employees are not required to make a declaration that they will adhere to the Code as is the case with elected officials. However, the

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<sup>78</sup> See *Harper v Racing Penalties Appeal Tribunal of Western Australia and Anor* (1995) 12 WAR 337.

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Local Law attempts to give the rules and norms of behaviour contained in the Code of Conduct legislative force by making it a “policy” under Part 2.

- 11.4 However, the only means by which external documents can be given legislative force is if they are lawfully incorporated into the Local Law. This can be done either directly, for example, by annexing the Code of Conduct as a schedule to the Local Law or by reference. Incorporation by reference can be achieved by a power granted under the Act or under common law principles of incorporation if these are left undisturbed by the scope of incorporation permitted by the Act.
- 11.5 There is an express power in section 3.8 of the Act to adopt Australian Standards as they are at a specific date or as amended from time to time. These standards are not made by the council of a local government but by another body. Like the Code of Conduct, by themselves they are administrative in nature and have no legislative effect except when validly incorporated into a local law. An Australian Standard can be amended from time to time by the external body that makes them so a change to these standards can affect obligations under a local law if the standard has been incorporated “as amended from time to time” under section 3.8(2)(c) of the Act. There is judicial support for the proposition that in the absence of an express power in an Act to adopt a standard, code or other instrument as amended from time to time any such incorporation would be invalid as an unlawful sub-delegation of legislation making power.<sup>79</sup> This is because the power to make a local law is granted to the council of the local government and no other body. The Act expressly permits incorporation of a document that is amended from time to time by an entity that is not the council, for example, by external bodies such as Standards Australia International Limited<sup>80</sup>. Any attempt to do so in the absence of such a power would be unlawful and the purported incorporation void.
- 11.6 The adoption of a document made by another body is common in local laws and other legislation. Local laws may and do create offences and impose penalties in circumstances where there is a breach of Australian Standards that have been incorporated by reference into a local law under section 3.8(1)(c). This is because breach of the relevant standard is made an offence under the local law in which it has been adopted. However, this is not the case with the Local Law. A breach of the Code is not an offence. It merely exposes the transgressor to the investigative requirements of the Local Law and the disciplinary sanctions in the event that Council makes a “determination”.
- 11.7 The Committee raised with Mr Neil Douglas the issue as to how the City of Perth could give legal effect to a policy (the Code) that did not physically form part of the

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<sup>79</sup> *Dainford Ltd v Smith* (1985) 58 ALR 285 per Wilson J at 295.

<sup>80</sup> Formerly known as the Standards Association of Australia.

local law. The following exchange between the Chairman and Mr Douglas explains the City's approach.

**The CHAIRMAN:** *Section 3.8 of the Local Government Act provides for codes of conduct made by other bodies being incorporated. It is presumably contemplating design standards and that sort of thing. We are talking about your code. Is that something you have looked at?*

**Mr Douglas:** *We did not see section 3.8 as being relevant at all.*

**The CHAIRMAN:** *Why not?*

**Mr Douglas:** *It deals with codes other than codes of conduct.*

**The CHAIRMAN:** *If that is not the relevant section, which section provides for the capacity to incorporate the code of conduct by reference?*

**Mr Douglas:** *It is a specific power to incorporate by reference rather than including the code in the nature of the policy of a local law. They are two quite different issues.*

**The CHAIRMAN:** *Are you saying that Perth City Council is not incorporating by reference but doing something other than that?*

**Mr Douglas:** *Yes. Incorporation by reference, as I understand it, means passing a law and then saying that Standards Australia, for example, apply by reference. Whatever they are, they apply.*

**The CHAIRMAN:** *You are saying that you are not doing that but doing something else, which is alluding to a policy. Is that correct?*

**Mr Douglas:** *Part of the local law is the policy. The analogy is a policy that is part of another local law.*

**The CHAIRMAN:** *That brings us back to the question of what authorises you to do it in that way.*

**Mr Douglas:** *I do not see the provision dealing with incorporation by reference as being inconsistent. There is a general competency power to make laws which would include the power to include a policy by reference.*

**The CHAIRMAN:** *Are you saying that in the strict sense it is not an incorporation by reference?*

*Mr Douglas: That is right.*

*The CHAIRMAN: By doing it in that way, are you effectively imposing sanctions that were not authorised under the Act? Do you consider it an issue?*

*Mr Douglas: It is important to acknowledge from the start that there are no express powers in the Act to apply sanctions, as there are no express powers to have a mechanism to determine whether there is a breach. We understand that what we have done is consistent with the local law making powers under the Act which enable local laws to be made and give effect to them. That will always result in an argument about whether or not those powers are authorised. Because there is no express authorisation, it falls within general law-making powers.<sup>81</sup>*

- 11.8 The Committee has determined that the local law making power under the Act does not authorise local governments to set up their own disciplinary tribunals to impose sanctions for breaches of their codes of conduct. Therefore the question as to whether or not the City of Perth has validly incorporated its Code of Conduct into its Local Law is somewhat academic. However, the Committee is of the opinion that the only method of giving legal effect to a document that does not physically form part of the local law text is by incorporating the document by reference. This can be done either under the express power in section 3.8 of the Act<sup>82</sup> or possibly under common law principles of incorporation if these have not been excluded by the express provisions permitting incorporation in the Act. Dr Schoombee supports this view. He said:

*In my view, the Local Law does as a matter of substance (if not form) seek to incorporate the Code. The Code and its contents are given particular enforceability by the provisions of the Local Law. The Code does not otherwise and as a lone standing policy document have this enforceability. I note that Mr Neil Douglas, of the solicitors firm Minter Ellison, who assisted in the drafting of the Local Law, took the view in evidence before the Committee, that the Code is not incorporated in the Local Law, and that the incorporation provision in the Local Government Act, namely section 3.8, has no application. In my view the incorporation of the Code in the Local Law is not covered by s 3.8 but as a matter of principle, the Code can only have effect if it is incorporated in or adopted as part of the Local Law. There is simply no other way, principle or legal doctrine by which the behavioural standards of the Code can have direct application.*

<sup>81</sup> Transcript of Evidence May 8 2002, pp 11-12.

<sup>82</sup> This section includes a power to adopt the text of another local government's local law, a model local law made by the Governor or any code, rules, specifications, or standard issued by the Standards Association of Australia or by such other body as specified in the local law.

*"Direct" application in this context may be contrasted with the circumstances where powers under a written law may be exercised with reference to an administrative policy - which is commonly the case with statutory powers. Such an administrative policy is then a relevant consideration in the decision-making process, but its terms are not in themselves, directly, given the force of law. Thus there are well-established principles of law applying to the use that may be made of such (true) administrative policies. They cannot for instance be applied inflexibly or invariably in the exercise of statutory powers, without considering in each case whether the policy should be followed or not. If a policy is simply slavishly applied, the resultant decision can be set aside under the "fettering of discretion" ground of judicial review. But under the Local Law, the Code has a very different application: it supplies, directly and invariably, the norms upon which the sanctions of the Local Law are to operate.<sup>83</sup>*

- 11.9 The Committee is of the view that section 3.8(1)(c) does not support the adoption by reference to an internal document made by the local government itself such as a policy of the local government. The clear intent of section 3.8(1)(c) is to enable local governments to incorporate into their local laws codes, standards and the like made by external bodies independent of the local government such as Australian Standards International Limited.<sup>84</sup> Dr Schoombee said:

*The Act expressly empowers local governments to incorporate the text of other documents into local laws. Section 3.8(1)(c) states that a local government may make a local law that adopts the text of "any code, rules, specifications, or standard issued by the Standards Association of Australia or by such other body as is specified in the local law." In my view this refers to codes and the like by external bodies. One can see the ratio for allowing such adoption or incorporation by reference. This section cannot support the Code in our case. S 3.8(1) can clearly not be used by a local authority to enact skeletal local laws which simply provide that the substantive provisions are to be contained in a policy document adopted by the Council by simple majority!<sup>85</sup>*

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<sup>83</sup> Schoombee opinion pp.3-4.

<sup>84</sup> Formerly the Standards Association of Australia.

<sup>85</sup> Schoombee opinion p.23.

*Incorporation by Reference at Common Law*

- 11.10 The High Court case of *Dainford Limited v Smith*<sup>86</sup> is authority for the proposition that, at common law, subsidiary legislation can be made that incorporates external documents by reference. That case dealt with legislation that allowed a body corporate of strata title units to provide by means of a by-law that parts of the common property of a strata titles development be allocated for the specific use of certain owners. A by-law was made allowing for parking bays to be allocated by a notice to be given by the company that owned all the units. This company sold a unit and allocated a bay by giving such a notice. The purchasers argued that the notice was ineffectual as it was *ultra vires* the legislation. This was because the allocation was not contained in the relevant by-law itself and constituted an unauthorised delegation of the power to make by-laws by the body corporate to the company. By a 3:2 majority, the High Court rejected the sub-delegation argument. Gibbs CJ for the majority observed at 348:

*The question for decision is whether s. 30(7) requires that the by-law shall itself define that part of the common property which is allotted for the exclusive use of the proprietor of a particular lot, or whether it permits the definition to be made by means of a separate instrument, such as the notice contemplated by by-law 40. The sub-section does not in terms require that the part of the common property whose exclusive use is conferred on a proprietor shall be identified in the by-law itself. There is no general principle that a power to make by-laws may not be exercised by referring to some other document and incorporating or applying it, provided that what is referred to is sufficiently certain: Wright v T.I.L. Services Pty Ltd [1956] 56 SR (NSW) 413 at 421-2; Sobania v Nitsche (1969) 16 FLR 329 at 340-242. There is no reason in principle why a by-law should not confer rights in respect of property which is not defined in the by-law itself, but which can be identified with certainty by reference to another document or to extrinsic facts. By-law 40 itself confers on a proprietor the exclusive use of part of the common property, notwithstanding that the identity of the proprietor, and the part to which he is entitled, must be ascertained by reference to a notice given to the body corporate.*

- 11.11 The Code and the Local Law are documents that are required to be available to the public for inspection at the office of the local government under section 5.94 of the Act. Both current and past versions of Code and Local Law are subject to the requirement together with a variety of other documentation.<sup>87</sup> Copies of this

<sup>86</sup> (1985) 58 ALR 285.

<sup>87</sup> See the list in section 5.94.

documentation are required to be available at a price that does not exceed the cost of provision.<sup>88</sup> Does the requirement to have the Code available to the public for inspection satisfy the certainty requirement in *Dainford v Smith* or does it offend the rule against the sub-delegation of legislative power?

- 11.12 The *Dainford* case dealt with a very mild form of “incorporation” or external reference - simply a notice - identifying the relevant parking bay. It did not involve any law of general application, like a local law under the *Local Government Act* but with the exercise of administrative powers. This is what distinguishes the Local Law’s attempt to incorporate the Code (a policy) by stating that it is part of the Local Law from the incorporation in the *Dainford* case. Unlike the by-law in *Dainford*, the Local Law is of general application notwithstanding that the disciplinary sanctions apply only to councillors and staff of the City of Perth. For example, the offence provisions of the local law have a general application and anyone can have access to the complaint procedure that starts the investigative procedures under the Local Law.
- 11.13 There is also a public interest in the manner in which a local government can incorporate external material that is of general application. In this context, the following observations of Wilson J (also part of the majority in *Dainford*) at 359 are relevant:

*It was clearly the intention of the legislature that by-laws made by a body corporate should be noted in the office of the Registrar of Titles but I fail to see the same significance attaching to the precise allocation of car spaces among the members of the body corporate. There is no such public interest in the detailed administration of the affairs of a body corporate as to require such details to be made a matter of public record. If any proprietor or mortgagee of a lot desires access to the information then it is available to them at the office of the body corporate: see s. 40. Furthermore, if it matters, it may be questioned whether the power conferred by s. 30(7) is properly to be regarded as a delegation to the body corporate of legislative power. The by-laws which are made in exercise of that power are not of general application; they bind only the body corporate itself and the proprietors and any mortgagee in possession, lessee or occupier of a lot to the extent described in s. 30(5). However, the matter need not be pursued.*

- 11.14 Unlike the *Dainford* case, there is a significant public interest in the detailed administration of the affairs of a public institution such as a local government. This public interest is reflected in the scheme of the Act in applying stringent requirements to make a local law, the scrutiny of local government law making and the scrutiny of local government affairs generally. This is explored further in Committee’s

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<sup>88</sup>

Section 5.96.



discussion of sub-delegation and scrutiny and accountability issues in 12 and 13 below.

- 11.15 In the Committee's opinion, the Code had not been incorporated by reference under section 3.8 or under common law principles of incorporation. There is a presumption when interpreting laws that in the absence of an unambiguous contrary intention, laws should be interpreted so as not to disturb the principles of the common law and equity.<sup>89</sup> However, it would appear there is an arguable case that section 3.8 of the Act was intended to cover the field of operation in relation to the power of local governments to incorporate documents in local laws by reference. If this were the case, it would leave no room for the City of Perth to incorporate its own code of conduct under common law principles. Therefore a failure to incorporate under the power granted by section 3.8 (as is the case with the Local Law) will result in any such purported incorporation being inoperative under section 3.7 of the Act and void under section 43(1) of the *Interpretation Act 1984*.

## **12 SUB-DELEGATION OF LOCAL LAW MAKING POWER.**

- 12.1 In the absence of legislative authority to the contrary there is a common law rule against sub-delegation of legislative power. This rule is based on the principle that a body that has been delegated the power to make legislation cannot itself delegate this power.<sup>90</sup> Local governments have been delegated the power to make local laws by the Parliament enacting section 3.5(1) of the Act. Local governments are not permitted to delegate this power to make local laws to another body unless authorised by the Act.
- 12.2 The making, amendment and repeal of the Code of Conduct under the Local Law can be affected by simple majority of the Council of the City of Perth subject to the consultation requirements in Part 2. If, as Mr Douglas contends, the Code is part of the Local Law, the Local Law can effectively be amended without having to comply with the requirements for the making of a local law under section 3.12 of the Act. This is because the Code can be made, amended or repealed by a council differently constituted from that which can make, amend or repeal a local law under the Act.
- 12.3 One of the requirements of section 3.12 is that the making, amendment or repeal of a local law requires a vote of a special majority<sup>91</sup> of councillors whereas a change to the Code of Conduct can be made by simple majority vote. In the City of Perth, which

<sup>89</sup> *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687. See the discussion in Chapter 5 of Pearce and Geddes, *Statutory Interpretation in Australia*, 5<sup>th</sup> Edition, Butterworths, 2001.

<sup>90</sup> This is expressed in the latin maxim *delegatus non potest delegare*.

<sup>91</sup> "Special Majority" is defined in section 1.10 of the Act as meaning that —

- “(a) if there are more than 11 offices of member of the council, the power can only be exercised by, or in accordance with, a decision of a 75% majority of the council; or
- (b) if there are not more than 11 offices of member of the council, the power can only be exercised by, or in accordance with, a decision of an absolute majority of the council.”

comprises nine elected members, the special majority required to make, amend or repeal a local law is five councillors. The number of members that constitutes a quorum for transacting the ordinary business of Council is a simple majority of elected members, that is five councillors.<sup>92</sup> A simple majority of this quorum is three members.<sup>93</sup> The result is that the Code of Conduct can be made, amended or repealed by a simple majority of three councillors complying with the public consultation and other requirements in Part 2 of the Local Law. If the Code forms part of the Local Law, the making, amendment or repeal of the Local Law by simple majority of Council takes place in a manner very different from the requirements of the Act. These are contained principally in section 3.12.

12.4 These requirements go beyond merely passing a law with a special majority of council but include:

- the presiding officer at a council meeting reading aloud a summary of the purpose and effect of the proposed local law (s. 3.12(2));
- prior to making the local law, advertising the proposed local law by way of Statewide and Local Public Notices including a summary of its purpose and effect and where copies can be obtained (s. 3.12(3) & (3a));
- a minimum consultation period of six weeks from advertising the proposed local law before it can be made by council (s. 3.12(4));
- providing copies of the proposed local law and the local law when passed to Minister for Local Government and Regional Development and any other relevant Minister (s. 3.12(3)(b) and (5)); and
- publication in the *Government Gazette* (s. 3.12(6)).

12.5 These requirements are mandatory in the sense that a failure to strictly comply with any of them will render a local law inoperative under section 3.7 and void for inconsistency with the Act under section 43(1) of the *Interpretation Act 1984*.<sup>94</sup> In the case of the Local Law, section 3.12 is not followed when making, amending or repealing the Code of Conduct.

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<sup>92</sup> Section 5.19 of the Act provides that: “The quorum for a meeting of a council or committee is at least 50% of the number of offices (whether vacant or not) of member of the council or the committee.”

<sup>93</sup> Section 5.20(1) of the Act provides that: “A decision of a council does not have effect unless it has been made by a simple majority or, if another kind of majority is required under any provision of this Act or has been prescribed by regulations or a local law for the particular kind of decision, by that kind of majority.”

<sup>94</sup> Opinion, Crown Solicitor’s Office to Department of Local Government and Regional Development dated January 31 2002.

- 12.6 The rule against sub-delegation only applies to the delegation of legislative powers and not administrative powers.<sup>95</sup> In the case of the Code, the Local Law seeks to give it legislative force by it being made a “policy” under Part 2. In the Committee’s view, by attempting to give it this effect, the Local Law clothes the Code with legislative character. It is no longer an administrative document to be used to guide decision makers but comprises the very rules and norms of behaviour that are sought to be enforced by the Local Law. The Code is also not a document contemplated by the Act as one that can be incorporated by reference under section 3.8(1)(c) into a local law and enforced accordingly.
- 12.7 In the Committee’s opinion the Local Law therefore sub-delegates the power of the Council to make local laws. This is because the Council has via the Local Law granted itself the power to deal with the subject matter of the delegated legislation (the Code) by simple majority resolution in circumstances where it is differently constituted from that required when making a local law under the Act.<sup>96</sup>
- 12.8 In addition, the other requirements of section 3.12 of the Act have not been followed in making, amending or repealing a Code of Conduct and the requirements of the *Interpretation Act 1984* in respect of publication and tabling of the Code have also not been followed.
- 13 AVOIDANCE OF PARLIAMENTARY OR DEPARTMENTAL SCRUTINY AND ACCOUNTABILITY ISSUES**
- 13.1 The device of using a policy (the Code) to prescribe the standards of behaviour breach of which is punishable under a local law raises issues of scrutiny and accountability of local government law making and affairs. Even if the defects in the Local Law could be rectified the Committee would recommend disallowance on the grounds that it avoids proper scrutiny of local government law making.
- 13.2 One of the objects of the Act was to ensure scrutiny of local government activity. Section 1.3 of the Act in part provides:

**1.3. Content and intent**

(1) *This Act provides for a system of local government by —*

...

<sup>95</sup> *Dainford Ltd v Smith* (1985) 58 ALR 285. See also *R v Lampe and Ors; Ex parte Manddalozzo* [1963] 5 FLR 160.

<sup>96</sup> *Staples & Co Ltd v City of Wellington* (1900) 18 NZLR 857. See the discussion in Pearce & Geddes, *Delegated Legislation in Australia*, Second Edition, Butterworths, 1999 in Chapter 23, particularly at para 23.10.

(d) providing a framework for the administration and financial management of local governments and for the scrutiny of their affairs.

- 13.3 Part of the scrutiny of the affairs of local government is provided for by the requirement under section 3.12(6) that proposed local laws be submitted to the Minister.<sup>97</sup> The purpose of the provision is to provide an opportunity for the Department to monitor local government affairs and therefore ensure that local laws are not made that are contrary to the Act, other existing law or government policy. This scrutiny mechanism is linked to the control device under section 3.17 whereby the Governor<sup>98</sup> can repeal or amend local laws that do not meet with the approval of the government of the day. Another control device available to the government is regulations made under section 3.5(4) specifying matters about which, or purposes for which, local laws are not to be made or types of local laws that are not to be made.<sup>99</sup>
- 13.4 In addition to the scrutiny and control devices available to the Executive to maintain local government accountability, the Act also assists the Parliament to scrutinise and control through disallowance, the exercise of the power it has delegated to local governments to make local laws. Section 3.12(7) grants the Minister of Local Government and Regional Development the power to issue directions to local governments requiring them to provide to Parliament “copies of local laws they have made and any explanatory or other material relating to them.”<sup>100</sup> The directions require that this information be provided to the Committee. The purpose of the directions is to ensure that sufficient information is provided to the Committee so it can inform the Parliament as to whether any local law ought to be disallowed under the power contained in section 42 of the *Interpretation Act 1984*.
- 13.5 Disallowance is an accountability mechanism whereby the Parliament can exercise its ultimate control over the delegation of its power to make subsidiary legislation like local laws. It is one of the three procedural controls on subsidiary legislation that the Parliament has put in place in Part VI of the *Interpretation Act 1984*. These are (a) publication in the *Government Gazette*, (b) tabling in both Houses of Parliament and (c) disallowance by either House of Parliament. Disallowance is only exercisable against a defined subset of subsidiary legislation – regulations, local laws, by-laws and

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<sup>97</sup> In practice proposed local laws and local laws once made are given to the Department of Local Government and Regional Development.

<sup>98</sup> The Governor must act on the advice and consent of the Executive Council. See section 60 *Interpretation Act 1984*.

<sup>99</sup> The only example is regulation 2A of the *Local Government (Functions and General) Regulations 1996* which prevents the Town of Cottesloe from making a local law charging parking fees in the District west of Broome Street.

<sup>100</sup> Explanatory Memoranda Directions 2002 issued by Hon Tom Stephens MLC on August 27 2002 have replaced Explanatory Memoranda Directions 1996 issued by the then Minister for Local Government Hon Paul Omodei MLA on August 15 1996 and distributed to all local governments in Circular 120.

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rules or where a statute specifies that another type of instrument is subject to disallowance.<sup>101</sup> Disallowance is dependent on the Parliament being aware that the subsidiary legislation has been made. This is the reason for the requirement that all subsidiary legislation be published and that disallowable instruments be tabled in both Houses of Parliament.

- 13.6 Despite the broad powers given to local governments and the policy reflected in the Act that local governments be given greater autonomy, local governments are not sovereign entities. Their powers are a creature of statute made by the Parliament. Parliament has therefore put in place scrutiny and control mechanisms to assist in ensuring the accountability of local governments to the legislature and the government of the day. These mechanisms recognise that the ballot box is a notoriously inefficient means of ensuring accountability of government institutions. This is particularly the case with local governments where voting is not compulsory and participation in local government elections is traditionally low.
- 13.7 The making of a new Code or its amendment does not come before the Committee for scrutiny as the Code is not a document subject to the requirements of the current ministerial direction.<sup>102</sup> The Code is not an instrument capable of disallowance under the *Interpretation Act 1984* because it is not a regulation, local law, by-law or rule under section 42(8)(b). As a stand-alone document, the Code does not have legislative effect and because of this it is not subsidiary legislation. The Code is therefore not subject to any of the procedural controls that the Parliament has put in place under the *Interpretation Act 1984*.
- 13.8 The Code also avoids the scrutiny and control mechanisms in the *Local Government Act 1995*. Importantly there is also no requirement to submit any proposed changes or new Code of Conduct to the Department, as would be the case with proposed local laws, or to comply with requirements of the ministerial direction to submit a copy of the Code and other explanatory material to Parliament. As a result the scrutiny and control devices put in place by the Parliament are entirely avoided. However, it is the Code that prescribes the rules and standards of behaviour that make a transgressor liable to punishment under the Local Law and these standards can be altered by simple majority vote of Council, subject only to the obligation to consult with the electors in the District.
- 13.9 There are three levels of scrutiny of local laws that maintain accountability of local governments, the electors in the District, the Government of the day via the responsible Minister and either House of Parliament through the operation of this Committee and ultimately disallowance of local laws. By using the device of making

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<sup>101</sup> See section 42(8)(b) *Interpretation Act 1984*.

<sup>102</sup> For example, the City of Perth did not provide the Committee with a copy of its Code of Conduct or the disciplinary policy referred to in the Local Law when it submitted its material in compliance with the then Ministerial Direction. These were provided later at the request of the Committee.

the Code as a “policy” under Part 2, the Local Law attempts to circumvent two of the three levels of scrutiny of local government law making.

- 13.10 The City of Perth’s rationale for having the Code stand apart and not having its text contained in the Local Law was to enable the Code to be altered without the need to comply with the procedures that are required by the Act when making, amending or repealing a local law. The following exchange between the Chairman and Mr Douglas illustrates that the reason for this was administrative efficiency and cost:

***The CHAIRMAN:** Last time you gave evidence we asked some questions about why you considered having the code of conduct in this form and not incorporating the two documents, and why you referred to the code by reference in the local law. What was the rationale behind that?*

***Mr Douglas:** It mainly related to administrative efficiency. The code is occasionally subject to change. The document is relatively simple. It does not contain a level of sophistication beyond any other local government codes. If there are changes, it is far easier to change the code than to go through the procedure of changing local laws. I point out that important consultation procedures are set out when changing the code.*

***The CHAIRMAN:** By doing it in that way, you are effectively avoiding scrutiny and accountability to some extent. There is not the same level of accountability to which you would be subject under local law, is there?*

***Mr Douglas:** It is more procedural because of the cost and time involved in changing local law compared with changing policy or the code in this case. Those procedures are set out in clause 2.2 of the local laws. They require public notice and consultation before any change to the code. That is set out in some detail in those provisions.*

***The CHAIRMAN:** Would you accept that generally it is a better procedure that if people want to know their rights, obligations and liabilities, the provisions should be incorporated in one document, so they can go to one place to find out?*

***Mr Douglas:** Yes. The way it is handled administratively, and this has occurred with a number of local laws over the years, is that information is readily accessible in a single document to members of the public.<sup>103</sup>*

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Transcript of Evidence May 15 2002 p. 9.

- 13.11 In the Committee's opinion, the scrutiny mechanisms established under the Act and the *Interpretation Act 1984* should not be avoided by the device of enacting skeletal local laws wholly dependent for their operation on substantive provisions set in policies of local government. These policies are adopted by the Council by simple majority and purport not to be subject to the scrutiny requirements intended to maintain accountability of local governments. Changes to these policies are not merely procedural as contended by Mr Douglas, they affect the very nature of the Local Law because, in this case, the Code contains the rules and standards of behaviour upon which the Local Law depends for its operation and effect.
- 13.12 There are cogent public policy reasons for disallowing such local laws aside from the legal defects identified by the Committee. A code of conduct enforceable in the manner proposed by the City of Perth can be made or amended to set behavioural standards inconsistent with the participatory intent of the Act when balanced against the need to ensure appropriate standards of behaviour by councillors and employees. A simple majority of Council can set these standards rather than the special majority required when making a local law. It is these standards that will largely determine the ease or difficulty by which the Code of Conduct can be breached and therefore the prospect of complaint and disciplinary action. Under the Local Law, the only checks on this standard setting are the Minister in consideration of an appeal and the local community that is required to be consulted under the procedure for making, amending or repealing the Code of Conduct in Part 2 of the Local Law. There is no requirement on the Council to act on any submission from the public, merely to consider them.<sup>104</sup>
- 13.13 Through the scrutiny of the Department and the Parliament, the community have a further level of protection from a local government enacting local laws that are unlawful, breach one of the Committee's terms of reference set by Parliament or are contrary to government policy. Using the device of a policy document makes the scrutiny of local laws ineffective because the substantive matters that will affect obligations under the local law are contained in what purports to be an administrative document made by simple majority resolution.
- 13.14 By way of comparison section 21 of the *Public Sector Management Act 1994* requires that each code of ethics governing the State's public servants is to be gazetted and tabled. These codes are also subject to disallowance by either House of Parliament.

#### *Determinations*

- 13.15 The Local Law uses the device of a "determination" made by Council to put in place the disciplinary action under the Local Law. Determinations first appeared in the *Shire of Moora Local Government Property Local Law*<sup>105</sup> which has subsequently been adopted by numerous other local governments. Under that local law a local

<sup>104</sup> See clause 2.2(4)(a).

<sup>105</sup> Published in the *Government Gazette* November 29 1999.

government could make determinations about the use of its property such as local halls, swimming pools, libraries, playgrounds, parks and the like rather than enact separate local laws regulating activities carried out in these places. So, for example, a local government could use the property local law to make a determination specifying that the speed of vehicles on roads in specified local government property is 40kph. Notification that this determination had been made would be included in a schedule to the local law and the full text of the determination made available to the public in a register of determinations available at the Council Office. A speed sign would be erected to that effect on each property as further notification. Under the local law the local government could make numerous determinations in relation to standards of behaviour by members of the public on its property.

- 13.16 Both the Department of Local Government and Regional Development and the former Joint Standing Committee on Delegated Legislation expressed concerns about the use of the determination device in that local law. The use of determinations avoided scrutiny by both the Department and the Parliament in a manner similar to the use of a policy made by simple majority of Council in the *City of Perth Code of Conduct Local Law*. This was because the procedure for making a local law under section 3.12 of the *Local Government Act 1995* was not required to be followed to make, repeal or amend a determination. Also the determination device by-passed the requirements of the *Interpretation Act 1984* in relation to publication of the determination in the *Government Gazette*, tabling in both Houses of Parliament and disallowance. The Department was of the view that the determination device was a back door route to making a local law and was hence unlawful. However a compromise position was adopted to ensure that the local law was required to set out the precise heads of power under which determinations could be made.<sup>106</sup>
- 13.17 Aside from the Department's concerns and the issue of scrutiny, the former Committee also raised the issue as to whether determinations made under the *Shire of Moora Local Government Property Local Law* were unlawful as a sub-delegation of legislation making power. The argument raised by Minter Ellison, lawyers representing the then Western Australian Municipal Association, to support the use of determinations in the *Shire of Moora Local Government Property Local Law* was that because they were administrative in character determinations were not an unlawful sub-delegation of legislative power.<sup>107</sup>
- 13.18 As a result of its concerns with the *Shire of Moora Local Government Property Local Law*, the then Joint Standing Committee on Delegated Legislation requested and obtained an undertaking from WAMA's Local Government Act Services Committee that the determination concept would not be expanded beyond the current Local

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<sup>106</sup> See the discussion in WALGA Local Laws Manual, 1997, section 6, pp. 9-12.

<sup>107</sup> Letter from Minter Ellison to Mr Ted Chown, Consultant to WAMA Local Laws dated March 30 2000.



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Government Property Local Law.<sup>108</sup> The advent of the *City of Perth Code of Conduct Local Law* extends the use of the determination concept beyond the Local Government Property Local Law to a new and quite unique area. Although the City of Perth cannot be bound by such an undertaking, the current Committee re-affirms the view previously expressed by the Joint Standing Committee on Delegated Legislation that the determination device should be restricted to the Local Government Property Local Law.

- 13.19 In the absence of judicial pronouncement on the validity of the determination device contained in the WALGA's Local Government Property Local Law, the Committee remains concerned that the making of determinations by local governments in relation to their property may be the exercise of legislative rather than administrative power. If this is the case such determinations will be an unlawful sub-delegation of local government law making power.

#### **14 HOW SHOULD CODES OF CONDUCT BE MADE ENFORCEABLE?**

- 14.1 A significant problem with leaving it to individual local governments to make and enforce their codes of conduct via a local law is that there is a high likelihood of lack of consistency throughout local government districts. In one local government there will be a procedure for dealing with complaints of breach of a code enforceable under a local law (both the Code and the local law may vary from local government to local government). In other local governments that have elected not to make a local law, a breach of the code of conduct will not be subject to sanction under a local law.
- 14.2 One of the weaknesses with the City of Perth's Local Law is that it does not eliminate factional issues when it comes to Council making a determination. For example, a recommendation of an investigation committee can be rejected by Council, not because of any genuine and considered analysis of the merits of the recommendation, but because the majority faction of the Council does not want one of its members to be subject to sanction. There might be political ramifications following this action but the result is that the whole disciplinary process is jeopardised by political considerations. This would not be possible if the decision as to sanction for breach was in the hands of an independent tribunal with statutory powers to impose sanctions.
- 14.3 If codes of conduct are to be used as a device to control behaviour of councillors and employees of local governments they must provide clear and concise standards of behaviour that are capable of being followed and enforced. The Committee is of the view that minimum standards of behaviour that are subject to sanction should be uniform and prescribed by the Act.
- 14.4 The preferred position of the Western Australian Local Government Association is for the State Government to enshrine minimum standards of conduct and enforcement

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<sup>108</sup> Letter to Hon Bob Wiese MLA, Chairman, Joint Standing Committee on Delegated Legislation from Mr Ted Chown, Coordinator, Local Laws WA Service dated August 3 2000.

provisions into the *Local Government Act*. WALGA represents all but one of the 144 local governments in Western Australia. Ms Ricky Burges, CEO of WALGA, gave evidence to the Committee that the City of Perth took the initiative to enact its Local Law because consecutive State Governments have not acted on this need. The following exchange between Ms Burges and the Chairman clearly indicates WALGA's preferred position:

***The CHAIRMAN:*** *Is it WALGA's preferred position that there be some form of disciplinary tribunal rather than having the 142 councils conduct their own disciplinary proceedings?*

***Ms Burges:*** *Yes. From our perspective, the situation has occurred because of a desperate need and a situation with which local governments have been grappling for a long time. The situation has become impossible and untenable. The best outcome from our perspective would be for the Act to be amended to provide local councils with minimum standards and disciplinary provisions for any breaches. We also hope to be able to develop an independent tribunal.*

***The CHAIRMAN:*** *Is it WALGA's preferred position that there be some minimum standards and that a disciplinary tribunal would overlay that?*

***Ms Burges:*** *Yes.*<sup>109</sup>

- 14.5 In the Committee's opinion, the minimum standards of behaviour of councillors and staff should be uniform and not left to the discretion of 144 local governments to set. This appears to have been the original intent of the Act in providing section 5.103 as a head of power to make regulations. It is regrettable that a uniform code of conduct has not been developed in the six years since the Act came into force. If codes of conduct are to have a proper role in guiding the behaviour of councillors and local government staff then the minimum or core standards of behaviour should be prescribed by the Act or regulations together with sanctions for breach and an enforcement mechanism. This will not prevent local governments including other matters in a code of conduct so as to recognise cultural or other differences unique to certain local governments, just that these provisions will not carry with them the threat of sanction under the Act for breach.
- 14.6 In relation to elected officials, enforcement action is not problematic. They are not subject to the direction or control of the local government in the sense that employees of the local government are subject. Sanctions such as suspension from council and

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<sup>109</sup>

Transcript of Evidence, May 8 2002, p. 2.

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removal of statutory allowances could be provided for relatively easily by amendment to the Act.

- 14.7 The position of staff of a local government (other than the CEO) is different to elected officials. Under the Act the CEO has the responsibility for the employment, management supervision, direction and dismissal of employees of the local government, including discipline and dismissal<sup>110</sup>. The majority of local government employees are subject to the Municipal Officers Award or other Awards. Behavioural standards in a code of conduct applicable to staff could be dealt with by incorporating the uniform code into their award or contract of employment. In the vast majority of cases staff who breach the code could then be dealt with by the CEO on the basis of a breach of a term of their award or contract of employment under existing disciplinary procedures. This would not exclude involvement of a tribunal or other dispute resolution bodies such as the Industrial Relations Commission and the courts.
- 14.8 However, because the local government is the employer then in the absence of some offence being committed under the Act, the powers of the tribunal should be limited to making recommendations to the CEO as to appropriate disciplinary action. Sanctions could be provided for in existing disciplinary policies and from a range of disciplinary options provided for under the Act.
- 14.9 Councils must approve the employment of CEOs and may also terminate a CEO's services. Again, in the absence of a CEO committing an offence under the Act, a disciplinary tribunal could make recommendations to Council regarding the disciplining of a CEO for breach of a uniform code of conduct. However, the Committee is of the view that it should be left to councils, as employers, to determine the appropriate disciplinary action either under the terms of the CEO's contract of employment or under a range of disciplinary options provided for under the Act.
- 14.10 The Committee recommends that the Government, in consultation with local governments, develop a uniform code of conduct prescribing the minimum standards of behaviour for elected officials and staff of local governments. This code to be contained in the Act.
- 14.11 This leaves the issue of investigation and enforcement action. There are broad powers of investigation of the affairs of local governments under Part 8 of the Act. Evidence was given principally by Ms Ricky Burges that inquiries under Part 8 of the Act were in dire need of reform. However, this matter is beyond the scope of this report. Under Part 8, the Minister and the Executive Director<sup>111</sup> can initiate investigations. Authorised persons investigating any matter have broad powers requiring persons to

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<sup>110</sup> The Council must approve the employment or dismissal of a senior employee under section 5.37.

<sup>111</sup> The Executive Director is the Chief Executive Officer of the Department of Local Government and Regional Development. See section 1.4 of the Act.

give evidence, produce documents and to enter property. The same powers would have to be available when investigating breaches of a uniform code of conduct.

14.12 The preferred position of the Committee is that the Act should be amended to provide for enforcement action for breaches of a uniform code of conduct through the establishment of a tribunal.

14.13 The Committee recommends that the tribunal should:

- deal with breaches of a uniform code of conduct and any other specified behaviour;
- not have jurisdiction to inquire into offences under the Act or other matters that would properly be within the jurisdiction of a court;
- be informal and not be bound by the rules of evidence and to the extent that it is consistent with the former to be bound by the rules of procedural fairness;
- deal only with matters referred to it by the Executive Director or the Minister so as to avoid the tribunal having to deal with trivial and vexatious matters;
- have the power to fine and suspend councillors and to withdraw the entitlement to reimbursement of expenses and payment of allowances under the Act;
- have the power to make recommendations to councils in respect of suspension of any privileges granted by the local government to a councillor; and
- have the power to make recommendations to the local government regarding the disciplining of staff including the CEO for breaches of the code of conduct.

14.14 Any amendments to the Act should be made in a manner that will make the tribunal one that is conducive to being incorporated into the proposed State Administrative Tribunal.<sup>112</sup>

14.15 The Committee understands that prior to the disallowance of the Local Law the Minister for Local Government and Regional Development, Hon Tom Stephens MLC has established an inter-agency working group with representatives from WALGA and the Department of Local Government and Regional Development to explore the establishment of a tribunal. There appears to be a desperate need in local government for such a tribunal with the power to investigate, determine and if necessary impose or recommend disciplinary sanctions against councillors or local government staff in a fair, speedy and cost effective manner. By establishing a tribunal and setting uniform minimum standards of behaviour in a code of conduct for the guidance of councillors

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<sup>112</sup> See the Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal, May 2002.

and local government staff the principal purpose of the Act to provide good government will be strengthened.

## **15 CONCLUSION**

15.1 The Committee is of the opinion that the *City of Perth Code of Conduct Local Law* is not authorised or contemplated by the *Local Government Act 1995*. This is because, amongst other things, the scheme of the Act does not permit a local government to make a local law under section 3.5 to set up a disciplinary tribunal to impose sanctions for breaches of a code of conduct made under section 5.103 of the Act.

15.2 The Legislative Council disallowed the Local Law on June 28 2002 at approximately 1:05am at which time it ceased to have effect.

15.3 Given its finding as to the absence of a power in the Act to enable the City of Perth to enforce its Code of Conduct and disallowance by the Legislative Council of the Local Law, the Committee makes the following recommendations:

15.3.1 That a code of conduct be incorporated into the *Local Government Act 1995* to establish the uniform minimum standards of behaviour for elected officials and local government staff of all 144 local governments in Western Australia.

15.3.2 That a tribunal be established by amending the *Local Government Act 1995* and that such a tribunal should:

- deal with breaches of a uniform code of conduct and any other specified behaviour;
- not have jurisdiction to inquire into offences under the Act or other matters that would properly be within the jurisdiction of a court;
- be informal and not be bound by the rules of evidence and to the extent that it is consistent with the former to be bound by the rules of procedural fairness;
- deal only with matters referred to it by the Executive Director or the Minister so as to avoid the Tribunal having to deal with trivial and vexatious matters;
- have the power to fine and suspend councillors and to withdraw the entitlement to reimbursement of expenses and payment of allowances under the Act;
- have the power to make recommendations to councils in respect of suspension of any privileges granted by the local government to a councillor; and

- have the power to make recommendations to the local government regarding the disciplining of staff including the CEO for breaches of the code of conduct.

15.3.3 That any amendments to the *Local Government Act 1995* should be made in a manner that will make the tribunal one that is conducive to being incorporated into the proposed State Administrative Tribunal.



**Margaret Quirk MLA**  
**Chairman**

**Date: September 25 2002**

## **APPENDIX 1**

### ***CITY OF PERTH CODE OF CONDUCT LOCAL LAW***





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## **CITY OF PERTH**

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LOCAL GOVERNMENT ACT 1995

## **CODE OF CONDUCT LOCAL LAW**

15 March 2002

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**LOCAL GOVERNMENT ACT 1995**

CITY OF PERTH

**CODE OF CONDUCT LOCAL LAW**

Under the powers conferred on it by the *Local Government Act 1995*, the Council of the City of Perth resolved on 12 February 2002 to make and submit for confirmation by the Governor the following local law.

**PART 1—PRELIMINARY**

- 1.1 Citation
- 1.2 Application
- 1.3 Content and intent
- 1.4 Definitions

**PART 2—CODE OF CONDUCT**

- 2.1 Policy
- 2.2 Procedures
- 2.3 Amendment and Revocation
- 2.4 Transitional

**PART 3—INVESTIGATION COMMITTEES**

- 3.1 CEO Investigation Committee
- 3.2 Members Investigation Committee
- 3.3 Payment to members and others

**PART 4—EMPLOYEES (OTHER THAN THE CEO)**

- 4.1 Complaints
- 4.2 Investigation
- 4.3 Determination
- 4.4 Objections and Appeal Rights

**PART 5—CEO**

- 5.1 Complaints
- 5.2 Investigation
- 5.3 Determination
- 5.4 Objection and Appeal Rights

**PART 6—MEMBERS**

- 6.1 Complaints
- 6.2 Investigation
- 6.3 Determination
- 6.4 Objection and Appeal Rights

**PART 7—GENERAL**

- 7.1 Notices
- 7.2 Protection from Liability
- 7.3 Costs
- 7.4 Disclosure of information
- 7.5 Offences and penalties

**SCHEDULES**

- 1. Investigation of complaints against employees other than the CEO
- 2. Investigation of complaints against the CEO
- 3. Investigation of complaints against a member

## LOCAL GOVERNMENT ACT 1995

## CITY OF PERTH

## CODE OF CONDUCT LOCAL LAW

## PART 1—PRELIMINARY

**Citation**

1.1 This local law may be cited as the “City of Perth Code of Conduct Local Law”.

**Application**

1.2 This local law applies throughout the district.

**Content and intent**

1.3 (1) This local law is intended to ensure that, in the best interests of the local community and the public generally—

- (a) members and employees of the City act in accordance with the highest ethical standards; and
- (b) the business of the City is conducted with efficiency, impartiality and integrity.

(2) To achieve this object—

- (a) the Code of Conduct sets out the standards of behaviour expected of the City's members and employees; and
- (b) the City's members and employees are accountable to the community, through an independent review process, for any breaches of the Code of Conduct.

**Definitions**

1.4 In this local law, unless the context otherwise requires—

“**Act**” means the *Local Government Act 1995*;

“**CEO**” means the chief executive officer of the City—

“**CEO Investigation Committee**” means the committee established under Part 3;

“**City**” means the City of Perth;

“**Code**” or “**Code of Conduct**” means the Code of Conduct made by the Council under Part 2;

“**committee**” means a committee established under section 5.8 of the Act;

“**Council**” means the Council of the City;

“**Councillor**” means a person who holds the office of Councillor on the Council and includes the Lord Mayor;

“**district**” means the district of the City;

“**employee**” means a person employed by the City under section 5.36 of the Act;

“**Lord Mayor**” means the Lord Mayor of the City;

“**member**” means a person who is a member of a committee, whether or not the person is a Councillor or an employee;

“**Members Investigation Committee**” means the committee established under Part 3; and

“**Regulations**” means the *Local Government (Administration) Regulations 1996*.

*Note: The Interpretation Act 1984 is of assistance in construing this local law. For example, words and expressions used in this local law which are not defined in this local law, have the meanings given to them in the Local Government Act 1995.*

## PART 2—CODE OF CONDUCT

**Policy**

2.1 The Code of Conduct is to take the form of a policy in accordance with the procedures set out in this Part.

*Note: 1 Under section 5.103 of the Act the City is required to have, and to review periodically, a code of conduct to be observed by Councillors, committee members and employees.*

*2 The Regulations prescribe the content of, and matters in relation to, a code of conduct.*

**Procedures**

- 2.2 (1) The City is to give local public notice under the Act of its intention to make a Code of Conduct.
- (2) The local public notice referred to in sub-clause (1) is to state—
- (a) that the City intends to make a Code of Conduct, the policy and effect of which is summarised in the notice;
  - (b) where a copy of the draft Code of Conduct may be inspected; and
  - (c) where, in what form and during what period written submissions may be made to the Council.
- (3) If no submissions are received in accordance with clause 2.2(2)(c), the Council is to decide—
- (a) to give local public notice that the proposed Code of Conduct has effect as a policy on and from the date of publication; or
  - (b) to amend the proposed Code of Conduct, in which case sub-clause (5) will apply.
- (4) If submissions are received in accordance with clause 2.2(2)(c), the Council is—
- (a) to consider those submissions; and
  - (b) to decide whether or not to amend the proposed Code of Conduct.
- (5) If the Council decides to amend the proposed Code of Conduct, it is to give local public notice—
- (a) of the effect of the amendments; and
  - (b) that the proposed Code of Conduct has effect as a policy on and from the date of publication.
- (6) If the Council decides not to amend the proposed Code of Conduct, it is to give local public notice that the policy has effect on and from the date of publication.
- (7) A proposed Code of Conduct is to have effect as a policy on and from the date of publication of the local public notice referred to in sub-clauses (3), (5) and (6).

**Amendment and revocation**

- 2.3 (1) The Council may amend or revoke the Code of Conduct.
- (2) The provisions of clause 2.2 are to apply to an amendment of the Code of Conduct as if the amendment were the proposed Code of Conduct.
- (3) If the Council revokes the Code of Conduct, it is to give local public notice of the revocation and the Code is to cease to have effect on the date of publication.

**Transitional**

- 2.4 Until the City makes a Code of Conduct under this Part, the Code of Conduct adopted by the City on 23 October 2001 is to be taken as having been made as a policy under this Part.

**PART 3—INVESTIGATION COMMITTEES**

**CEO Investigation Committee**

- 3.1 (1) For the purposes of Part 5 and Schedule 2 of this local law, the Council is to establish a CEO Investigation Committee.
- (2) The CEO Investigation Committee is to have 3 members who are—
- (a) the Chief Executive Officer of the Australian Institute of Management (WA Division) or his or her representative;
  - (b) the President of the Local Government Managers Australia (WA Division) or his or her representative; and
  - (c) the President of the Law Society of Western Australia (Inc) or his or her representative.

**Members Investigation Committee**

- 3.2 (1) For the purposes of Part 6 and Schedule 3 of this local law, the Council is to establish a Members Investigation Committee.
- (2) The Members Investigation Committee is to have 3 members who are—
- (a) the President of the Western Australian Local Government Association or his or her representative;
  - (b) the President of the Law Society of Western Australia (Inc) or his or her representative; and
  - (c) the President of the Institute of Company Directors (WA Division) or his or her representative.

**Payment to members and others**

- 3.3 Any payment to—
- (a) a member of the CEO Investigation Committee or the Members Investigation Committee; or
  - (b) a person employed or engaged to assist with the CEO Investigation Committee or the Members Investigation Committee;
- is to be determined and made in accordance with the relevant delegated authority granted by the Council.

**PART 4—EMPLOYEES OTHER THAN THE CEO****Complaints**

- 4.1 (1) Any person who considers that an employee of the City, other than the CEO, has breached the Code of Conduct or this local law, may make a written complaint.
- (2) The complaint is to set out the details of the alleged breach and is to be given, in confidence, to the CEO.
- (3) The CEO is to give to the employee against whom the complaint was made—
- (a) a copy of the complaint excluding, so far as practicable, the name and other identifying details of the person who made the complaint; and
  - (b) notice that the complaint is to be investigated under this local law.

**Investigation**

- 4.2 The investigation of the complaint is to be in accordance with the provisions of Schedule 1.

**Determination**

- 4.3 (1) In this clause, “**relevant employee**” means the employee against whom the complaint was made.
- (2) Where the CEO is satisfied that the complaint has not been substantiated, he or she must—
- (a) dismiss the complaint; and
  - (b) give to the relevant employee and to the person who made the complaint written notice that the complaint has been dismissed.
- (3) Where the CEO is satisfied that the complaint has been substantiated, he or she must inform the relevant employee—
- (a) that the complaint has been substantiated;
  - (b) that the CEO proposes to take one or more of the actions set out in sub-clause (4);
  - (c) which of the specific action or actions the CEO proposes to take; and
  - (d) that the relevant employee has 7 days to make representations, whether orally or in writing, to the CEO about the proposed action.
- (4) After taking into account any representations made by the relevant employee under sub-clause (3), the CEO is to determine that one or more of the following is to apply—
- (a) that no further action be taken against the relevant employee;
  - (b) that the relevant employee be reprimanded in terms which may constitute a formal warning under the disciplinary procedures applying to employees;
  - (c) that the relevant employee undertake a specified course of education, or complete a specified number of hours in a course of professional or personal development, as determined by the CEO;
  - (d) that a report be submitted to the relevant employee's professional body informing it of the breach of the Code of Conduct and that the professional body be asked to consider investigating the complaint under its own Code of Conduct of its members;
  - (e) that one or more of the privileges provided to the relevant employee, as determined by the CEO, be withdrawn for a specified period of time;
  - (f) that action be taken against the relevant employee for a suspected breach of the Act;
  - (g) that the matter be referred to the Commissioner of Police to determine whether criminal charges should be laid;
  - (h) in a case where the relevant employee is not a senior employee under section 5.37 of the Act, that the relevant employee be dismissed; and
  - (i) in a case where the relevant employee is a senior employee under section 5.37 of the Act, that a recommendation be made to the Council that the relevant employee be dismissed.
- (5) Within 7 days of his or her determination under sub-clause (4), the CEO is to give to the relevant employee and to the person who made the complaint written notice—
- (a) that the complaint has been substantiated; and
  - (b) of the action to be taken against the relevant employee.

**Objection and Appeal Rights**

- 4.4 For the purposes of Division 1 of Part 9 of the Act—

- (a) the decision of the CEO under Clause 4.3 is a decision to which the Division applies; and
- (b) the relevant employee under Clause 4.3 is an affected person for the purposes of the Division.

**PART 5—CEO****Complaint**

- 5.1 (1) Any person who considers that the CEO has breached the Code of Conduct or this local law may make a written complaint.
- (2) The complaint is to set out the details of the alleged breach and is to be given, in confidence, to the Lord Mayor.

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(3) Within 3 days of receiving the complaint, the Lord Mayor is to send it to each of the members of the CEO Investigation Committee.

(4) Within 5 days of receiving the complaint from the Lord Mayor, the CEO Investigation Committee is to give to the CEO—

- (a) a copy of the complaint excluding, so far as practicable, the name and other identifying details of the person who made the complaint; and
- (b) notice that the complaint has been referred to the CEO Investigation Committee.

#### **Investigation**

5.2 (1) In this clause, “**specified**” means specified by the Council.

(2) The investigation of the complaint is to be in accordance with the provisions of Schedule 2.

(3) If after considering the complaint, the CEO Investigation Committee considers that the complaint has not been substantiated, it must—

- (a) dismiss the complaint; and
- (b) give to the CEO and to the person who made the complaint written notice that the complaint has been dismissed.

(4) Where the CEO Investigation Committee is satisfied that a complaint against the CEO has been substantiated, it must recommend to the Council that one or more of the following determinations be made—

- (a) that no further action be taken against the CEO;
- (b) that the CEO be reprimanded;
- (c) that the CEO undertake a specified course of education, or complete a specified number of hours in such a course of professional or personal development, as determined by the Council;
- (d) that a report be submitted to the CEO's professional body informing it of the breach of the Code of Conduct and that the professional body be asked to consider investigating the complaint under its own Code of Conduct for its members;
- (e) that one or more of the privileges provided to the CEO, as determined by the Council, be withdrawn for a specified period of time;
- (f) that action be taken against the CEO for a suspected breach of the Act;
- (g) that the matter be referred to the Commissioner of Police to determine whether criminal charges should be laid;
- (h) that the CEO's employment be terminated in accordance with the provisions of his or her employment contract.

#### **Determination**

5.3 (1) After being given the CEO Investigation Committee's report, the Council must arrange a special meeting for the purpose of considering the report and its recommendations.

(2) At least 14 days before the date of the meeting, the Council must—

- (a) advise the CEO in writing of the date and time of the meeting;
- (b) give to the CEO a copy of the CEO Investigation Committee's report; and
- (c) invite the CEO to make a submission on the recommendations in the report.

(3) A member of the CEO Investigation Committee must formally present its findings and recommendations to the Council and is to answer any questions or clarify any facts.

(4) After considering the report and recommendations of the CEO Investigation Committee, the Council must either—

- (a) accept or reject the recommendation; or
- (b) where related proceedings have been instituted against the CEO, reserve its decision for up to 28 days after those proceedings have been concluded.

(5) Within 7 days of its decision under sub-clause (4), the Council is to give to the CEO and to the person who made the complaint written notice of its decision.

#### **Objection and Appeal Rights**

5.4 For the purposes of Division 1 of Part 9 of the Act—

- (a) the decision of the Council under Clause 5.3 (4) is a decision to which the Division applies; and
- (b) the CEO is an affected person for the purposes of the Division.

### **PART 6—MEMBERS**

#### **Complaint**

6.1 (1) Any person who considers that a member has breached the Code of Conduct or this local law may make a written complaint.

(2) The complaint is to set out the details of the alleged breach and is to be given, in confidence, to the CEO.

- (3) The CEO is to give to the member against whom the complaint was made—
- (a) a copy of the complaint; and
  - (b) notice that the complaint has been referred to the Members Investigation Committee.
- (4) The copy of the complaint to be given to the member against whom the complaint was made, including the name and other identifying details of the person who made the complaint.

**Investigation**

6.2 (1) In this clause “specified” means specified by the Council.

(2) The investigation of the complaint is to be in accordance with the provisions of Schedule 3.

(3) If, after considering the complaint, the Members Investigation Committee considers that the complaint has not been substantiated, it must—

- (a) dismiss the complaint; and
- (b) give to the member and the person who made the complaint written notice that the complaint has been dismissed.

(4) Where the Members Investigation Committee is satisfied that a complaint against the member has been substantiated, it must recommend to the Council that one or more of the following determinations be made—

- (a) that no further action be taken against the member;
- (b) that the member be censured;
- (c) in the case of a Councillor, that one or more of the following privileges provided to the Councillor, as determined by the Council, be withdrawn for a specified period of time, or in part, as appropriate—
  - (i) use of the dining room;
  - (ii) use of the Council's equipment or other resources;
  - (iii) payment of any allowance; and
  - (iv) reimbursement of expenses;
- (d) that a penalty not exceeding a sum of \$5,000 be imposed;
- (e) in the case of a Councillor, that he or she be prohibited from taking part in the debate (other than by recording his or her vote) in any specified meeting or meetings of the Council or a committee;
- (f) in the case of a member who is not a Councillor, that he or she be prohibited from taking part in the debate (other than by recording his or her vote) in any specified meeting or meetings of a committee of which he or she is a member;
- (g) that action be taken against the member for a suspected breach of the Act;
- (h) that the matter be referred to the Commissioner of Police to determine whether criminal charges should be laid; and
- (i) that, in the case of a member who is not a Councillor, that the Council remove the member from the committee or committees of which he or she is a member.

**Determination**

6.3 (1) After being given the Members Investigation Committee's report, the Council must arrange a special meeting for the purpose of considering the report and its recommendations.

(2) At least 14 days before the date of the meeting, the Council must—

- (a) advise the member in writing of the date and time of the meeting;
- (b) give to the member a copy of the Members Investigation Committee's report; and
- (c) invite the member to make a submission on the recommendations in the report.

(3) A member of the Members Investigation Committee must formally present the findings and recommendations to the Council and is to answer any questions or clarify any facts.

(4) After considering the report and recommendations of the Members Investigation Committee, the Council must either—

- (a) accept or reject the recommendations; or
- (b) where related proceedings have been instituted against the member, reserve its decision for up to 28 days after those proceedings have been concluded.

(5) Within 7 days of its decision under sub-clause (4), the Council is to give to the member and to the person who made the complaint written notice of its decision.

**Objection and Appeal Rights**

6.4 For the purposes of Division 1 of Part 9 of the Act—

- (a) the decision of the Council under Clause 6.3 (4) is a decision to which the Division applies; and
- (b) the member referred to in Clause 6.3 is an affected person for the purposes of the Division.

**PART 7—GENERAL**

**Notices**

7.1 Any notice or other document required or permitted to be served or given under this local law must be in writing and may be served or given—

- (a) by delivering it personally to the person to whom it is addressed; or
- (b) by sending it by registered post, addressed to that person at that person's last known place of residence or business as appearing in the records of the City.

**Protection from liability**

7.2 A person who—

- (a) is a member of the CEO Investigation Committee or the Members Investigation Committee; or
- (b) is engaged or appointed by the City or the CEO Investigation Committee or the Members Investigation Committee for the purposes of this local law,

is a protected person to whom the provisions of section 9.56 of the Act apply.

**Costs**

7.3 (1) In this clause—

- (a) “**relevant person**” means a person against whom a complaint has been made and investigated under Part 5 or Part 6; and
- (b) “**relevant Committee**” means the CEO Investigation Committee or the Members Investigation Committee which investigated the complaint against the relevant person.

(2) The Council may by resolution order the relevant person to pay all or part of the costs and expenses of the relevant Committee relating to the investigation and determination of the complaint.

(3) Sub-clause (2) does not apply unless the relevant person has been found by the relevant Committee to have breached the Code of Conduct or this local law.

(4) The Council may by resolution, in exceptional circumstances, pay from the funds of the City to the relevant person against whom there has been no adverse finding the costs or part of the costs incurred by the relevant person in responding to the complaint.

(5) Any costs or expenses ordered to be paid under sub-clause (2) are recoverable in any Court of competent jurisdiction as a debt due to the City.

**Disclosure of information**

7.4 (1) In this clause—

- (a) “**investigation**” means an investigation into a particular complaint under Part 4, 5 or 6 of this local law; and
- (b) “**investigator**” means the person, or one of the persons, carrying out an investigation.

(2) An investigator or any other person who acquires any information solely as a result of his or her investigation, or involvement in the investigation, of a complaint under this local law must not make a record of, or divulge or communicate that information to any other person except for the purposes of the performance of his or her functions under this local law.

**Offences and penalties**

7.5 (1) A person who—

- (a) fails to do anything required or directed to be done under this local law; or
- (b) does anything which under this local law that person is prohibited from doing,

commits an offence.

(2) A person who commits an offence under sub-clause (1) is liable, upon conviction—

- (a) to a maximum penalty of \$5,000; and
- (b) if the offence is of a continuing nature, to an additional maximum penalty of \$500 for each day or part of a day during which the offence has continued.

**SCHEDULE 1**

**INVESTIGATION OF COMPLAINTS AGAINST EMPLOYEES OTHER THAN THE CEO**

[Clause 4.2]

**Definition**

1. In this Schedule—

- (a) “**investigation**” means the investigation into a particular complaint under Part 4 of this local law;
- (b) “**investigator**” means the person, or one of the persons, carrying out an investigation; and
- (c) “**relevant employee**” means the employee against whom the complaint is made.

**Conduct of an investigation**

2. (1) Unless otherwise provided in this Schedule, the investigation of a complaint is to be carried out in accordance with the City's disciplinary procedures for employees.

(2) The City may engage whatever assistance it requires to conduct an investigation.



**Procedural fairness**

3. (1) The conduct of an investigation is to be carried out in accordance with the principles of procedural fairness.
- (2) A person is not to be an investigator of a complaint if he or she has an actual or apparent conflict of interest in a matter relevant to the determination of that complaint.

**Proceedings**

4. (1) Where a complaint is being investigated by more than one investigator, proceedings into that complaint are not to commence or continue unless each investigator is present.
- (2) The investigator is to ensure that—
- (a) all proceedings are conducted in private in a way that best protects their confidentiality;
  - (b) minutes are kept of all proceedings; and
  - (c) the relevant employee and any other person required to attend before the investigator is given at least 3 working days' notice of the required dates and times.
- (3) An employee, or any other person, must—
- (a) appear before the investigator when he or she has been given notice to do so; and
  - (b) comply with any reasonable request or direction given by an investigator.
- (4) If the relevant employee does not attend as required, the matter may be heard in his or her absence.

**Investigator's report**

5. At the conclusion of the investigation, the investigator is to give to the CEO a written report that is to include—
- (a) a summary of the investigation;
  - (b) the names of, and information given by, any person who was interviewed or who provided information;
  - (c) the major relevant documents;
  - (d) the findings on material questions of fact and the recommendations made;
  - (e) the reasons for those findings and recommendations; and
  - (f) the material and other information on which those findings and recommendations were based.

**SCHEDULE 2****INVESTIGATION OF COMPLAINTS AGAINST THE CEO****CEO Investigation Committee**

1. (1) At its first meeting after reviewing the complaint, the CEO Investigation Committee must appoint one of its members to be the presiding member for the purposes of that complaint.
- (2) Each member of the CEO Investigation Committee is to be present during all proceedings and all deliberations relating to the complaint.
- (3) A decision of the CEO Investigation Committee will be made by a majority of its members.

**Procedural fairness**

2. (1) The conduct of an investigation is to be carried out in accordance with the principles of procedural fairness.
- (2) A person is not to be a member of the CEO Investigation Committee in relation to a particular complaint if he or she has an actual or perceived conflict of interest in a matter relevant to the determination of that complaint.

**Preliminary review of a complaint**

3. (1) The CEO Investigation Committee is to conduct a preliminary review of the complaint to determine whether the complaint should be investigated further.
- (2) The preliminary inquiry may take whatever form the CEO Investigation Committee considers to be appropriate.
- (3) If the CEO Investigation Committee determines that the complaint is frivolous, vexatious or lacking in substance, it is—
- (a) to dismiss the complaint; and
  - (b) to give to the CEO and to the person who made the complaint written notice that the complaint has been dismissed.

**Investigation**

4. (1) If the CEO Investigation Committee determines that the complaint is not frivolous, vexatious or lacking in substance, it is to proceed with the investigation.
- (2) The CEO Investigation Committee may—
- (a) appoint or engage a person or persons to assist it with the investigation; and
  - (b) obtain written statements, documentary material or other information that it considers may be relevant to the investigation.

15 March 2002

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**Notice to the CEO**

5. The CEO Investigation Committee must, at least 3 working days before the date on which it proposes to hear from or question the CEO—

- (a) notify the CEO of the proposed time and date;
- (b) notify the CEO of the substance of any allegations that are not apparent from the complaint itself; and
- (c) give to the CEO copies of documents, or access to information, which it is necessary for the CEO to have in order to respond to the complaint.

**Proceedings**

6. (1) All proceedings of the CEO Investigation Committee are to be conducted in private in a way that best protects their confidentiality.

(2) No one is entitled to be present during any part of the proceedings of the CEO Investigation Committee, except with the permission of, and in accordance with any direction given by, the CEO Investigation Committee.

(3) The CEO Investigation Committee is to ensure that minutes are kept of all its proceedings.

(4) The CEO Investigation Committee may—

- (a) permit the CEO, or any other person, to be legally represented;
- (b) adjourn its proceedings at any time;
- (c) permit the CEO, or any other person—
  - (i) to provide an oral or written statement;
  - (ii) to question another person giving information to the CEO Investigation Committee; or
  - (iii) to arrange for another person to provide an oral or written statement to the CEO Investigation Committee.

(5) The CEO Investigation Committee is not bound by the rules of evidence and, in conducting its proceedings—

- (a) must act according to equity, good conscience and the substantial merits of the case without regard to legal formalities; and
- (b) may adopt whatever procedures it thinks appropriate.

(6) The CEO Investigation Committee may obtain any information from any source and by whatever lawful means that it considers appropriate, but it is not to use that information as the basis of an adverse finding against the CEO without giving the CEO an opportunity to be heard in relation to that information.

(7) The CEO, and any other person, must—

- (a) attend a hearing of which he or she has been given notice; and
- (b) comply with any reasonable request or direction given by the CEO Investigation Committee.

(8) If the CEO does not attend a hearing, the matter may be heard and determined in his or her absence.

**Communications with the City**

7. All communications from the CEO Investigation Committee to the City must be through the Director, Corporate Services.

**SCHEDULE 3**

**INVESTIGATION OF COMPLAINTS AGAINST A MEMBER**

**Members Investigation Committee**

1. (1) At its first meeting after reviewing the complaint, the Members Investigation Committee must appoint one of its members to be the presiding member for the purposes of that complaint.

(2) Each member of the Members Investigation Committee is to be present during all proceedings and all deliberations relating to the complaint.

(3) A decision of the Members Investigation Committee will be made by a majority of its members.

**Procedural fairness**

2. (1) The conduct of an investigation is to be carried out in accordance with the principles of procedural fairness.

(2) A person is not to be a member of the Members Investigation Committee in relation to a particular complaint if he or she has an actual or perceived conflict of interest in a matter relevant to the determination of that complaint.

**Preliminary review of a complaint**

3. (1) The Members Investigation Committee is to conduct a preliminary review of the complaint to determine whether the complaint should be investigated further.

(2) The preliminary inquiry may take whatever form the Members Investigation Committee considers to be appropriate.

(3) If the Members Investigation Committee determines that the complaint is frivolous, vexatious or lacking in substance, it is—

- (a) to dismiss the complaint; and
- (b) to give to the member and to the person who made the complaint written notice that the complaint has been dismissed.

#### **Investigation**

4. (1) If the Members Investigation Committee determines that the complaint is not frivolous, vexatious or lacking in substance, it is to proceed with the investigation.

(2) The Members Investigation Committee may—

- (a) appoint or engage a person or persons to assist it with the investigation; and
- (b) obtain written statements, documentary material or other information that it considers may be relevant to the investigation.

#### **Notice to the member**

5. The Members Investigation Committee must, at least 3 working days before the date on which it proposes to hear from or question the member—

- (a) notify the member of the proposed time and date;
- (b) notify the member of the substance of any allegations that are not apparent from the complaint itself; and
- (c) give to the member copies of documents, or access to information, which it is necessary for the member to have in order to respond to the complaint.

#### **Proceedings**

6. (1) All proceedings of the Members Investigation Committee are to be conducted in private in the way that best protects their confidentiality.

(2) No one is entitled to be present during any part of the proceedings of the Members Investigation Committee, except with the permission of, and in accordance with any direction given by, the Members Investigation Committee.

(3) The Members Investigation Committee is to ensure that minutes are kept of all its proceedings.

(4) The Members Investigation Committee may—

- (a) permit the member, or any other person, to be legally represented;
- (b) adjourn its proceedings at any time;
- (c) permit the member, or any other person—
  - (i) to provide an oral or written statement;
  - (ii) to question another person giving information to the Members Investigation Committee; or
  - (iii) to arrange for another person to provide an oral or written statement to the Members Investigation Committee.

(5) The Members Investigation Committee is not bound by the rules of evidence and, in conducting its proceedings—

- (a) must act according to equity, good conscience and the substantial merits of the case without regard to legal formalities; and
- (b) may adopt whatever procedures it thinks appropriate.

(6) The Members Investigation Committee may obtain any information from any source and by whatever lawful means that it considers appropriate, but it is not to use that information as the basis of an adverse finding against the member without giving the member an opportunity to be heard in relation to that information.

(7) The member, and any other person, must—

- (a) attend a hearing of which he or she has been given notice; and
- (b) comply with any reasonable request or direction given by the Members Investigation Committee.

(8) If the member does not attend a hearing, the matter may be heard and determined in his or her absence.

#### **Communications with the City**

7. All communications from the Members Investigation Committee to the City must be through the Director, Corporate Services.

Dated this 12th day of February 2002.

The Common Seal of the City of Perth was affixed by authority of a resolution of its Council in the presence of—

Dr. P. NATTRASS, Lord Mayor.  
Mr. G. HUNT, Chief Executive Officer.





**APPENDIX 2**  
**CITY OF PERTH**  
**CODE OF CONDUCT**



POLICY NO:CS29  
**CODE OF CONDUCT**

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**ORIGIN/AUTHORITY**

Council meeting - 15 October 1990

**FILE NO.**P1013078

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**OBJECTIVE**

To set out the standards of behavior expected by the City's members and employees.

**POLICY STATEMENT****DEFINITIONS**

In this Code:-

"**Act**" means the *Local Government Act 1995*.

"**Local Law**" means the City of Perth Code of Conduct Local Law 2001.

"**Regulations**" means the Local Government (Administration) Regulations 1996.

**PART 1 - VALUES AND ETHICAL PRINCIPLES**

A Code of Conduct is determined by the values and ethical principles on which it is based:-

**1.1 Values**

This Code of Conduct is governed by The Seven Keys, being a statement of the City of Perth's key corporate values. The direction statements encompassed in The Seven Keys are:-

**1.1.1 Living Our Values**

As the Capital City we have a special responsibility to the people of Western Australia. We show this by practising our values in the work we do.

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## **POLICY NO:CS29**

### **1.1.2 Partnerships**

Trust and communication are the basis for fostering partnerships.

### **1.1.3 Leadership**

Leaders demonstrate the organisation's values and provide clear direction and support. As one organisation we all contribute to shaping the City's future.

### **1.1.4 People**

We value our people by recognising their creativity, experience, commitment and potential.

### **1.1.5 Improvement**

We find ways of doing things better.

### **1.1.6 Participation**

Throughout the ongoing process of change, we encourage participation and good communication.

### **1.1.7 Service**

We take pride in delivering quality customer service.

## **1.2 Ethical Principles**

This Code of Conduct is also governed by three ethical principles - Justice, Respect for Persons, and Responsible Care.

### **1.2.1 Justice**

A responsibility to:-

- Be fair and equitable in our treatment of others, not treating people as a means to an end.
- Use and share power for the common good of both individuals and society.
- Avoid discrimination, abuse or exploitation of others.

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**POLICY NO:CS29****1.2.2 Respect for Persons**

A responsibility to:-

- Respect the rights of individuals and groups allowing them their opinion and their right to be different.
- Enable and empower others to achieve their potential by promoting their physical, mental and social well being.
- Encourage honest working relationships by being truthful and sincere when dealing with others.

**1.2.3 Responsible Care**

A responsibility to:-

- Contribute to the well being of individuals and society by exercising due diligence and a duty of care to others.
- Treat others as they would like to be treated, doing good and not doing harm.
- Uphold the rights of those who are unable to do so, advocating for others where required.
- Protect and responsibly manage the resources of the City of Perth.

**PART 2 - CONFLICT AND DISCLOSURE OF INTEREST**

In this Part:-

**"interest"** means an interest that would give rise to a reasonable belief that the impartiality of the person having the interest would be adversely affected (see regulation 34C of the Regulations).

The benefit or advantage which could be received from a situation can sometimes appear inconsistent with the role of member or public officer. Conflict of interest can undermine the confidence of the public in the City's honesty and integrity. Where there is the potential for misunderstanding, members and employees are to openly declare their interests or alternately, avoid situations which could be misconstrued.

**2.1 Conflict of Interest**

In this clause, unless the context requires otherwise:-

**"relevant person"** means a member, employee or other person who is required to

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## **POLICY NO:CS29**

declare an interest under section 5.70 or 5.71 of the Act (see section 5.59 of the Act).

A relevant person must ensure there is no actual (or perceived) conflict or incompatibility between their personal interests and the impartial fulfillment of their public duties.

The following provisions therefore apply:-

- 2.1.1 Employees must not engage in private work with or for any person or body with an interest in a proposed or current contract with the City of Perth, without first making written disclosure to the CEO.
- 2.1.2 A relevant person must lodge written notice with the CEO describing an intention to undertake a dealing in land within the municipality or which may otherwise be in conflict with the City of Perth's functions (other than purchasing or leasing the principal place of residence).
- 2.1.3 A relevant person who exercises a decision making function must make written disclosure to the CEO before dealing with relatives or close friends, and will disqualify themselves from dealing with those persons.
- 2.1.4 Employees must refrain from local government political activities which could cast doubt on their neutrality and impartiality in acting in their professional capacity.

### **2.2 Disclosure of Interests**

Members and employees must comply with the requirements of disclosure of financial and conflict of interest as contained within Division 6 of Part 5 of the Act and Regulation 34C of the Local Government (Administration) Regulations 1996.

- 2.2.1 A member or employee who has an interest in any matter to be discussed at a Council or Committee meeting to be attended by that member or employee, must disclose the nature of the interest.
- 2.2.2 A member or employee who has an interest in any matter in respect of which the member or employee has given or will give advice, must disclose the nature of the interest.
- 2.2.3 The disclosure of an interest in a matter in respect of which a member or employee has given or will give advice must:-

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**POLICY NO:CS29**

- 2.2.3.1 be made in writing;
- 2.2.3.2 be made at the time that the advice is given;
- 2.2.3.3 accompany the advice; and
- 2.2.3.4 be recorded in the minutes of the meeting at which the advice is considered.

2.2.4 The disclosure of an interest in a matter to be discussed at a Council or Committee meeting must be:-

- 2.2.4.1 made in writing;
- 2.2.4.2 given to the CEO either before the meeting or immediately before the matter is discussed at the meeting; and
- 2.2.4.3 recorded in the minutes of the meeting.

2.2.5 The onus is on members and employees to identify possible financial and conflicts of interest, and to determine whether such interests, to which no statutory exemption applies, exists.

**2.3 Disclosure of Information in Returns**

In this clause:-

**"designated employee"** means:-

- (a) a CEO;
- (b) an employee, other than the CEO, to whom any power or duty has been delegated under Division 4 of the Act;
- (c) an employee who is a member of a committee comprising Council members and employees; and
- (d) an employee nominated by the City to be a designated employee.

**"relevant person"** means a person who is a Council member or a designated employee.

A relevant person must comply with the requirements of the following Sections of the Act:-

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## **POLICY NO:CS29**

- 2.3.1 Section 5.79: Real Property;
- 2.3.2 Section 5.80: Source of Income;
- 2.3.3 Section 5.81: Trusts;
- 2.3.4 Section 5.82: Gifts;
- 2.3.5 Section 5.83: Contributions to Travel;
- 2.3.6 Section 5.84: Interests and Positions in Corporations;
- 2.3.7 Section 5.85: Debts;
- 2.3.8 Section 5.86: Dispositions of Property;

in relation to the disclosure of information in a return.

### **2.4 Personal Benefit**

#### **2.4.1 Improper Use of Information**

2.4.1.1 Section 5.93 of the Act provides that:-

A person who is a Council member, a committee member or an employee, must not make improper use of any information acquired in the performance by the person of his or her functions under this Act or any other written law:-

- (a) To gain directly or indirectly an advantage for the person or any other person.
- (b) To cause detriment to the local government or any other person.

Penalty: \$10,000 or imprisonment for two years.

2.4.1.2 Confidential reports to the Council or a Committee of the Council shall remain confidential unless the Council resolves to the contrary.

#### **2.4.2 Improper or Undue Influence**

Members and employees must not take advantage of their position to improperly influence other members or employees in the performance of their duties or functions, in order to gain direct or indirect advantage for themselves or for any other person.

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**POLICY NO:CS29****2.4.3 Gifts**

In this clause:-

**"gift"** means any disposition of property, or the conferral of any other financial benefit, made by one person in favour of another otherwise than by will (whether with or without an instrument in writing), without consideration in money or money's worth passing from the person in whose favour it is made to the other, or with such consideration so passing if the consideration is not fully adequate, but does not include any financial or other contribution to travel.

It does not include:-

- (a) a gift from a relative as defined in section 5.74(1);
- (b) a gift as defined in regulation 30A of the *Local Government (Elections) Regulations 1997*;

**"token gift"** means a gift of, or below, the value of \$20.

2.4.3.1 A relevant person cannot accept a gift, other than a token gift, from a person who is undertaking, or is likely to undertake, business:-

2.4.3.1.1 That requires the person to obtain any authorisation from the City;

2.4.3.1.2 By way of contract between the person and the City; or

2.4.3.1.3 By way of providing any service to the City.

2.4.3.2 The CEO is to keep a register of gifts, including token gifts, and is to include in the register the details that are given under Clause 2.4.3.3.

2.4.3.3 A relevant person who receives, other than in his or her purely private capacity:-

(a) A gift or other benefit; or

(b) A token gift from a person referred to in Clause 2.4.3.1,

must, within 5 days of its receipt, give to the CEO written details of:-

(i) The name of the person who gave, and received, the gift or

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## **POLICY NO:CS29**

token gift;

- (ii) The date of receipt of the gift or token gift; and
- (iii) A description, and the estimated value, of the gift or token gift.

Reference should be made to Regulation 34B of the Local Government (Administration) Regulations 1996.

### **PART 3 - CONDUCT OF MEMBERS AND EMPLOYEES**

As members and employees, high standards of professional conduct ensure that a positive image of the City of Perth is conveyed when the City interacts with the City's stakeholders and general public. The conduct displayed should encourage fair, equitable and lawful management and operation of the City.

#### **3.1 Personal Behaviour**

##### **3.1.1 Members and employees must:-**

3.1.1.1 Act in accordance with the requirements of the law and the terms of this code;

3.1.1.2 Perform their duties impartially and in the best interests of the City of Perth;

3.1.1.3 Act in good faith in the interests of the City of Perth and the community;

3.1.1.4 Make no allegations which are improper or derogatory and refrain from any form of conduct, in the performance of their official or professional duties, which may cause any person unwarranted offence or embarrassment, unless they are true and in the public interest;

3.1.1.5 Always act in accordance with their obligations to the City of Perth and in line with relevant policies and procedures.

3.1.2 Elected members must represent and promote the interests of the local government of the City of Perth, while recognising their special duty to their own constituents.

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## **POLICY NO:CS29**

### **3.2 Honesty and Integrity**

Members and employees must:-

- 3.2.1 Observe the highest standards of honesty and integrity;
- 3.2.2 Bring to the notice of the CEO any dishonesty on the part of any other member or employee. All such notices will be given strict confidentiality. The organisation will give appropriate support to all parties during any investigation;
- 3.2.3 Be frank and honest in their official dealing with each other.

### **3.3 Performance of Duties**

- 3.3.1 While on duty, employees must give their whole time and attention to the City of Perth's business and ensure that their work is carried out efficiently and effectively, so that their standard of work reflects favourably both on them and on the City of Perth.
- 3.3.2 Members must at all times exercise reasonable care and diligence in the performance of their duties, being consistent in their decision making but treating all matters on individual merits. Members will be as informed as possible about the functions of the City of Perth and will treat all members of the community honestly and fairly.

### **3.4 Compliance with Local Laws and Policies**

Members and employees must give effect to the adopted local laws and policies of the City of Perth, whether or not they agree with or approve of them.

### **3.5 Management Practices**

Members and employees must ensure compliance with the City of Perth's management practices and administrative procedures, whether or not they agree with or approve of them.

### **3.6 Communication and Public Relations**

- 3.6.1 All aspects of communication by employees (including verbal, written,

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## **POLICY NO:CS29**

electronic or personal), involving the City of Perth's activities must be accurate, polite and professional, and in accordance with the City of Perth's communication guidelines and standards.

3.6.2 As a representative of the community, members need to be not only responsive to community views, but to adequately communicate the attitudes and decisions of the Council. In doing so members must acknowledge that:-

3.6.2.1 As a member of the Council or its Committees there must be respect for the decision making processes of the Council which are based on a decision of the majority of the Council or Committee;

3.6.2.2 Information of a confidential nature must not be communicated until it is no longer treated by the City as confidential;

3.6.2.3 Information relating to decisions of the Council must only be communicated in an official capacity by the Lord Mayor or his/her representative, or a designated officer of the City of Perth;

3.6.2.4 Information concerning adopted policies, procedures and decisions of the City of Perth must be conveyed accurately.

### **3.7 Relationships Between Members and Employees**

An effective member will work as part of the City of Perth team with the CEO and other members and employees. That teamwork will only occur if members and employees have a mutual respect and co-operate with each other to achieve the City's corporate goals and implement the City's strategies. To achieve that position all parties need to understand each others roles as specified in the Act and any relevant agreements.

To achieve this effectiveness in teamwork, all members will:-

3.7.1 Accept that their role is one of Council leadership, and not a management or administrative role;

3.7.2 Acknowledge that they have no capacity to individually direct employees to carry out particular functions;

3.7.3 Refrain from publicly criticising employees in a way that casts aspersions on their professional competence and credibility;

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**POLICY NO:CS29**

- 3.7.4 Ensure that no restrictions or undue influence is placed on the ability of employees to give professional advice to the Council.

At the same time, employees will recognise that members' views and opinions often reflect valid community viewpoints that should be considered in conjunction with professional opinion. Employees will therefore make every effort to assist members in the performance of their role, and to achieve the satisfactory resolution of issues that may arise in the performance of their official role.

**3.8 Appointments to Committees (External)**

Elected members representing the Council on external organisations are to ensure that they:-

- 3.8.1 Clearly understand the basis of their appointment;
- 3.8.2 Provide regular reports on the activities of the organisation in accordance with the confidentiality requirements of that organisation;
- 3.8.3 Represent the Council's interests on all matters relating to that organisation, whilst maintaining the confidentiality requirements of the City of Perth.

**3.9 Defamation**

- 3.9.1 Comments by members at meetings of the Council and/or Committees of the Council are covered only by qualified privilege against defamation and this qualified privilege may not extend to comments by employees.
- 3.9.2 A member can only rely on the defence of qualified privilege whilst exercising the proper discharge of his or her duties, and doing so in the public interest.
- 3.9.3 In order to maintain the qualified privilege, a member should ensure that comments made are pertinent to the business of local government, they are not made maliciously, or without due regard to whether they represent the truth.

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## **POLICY NO:CS29**

### **PART 4 - DEALING WITH COUNCIL PROPERTY**

#### **4.1 Use of Resources**

Members and employees must:-

- 4.1.1 Be honest in their use of the City of Perth's resources and shall not misuse them or permit their misuse by any other person or body;
- 4.1.2 Use City of Perth's resources entrusted to them effectively and efficiently in the course of their duties, and;
- 4.1.3 Ensure the City of Perth's resources are only to be utilised for authorised activities (for example - no use of employees for personal tasks or no use of equipment for non Council business).

#### **4.2 Reimbursement of Expenses**

Members and employees must only claim for reimbursement of expenses in accordance with the relevant policy.

### **PART 5 - WHISTLEBLOWER PROTECTION**

- 5.1 The CEO is to ensure that employees who report unacceptable or illegal behaviour of members or employees (that is, whistleblowers) are not in any way disadvantaged nor victimised because of their actions.
- 5.2 Employees are encouraged to, in the first instance, report unacceptable or illegal behaviour to the relevant Supervisor or Manager. Behaviour of a serious nature must be reported directly to the CEO.
- 5.3 Members and employees must be aware of the Anti-Corruption Commission Act 1988 which provides for the voluntary reporting of possible corrupt conduct to the Commission. Penalties will prevail if a person who makes a complaint:-
  - 5.3.1 Has his or her safety or career prejudiced, or threatened to be prejudiced;
  - 5.3.2 Is intimidated or harassed; or
  - 5.3.3 Has an act done to his or her detriment because of having assisted

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**POLICY NO:CS29**

the Commission, or furnished information to the Commission.

**Amendments/Review:**

Council meeting - 10 June 1997

Council meeting - 23 October 2001

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**APPENDIX 3**  
**LIST OF WRITTEN SUBMISSIONS & TABLED**  
**DOCUMENTS**



## APPENDIX 3

### LIST OF WRITTEN SUBMISSIONS & TABLED DOCUMENTS

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#### WRITTEN SUBMISSIONS:

1. Councillor Vincent Tan (May 13 2002)
2. Councillor Bert Tudori (May 15 2002)
3. Australian Services Union (June 19 2002)

#### DOCUMENTS TABLED AT HEARING ON MAY 8 2002:

1. Copy of article “Allegations on Council thrown out” - *The West Australian* May 8 2002.
2. WA Local Government Association – Joint Standing Committee on Delegated Legislation – Consideration of the City of Perth Code of Conduct Local Law.
3. Documents tabled by the City of Perth:

Document Date	Description	Ref No
9.7.96	Policy No: CS20 : Elected Members – Attendance Fees	1
27.8.96	Policy No: CS11: Elected Members – Reimbursement of Expenses	2
23.12.97	Letter to Minister for Local Government from G Hunt, CEO re Code of Conduct	3
1.12.98	Facsimile to Dept of Local Government from J Parry, Manager Corporate Support re Code of Conduct	4
30.7.99	Council Minutes of Special Council Meeting on 30 July 1999	5
30.7.99	Media Release resulting from Special Council Meeting 30 July 1999	6
25.8.99	Letter to Minister for Local Government from G Hunt, CEO re	7

	Local Law Relating to Breaches of Code of Conduct	
29.9.99	Letter from Minister for Local Government; Disability Services to G Hunt, CEO responding to above letter of 25 August 1999	8
8.8.00	Extract of Item 508/00 from Council Minutes of Council Meeting on 8 August 2000	9
8.8.00	Letter to Minister for Local Government from G Hunt, CEO re Code of Conduct	10
30.8.01	Letter from Minister for Housing and Works; Local Government & Regional Development; The Kimberley, Pilbara & Gascoyne responding to above letter of 8 August 2001	11
25.10.01	Letter to Minister for Local Government and Regional Development from G Hunt, CEO	12

## **DOCUMENTS TABLED AT HEARING ON MAY 15 2002**

1. Flow Chart explaining Code of Conduct local law investigation and disciplinary process