Submission by depa to the Independent review of the effectiveness of the framework for dealing with councillor misconduct in NSW

depa is an association of employees registered under the *Industrial Relations Act 1996*, covering professional employees in local government in New South Wales involved in public and environmental health, building and building compliance, planning and related professions.

This submission is comprised of three parts:

Part 1

A brief explanation of our experience in recent years, an illustration of all those things that are wrong with its framework for dealing with councillor misconduct and some suggested principles to develop a framework that inspires confidence in the industry, and in the community.

Part 2

Responses to the 28 Considerations in the review's Consultation Paper, and

Part 3

An affidavit in Ian Robertson v Office of Local Government filed in NCAT on 26 May 2021, heard with a written decision reserved and still not delivered some twelve months later. The first part of our submission reveals the relevance of the information contained within the affidavit.

As a significantly affected party in the industry we request a meeting with the Reviewer to deal with any questions that might arise from our submission and to generally assist.

Yours sincerely

Ian Robertson
Secretary

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Part 1

On 5 February 2021 Tim Hurst, CEO of the Office of Local Government, made a mistake.

That mistake, the circumstances of making that mistake and the way in which OLG responded to the immediate reaction in the industry to that error, reveals everything that's wrong with the current framework for dealing with councillor misconduct.

This was an investigation into a councillor at the time at Wagga Wagga City Council, Paul Funnell. The Council had already dealt with his behaviour in shouting at a staff member in a Council meeting on 19 November 2018 and similar behaviour including profanities at some councillors, and then referred it to OLG. Almost 2 years after the behaviour was determined to be a breach of the Code of Conduct by a conduct reviewer, Mr Hurst published a Statement of Reasons for taking disciplinary action against the Councillor. Two years?

At paragraph 20 of the Statement, Mr Hurst said:

I have considered and taken into account that this conduct occurred in a single episode, and the absence of any prior offending or post event conduct in the past two years and the lack of previous incidents of misconduct on the part of Cllr Funnell.

This is demonstrably untrue. There had been prior offending and breaches of the Code by the councillor on 10 May 2020 by posting comments on the Facebook page of the Daily Advertiser in Wagga Wagga about an employee, a senior planner who was also the President of depa, which were *"vindictive, offensive, certainly defamatory, inaccurate and damaging*" to the employee's reputation and wellbeing.

There were then multiple complaints of breaches by the employee concerned, depa in support of our member, apparently other employees as well (although this is a very secretive process). Action was also taken by the Council GM Peter Thompson to have the comments withdrawn and to bring the issue to the attention of OLG.

On 20 May 2020, (p 36 Part 3) under the Subject *"Cllr Paul Funnell",* I had emailed Tim Hurst and another officer of OLG, Jon Davies, providing them with a copy of correspondence sent the previous day to the GM of the Council headed *"Wagga Wagga City Council is an unsafe workplace".*

In that email I said:

Good morning Comrades, I thought I give you a heads up so you are forewarned about this bloke, if you've not already been alerted.

The attached letter (p 37 Part 3) included a Statement and recommendations from the Industrial Relations Commission on 11 August 2010 (p 40) recommending that the Council *"without delay, develop and implement a policy around its duty of care to employees and around its need for the employment relationship to protect them against personal and reputational damage in the future."* This says a lot about that Council.

Having received no response from OLG to the 20 May email, on 12 June 2020 I followed it up (p 42 Part 3), under the same Subject heading *"Cllr Paul Funnell",* and said this:

"Good morning Tim and John, I know it's only three weeks, which is not long in dealing with OLG, but are you keeping an eye on this?

I know Tim, that we've had lots of discussions about disciplinary regimes for councillors, the complications of suspension, the three suspensions before you're removed entirely and all that, but it would be good if at some stage we could look at suitable mechanisms to take steps to get rid of the serial breachers of the Code of Conduct and the Act and put some dignity into public life in local government politics.

What's happening?"

There was no response but I know that the Office was well aware of the local action and the actions of the GM in having the posting deleted and the multiple code complaints that had been made.

It was impossible for that not to be notorious in the Office of Local Government. This was only eight months prior to Mr Hurst's 5 February 2021 Disciplinary Action against Councillor Funnell. Given that this matter involved behaviour two years prior to the Determination, in November 2018, the investigation of that behaviour would have overlapped with this further bad behaviour, and be well-known to the Office.

Returning to the 5 February 2021 Determination, I emailed Mr Hurst on 11 February 2021, under the subject *"WTF, Chinese or Russian hackers have been on your site and changed clause 20",* informing him of the error.

Again, on 16 February, with multiple examples of prior offending and post incident offending, including a Council censure of the Councillor on 25 November 2019.

Again, on 22 February with yet another example of councillor misconduct, this time boasting of attacking staff.

On 23 February, depa published the February issue of depaNews, with the lead story headlined *"Office of Local Government hacked by Russians"* with a photoshopped illustration of Putin, Councillor Funnell and Tim Hurst. The article contained a link to Mr Hurst's Order and our persistent email trail pursuing him about the inaccuracy. I forwarded that issue by email to Mr Hurst.

That article concluded:

Tim Hurst must act now or there can be no credibility for OLG in managing either the processes or the penalties arising from breaches of the Code of Conduct."

There was no response to any of that contact from either Mr Hurst, or the Office , and I know that there had been similarly frequent contact by the general manager of Wagga Wagga City Council who was also alarmed about the mistake, and its implications on managing the unmanageable councillor.

On 5 March 2021 I made application under the *GIPA Act* for the any OLG report into the incidence of this complaint, other briefing notes or relevant information and anything *"indicating any prior offending or post event conduct and previous incidents of misconduct".*

On 8 March the application was rejected by the OLG under section 51(1)b) of the *GIPA Act* as *"excluded information of the OLG"*. OLG has a discretion to disclose information but chose not to exercise it.

On 16 March depa filed an application in NCAT challenging the OLG refusal to provide the information.

On 19 April depa wrote to Mr Hurst referring to the forthcoming Case Conference on 26 April, reminding the Office of our email communications immediately after the Order was published and that *"we are open to a settlement of our application".*

All of this is included in Part 3.

Whatever kind of framework comes next must provide a practical solution to these sorts of factual errors.

But it got worse. OLG lawyers furiously defended their right to withhold information, citing a variety of precedents to keep the vault closed.

The NSW Information Commissioner made a comprehensive 67 paragraph submission, largely impenetrable but fundamentally supporting the right of OLG to protect their information. That seemed inconsistent with the thinking of the NSW Premier in the second reading speech for the bills establishing *"the nation's best freedom of information laws"* that:

The public's right to know must come first... Our public sector must embrace openness and transparency and governments must forever relent their habitual instinct to control information... this is supported by an explicit presumption in favour of disclosure".

This statement (leaving aside whether the Information Commissioner is acting consistently with it or not) should be embraced in developing the new framework for dealing with councillor misconduct.

The NCAT Senior Member who heard the dispute asked, in what had been a fairly dull administrative argument, for the parties to provide extrinsic information that may assist, and for our part, we provided the second reading speech and other intentions of government to enhance the public's right to know.

The way the OLG has handled this has had all the elements of farce.

This was an exercise where there should have been a more practical solution. There was a more practical solution available but OLG chose to ignore it. A discretion should have been exercised demonstrating that Mr Hurst was either correct in paragraph 20, or acknowledging that he was wrong, withdrawing or rescinding the Order and substituting it with another order. The subsequent order would acknowledge the prior breaches and the subsequent misconduct, consequently warranting a more significant penalty.

This became relevant in 2021 when, apparently faced with one or more draft reports with findings and potential action from OLG, Councillor Funnell resigned from the Council, citing health issues. But in doing so he avoided any further disciplinary action because OLG does not pursue action when the councillor ceases being a councillor. This subsequently allowed Mr Funnell to stand for election without those blemishes...

Whatever kind of framework comes next must be more practical and provide mechanisms to allow the correction of factual errors, rather than what, for all intents and purposes, looks like choosing to cover them up.

As the Secretary of the union in the industry covering employees involved in the assessment of development applications and compliance, our members are regularly attacked for doing their jobs properly. It's critical, if OLG is to continue as the regulator of councillor behaviour, conducting investigations and making determinations, then there needs to be absolute confidence in the process.

The OLG should provide transparency about its decision-making process and should protect those who make such complaints. I am not confident in responding to members who contact depa asking for advice about whether certain complaints should be made to the OLG.

It's now more than a year since we filed our application with NCAT, the case concluded in July, and the judgement remains reserved.

Under previous CEOs of OLG (or Directors-General of the Department of Local Government, there was more hands-on activity managing councillor behaviour, departmental officers would, as a result of industrial disputes, give advice to councillors on appropriate behaviour - even sit in and monitor Council meetings - and on one occasion a previous Director-General mediated a dispute between this union and a Council over what to do with an employee who had remained in a temporary position for more than twelve months, contrary to the restrictions preventing that in section 351 of the Local Government Act 1993.

The OLG provided serious practical assistance to the industry, unrestrained by secrecy, done quickly and effectively.

Historically, we have taken industrial action, imposed bans on bad behaviour, and taken action in the NSW Industrial Relations Commission. This industrial action, although it can put individual members at risk if bans are imposed, is a more reliable, instant and effective mechanism to deal with bad behaviour by councillors than making a complaint these days to the OLG.

The risk with putting a ban on an activity, or denying a councillor services until they apologise for unacceptable behaviour, is if the GM is not supportive of that action, employees can be directed to do the work in breach the ban, and potentially disciplined. Normally employees involved would then all go on strike in support, but Council employees should not be put in the position of seeking assistance from the Industrial Relations Commission when the Office of Local Government is charged with the responsibility of managing behaviour in the industry.

It is unacceptable to have the Office of Local Government unaccountable to the public and the industry in its investigation and consideration processes. These processes are established to manage and regulate the behaviour of in a way that would allow the community to have confidence in decisions made and the behaviour of local government representatives and employees.

It is unacceptable and not in the public interest to deny legitimate and reasonable access to this information to people or organisations affected by the information and by the integrity of the Office of Local Government's regulatory and investigative regime.

Employees in local government are vulnerable to councillors behaving badly, need an effective, quick and confident investigation and enforcement regime and one which inspires public confidence.

The Office of Local Government, if it is to continue to handle investigations, needs a framework that provides:

- An immediate triage of complaints to deal with the simpler complaints of prima facie clear breaches of the code and where the investigation can be conducted quickly and speedily concluded and allocating additional resources to those investigations that may be more complicated.

- Protection of the confidentiality of complainants.

- Protection of the employment of employees who may be thought to have made protected disclosures to OLG (or any subsequent successor) or the ICAC, so that councils are prohibited from taking adverse action against those employees, including termination. For example, s210 of the *Industrial Relations Act 1996* could be amended to prevent the victimisation of any person who informs any person or body of an alleged breach of the *Local Government Act 1993* or the regulations under that *Act.*

- Confidentiality provisions that cannot be misused by councils to hamper the effectiveness of the Industrial Relations Commission and prevent the provision of relevant information if the issues about councillor behaviour are also an industrial dispute.

  (By way of explanation, depa made complaints to the CEO of Sutherland Shire Council after a member working in compliance was abused foully by the Mayor in the process of enforcing compliance on cafes the Mayor owned. It was not a code of conduct complaint, when the Council acted slowly, an industrial dispute was filed under the *Industrial Relations Act* 1996, the Council internally treated it as a code of conduct complaint and when proceedings began in the dispute in the Commission, insisted that the proceedings be confidential because of the confidentiality requirements for a code of conduct complaint and investigation. The Council was effectively gaming the process to prevent the matter being dealt with in public.)

- Clear and concise procedures that are transparent and examinable

- Progress reports on a regular basis to complainants and the object of the complaint, with expectation dates for conclusion

- Resources sufficient to properly conduct and speedily conclude investigations, whether this role remains with the OLG or a successor.

- Draft findings and recommendation, which are currently disclosed only to the person the subject of the complaint, should be provided to the complainants as well, to ensure accuracy and completeness.

- A clear and unequivocal regime of penalties, more significant than those currently existing

- Consideration of mandatory statutory specific penalties for categories or types of behaviour which can be increased by a multiple with subsequent similar complaints

- Review of the obligation or preference (OLG has never clarified this) that a councillor who has to serve a suspension or has any other penalty, can resign as a councillor and those penalties do not continue for any subsequent renomination. Penalties need to be revived if the Councillor seeks re-election.

Finally, the Office of Local Government had more respect and pride in its work when it was a stand-alone government Department. A full-time CEO with a direct relationship with the Minister without also reporting through people with little interest and certainly no experience in local government, to the "cluster" head.

Governments have thought it appropriate to merge related functions and the Department of Planning and Environment is responsible for a range of activities and legislation managed by and the responsibility of local government, and there may be some sense in a structure that acknowledges this, but the structure would not affect the integrity and governance of what is the third level of government.

There is no Federal Department overseeing the operation of state governments and local government is not even included in the cluster department's title. This indicates a lack of relevance.

As the third level of government, issues of its governance and integrity should not be regarded as secondary considerations in a cluster established solely because of perceptions of like-with like.

How the third level of government operates, and how it manages the behaviour of councillors, should be through a stand-alone department.

Yours sincerely

Ian Robertson
Secretary

depa responses to the 28 Considerations within the Consultation paper

But first, a confession

It is very difficult to deal with questions like this when the only thing we have to inform responses is the lacklustre and unacceptable performance on councillor conduct over the last 5 to 8 years by the Office of Local Government. It appears unmotivated, uninterested in speedy resolution of investigations, focused solely on pulling down the shutters and being unexaminable. In a way, anything has to be an improvement.

The malaise in the Office is not just attributable to under resourcing, although the Office is grossly under resourced and has over the last 5 to 8 years lacked direction and to properly conduct investigations and make findings.

Secreting the Office in a massive multi-functioned departmental structure, the Department of Planning and Environment, where local government is not even mentioned, makes the Office less relevant. It's like it has slid down the back of the lounge.

The current mega-Department means that local government does not have the status it had historically, when it was respected, with a separate Ministry, and operated effectively and independently of the remainder of government. Clearly there is no status in being a minor part of a conglomeration with the OLG CEO reporting through a structure that has little interest, nor regard the local government.

Having said that, here are some responses:

Should there be separate codes of conduct prescribed for councillors, staff and other classes of council official?

No, a common code of conduct is more equitable.

Are the standards of conduct currently prescribed in the Model Code of Conduct appropriate? Do they need to be strengthened or softened?

The standards need to be strengthened. depa supports the reintroduction of *"respect"* and some reference to *"tolerance"* to require councillors to properly respect professional opinion where they have a different view.

Is the level of prescription in the Model Code of Conduct appropriate? Should it be more, or less prescriptive?

Support consistent processes and procedures for the management of complaints.

Do there need to be any changes to the types of conduct currently regulated under the Model Code of Conduct?

Having seen too many examples of bad behaviour by councillors against employees, depa supports specific reference to the unacceptability of defaming, posting offensive material on social media, name-calling and similar behaviour.

Are the current training requirements for mayors and councillors adequate? Do these requirements need to be strengthened?

Support mandatory training developed with consultation in the industry to ensure civility in relations with Council staff, and penalties to otherwise apply. Councillors need to be tested after the mandatory training and should not sit until they achieve a suitable standard.

Should code of conduct complaints about Councillors continue to be dealt with locally by councils in the first instance? If not, how should they be dealt with?

depa supports initial local assessment of complaints before reference to a Conduct Reviewer. There may however be a serious conflict in the Council dealing with such allegations, given the often highly part is in nature of the councillor group. In particular, the GM may put their own employment at risk (unless that is better protected) should they be required to identify and assess misconduct in the councillor group. There is a need for some mechanism to allow the GM or delegate to refer that initial assessment to another decision-maker such as OLG, if OLG is ever to be properly resourced, or somewhere else, such as to another Council.

Should code of conduct complaints about Councillors continue to be received by the general manager of the Council? If not, who should receive code of conduct complaints about Councillors?

See the response immediately above, emphasising flexibilities depending on local politics and potential threats to the GM and/or delegate.

Should mayors have a more active role in the management of code of conduct complaints about Councillors?

Yes, and should be recognised as having responsibility for the behaviour of councillors, and a potential role in stepping in where required where a councillor has gone beyond the limit and can be pulled back and apologise.

Should there continue to be a discretion to decline or resolve complaints about Councillors before they are referred to a conduct reviewer?

There is a need to be able to decline a complaint that is clearly frivolous or vexatious. However, given the temptation for general managers to dismiss complaints in response to pressures from councillors, there should be a mechanism for independent review of that decision.

Are the procedures for dismissing frivolous and vexatious complaints adequate and effective? How might they be improved?

See the response immediately above.

Does the current system for referring code of conduct complaints about Councillors to independent conduct reviewer's work effectively? If not, how can it be improved?

Yes, subject to suitable mandatory timeframes requiring that the process be expedited.

Should there continue to be an emphasis on the informal resolution of code of conduct complaints about Councillors? How can those processes be improved?

Informal resolution of complaints about Councillors needs to satisfy the complainant unless the complaint is frivolous or vexatious. There are examples of informal resolutions that are confidential and/or don't satisfy the complainant. It is preferable for the informal resolution to be managed by a Conduct Reviewer to avoid circumstances where a GM protects or panders to the councillor.

Are the current procedures governing the formal investigation of code of conduct complaints about Councillors effective in insuring investigations and their outcomes are robust and fair? If not, how can they be improved?

Anything currently managed by OLG is ineffective, unexaminable, and ponderously slow.

Are OLG's oversight powers adequate and effectively implemented? What improvements might be considered?

No, no, no. The industry has no confidence in the OLG properly managing complaints. As a union official approached by members who ask whether a complaint should be made to OLG, I have no confidence recommending that they do so because I lack confidence in the capacity of the Office to manage and resolve the complaint professionally, speedily and transparently.

OLG is grossly understaffed and unmotivated to properly conduct and speedily conclude investigations. There is a need for resources to be sufficient to properly conduct and speedily conclude home investigations, which are transparent and can be examined, and the current practice of providing to the target of the complaint a draft report with findings, should also be extended to provide it to the complainant. This would reduce the likelihood of content in the report that could be identified by the complainant is untrue or inaccurate.

How can the time taken to deal with allegations of councillor misconduct be reduced?

If this role is to continue in OLG, there need to be proper resources, rigid timeframes and a transparent process so that the complainant and the subject of the complaint are aware of what is happening at all times. Anyone filing a DA is able if there is no decision within forty days. To initiate action in the Land and Environment Court. Some similar arrangement would focus the attention of OLG on speedy conclusions and away from their current meandering or stalled approach.

How can the efficiency of the processes for dealing with code of conduct breaches by councillors under the model procedures be improved?

If the processes are to continue under OLG, resourcing, resourcing, resourcing and clear and precise guidelines requiring proper conduct of the investigation, speedy conclusion, and a process to examine the processes independently if there are a regularities or faults.

How can the efficiency of referrals of councillor misconduct to OLG for investigation and disciplinary action be improved?

Clear timeframes and deadlines, some complaints require little time to determine - whether a Councillor for example attacked staff on social media, they either did or didn't - other investigations take longer. Again, it's all about resourcing, motivation, transparency and timeframes.

Are there opportunities for councillor misconduct to be dealt with summarily? If so, how can this be done in a way that ensures due process and that is procedurally fair?

Yes.

Complaints based on facts that are not denied could be dealt with on the papers after putting the allegation to the councillor, seeking a response on whether the Councillor accepts that the behaviour is unacceptable and then provide a penalty in writing.

Should the full range of disciplinary powers previously available to councils under the Model Procedures before the Cornish decision be restored to legislation?

Yes.

If councils were once again able to require Councillors to apologise for breaches of the code of conduct or to give undertakings not to repeat their conduct, how should apologies and undertakings be enforced?

Apologies and undertakings should be public and provided at least to the same audience who witnessed the offence conduct. If the undertakings are breached, the process should be reopened and the Council are resentenced in the same way that breaches of good behaviour bonds are dealt with in a criminal context.

Should the disciplinary powers currently available to the departmental Chief Executive of OLG and NCAT for councillor misconduct sufficient

No, the sin binning regime has been rarely used, is ineffectual and more councillors should be suspended or prohibited from public office.

If councils were given stronger disciplinary powers, should the right of appeal in relation to the exercise of those powers need to OLG or to another agency or tribunal?

The right of appeal should only be to the OLG if it is rebuilt, properly focused and resourced. depa is open to the establishment of a new tribunal if this is not possible.

Are the disciplinary powers currently available to the departmental Chief Executive of OLG and the NCAT for councillor misconduct sufficient? If not, what additional disciplinary powers should be made available to them?

The disciplinary powers may well be strong enough but they seem reluctantly imposed, and then only after a lengthy and unexaminable investigation. Councillor behaviour is sufficiently poor across the state that there needs to be a more efficient and effective disciplinary regime.

Who should carry the cost of dealing with complaints about councillor misconduct?

The Council is responsible for the behaviour of its councillors but the potential to surcharge councillors found guilty should be explored.

Should councils be accountable to their communities for the cost of dealing with complaints about councillor misconduct?

Yes.

Should OLG be able to recover the cost of misconduct investigations from councils?

No.

Should councils and/or OLG be able to recover the cost of dealing with complaints about councillor misconduct on councillors who have been found to have engaged in misconduct? If so, what mechanisms should be used to recover these costs?

Yes, by some formula for surcharge and/or forfeiting sitting fees.

Are there any elements of interstate frameworks dealing with complaints about councillor misconduct that could be adapted to improve the NSW framework?

The misconduct process in Victoria of independent arbiters deserves further consideration. A slightly different processing Queensland of the Independent Assessor revives a similar model. That process gives an independent and robust disciplinary process.

It seems like a fantasy to have an independent tribunal or inspectorate, enforcing integrity as a primary responsibility of councillors with proper investigative powers and sufficient resourcing to conduct investigations properly and quickly. Why not a Department, with its own minister, independence, integrity and pride?
