Response to the recommendations of the Councillor Misconduct Review 2 February 2023

The problem

The Review identifies the need to flush out the blockages and delays in the management of complaints against councillors. In **2.3 Office of Local Government Action** (sic) it reveals from OLG information covering the period 1 April 2020 to 30 September 2021 (18 months) that:

"*the OLG finalised 56 misconduct complaints or referrals which did not proceed to investigation or departmental report stage. The average timeframe for finalisation of those matters was 75 days."* That's 75 days to decide to do nothing. *"And the OLG finalised 16 misconduct investigation/departmentally reports resulting in 11 councillor disciplinary orders and five performance improvement orders.*

The average timeframe from authorisation to finalisation for those matters was 418 days.

And 418 days to do something.

In **2.4 Timeframes for resolution of complaints** it acknowledges that in that timeframe:

"It takes the OLG 59 weeks to complete misconduct investigations were disciplinary action is taken by the departmentally Chief Executive. Where a misconduct matter is referred to the NCAT, the average time taken by the Tribunal to hand down its decision is 49 weeks (based on data collected over the last five years)."

depa's experiences with NCAT are consistent with the statistics. An application we filed in May 2021 after OLG had refused access to information on an investigation was rejected by the tribunal in May 2022 and a subsequent appeal heard in August 2022 remains outstanding.

Depa has had occasions in the last 20 years when members have voted to place a ban on contact or services to councillors who may have behaved badly, disrespected or abused members inappropriately and in breach of the Code of Conduct. This has resulted in apologies from the badly behaved councillor, a couple of industrial disputes, and even apologies from more than one Mayor and GM, who had failed to properly manage a meeting that then allowed a Councillor to breach the Code and disrespect or attack staff.

While this matter is considered by Government and these ludicrous timeframes listed above continue, we will revisit industrial action as a more immediate solution to dealing with councillors in the future. It also makes the members involved feel good.

The solution

The comprehensive nature of the 49 recommendations is welcome, impressive and thorough, prepared by people with significant and unrivalled expertise and experience in dealing with councillors behaving badly. It is accurately targeted at the sort of problems we have witnessed over the years. Our focus, of course, is predominantly the protection of employees from attacks by councillors and all of the considerations that relate to that.

Notwithstanding this primary consideration, we know that local government is an industry that struggles in the professional areas to attract and retain employees and it's clear that conflict between councillors, as it can play out between antagonists of different values and opinions or political allegiances, and competing code of conduct complaints against each other, tarnishes the reputation of the industry. That compromises the industry's ability to retain staff and particularly, to attract new staff.

A planner can waltz into to a job with the Department of Planning and start at $20,000 over the rate they were receiving working for a Council. And they don't have to deal with the politics of councillors either. It's hard to compete, councillors behaving badly, and that behaviour being poorly regulated and penalised makes that even more difficult.

depa supports all of the 49 recommendations.

Further proposals

1 depa supports the considered and orderly nature of the recommendations, falling into 9 themes, but, other than having read the *"Feedback considerations"* , we won't be providing any in this submission. Most of the considerations are beyond our experience and expertise we would happily leave it in the hands of those responsible the report on the recommendations to make those decisions. And have the Government commit, come what may, to whatever it costs.

2 depa would happily participate in any workshops or brainstorming exercises in the industry on these *considerations* where we do have an interest and some expertise.

3 Our unresolved issue about how a party which has made a complaint has no real recourse if there is an error of fact in the considerations, remains a running sore. This challenges the integrity of the system. That a flawed statement by a former Director-General of OLG remains uncorrected (in a complaint against a councillor at Wagga Wagga) when there is up bountiful evidence of that error, is shameful. And even more shameful is their reluctance to fix it before we all move on.

4 depa is not interested in being represented Independent Council or Conduct Review Panel but there should be provided an acknowledged *"right to be heard"* for complainants at the enquiry/hearing. Preferably an oral hearing but at least an opportunity to make a submission as to liability and penalty. And the provision of a draft report before the final report is released. Providing a draft to the councillor behaving badly prior to the office publishing a Report, but not to the complainant, inconsistent and allows inaccuracies and flaws to continue.

5 If the union is not a complainant, but a member is, then the union should be allowed to make written comment to the Independent Councillor Conduct Review Panel on any complaints made by others.

6 Most importantly, there is a need to protect staff during this process to ensure an employee can't be injured in their employment for having made a complaint. These sorts of protections are widespread in whistleblower and anti-victimisation provisions. Councillors have explicitly and impliedly threatened employees' employment to pressure them to support their particular proposal.

The length of time taken to proceed through the complaints process, or through ICAC, means that the employee has either usually given in, or been dismissed by the time any report is prepared.

There should be a process where an injunction can be sought to prevent dismissal while a complaint is determined. That would have the benefit of protecting the complainant in the meantime and should discourage dismissal.

7 Consideration should be given to changes to the *ICAC Act 2012* and/or the *Local Government Act 1993* and/or the *Industrial Relations Act 1996* where the latter Act at section 210 Freedom from victimisation, provides the following:

210 Freedom from victimisation

(1) An employer or industrial organisation must not victimise an employee or prospective employee because the person--

(a) is or was a member or an official of an industrial organisation of employees or otherwise an elected representative of employees, or

(b) does not belong to an industrial organisation of employees, or holds a certificate of conscientious objection to becoming a member of such an industrial organisation, or

(c) refuses to engage in industrial action, or

(d) exercises functions conferred under this Act, or

(e) claims a benefit to which the person is entitled under the industrial relations legislation or an industrial instrument, or

(f) informs any person of an alleged breach by an employer of the industrial relations legislation or of an industrial instrument, or

(g) participates, or proposes to participate, in proceedings relating to an industrial matter, or

(h) engages in, or proposes to engage in, any public or political activity (unless it interferes with the performance of the employee's duties), or

(i) informs any person of an alleged breach of the *Protection of the Environment Operations Act 1997* by an employer, or

(ia) informs any person or body of, or gives evidence in relation to, a notifiable occurrence within the meaning of the *Rail Safety National Law (NSW)* , or

(ib) reports a matter relating to the safety or reliability of railway, bus or ferry operations to the Chief Investigator (within the meaning of the *Transport Administration Act 1988*) or a person employed in the Transport Service, or

(ic) informs any person or body of, or gives evidence in relation to, a breach or alleged breach of the *Dangerous Goods (Road and Rail Transport) Act 2008* or the regulations under that Act (or a provision of a law of another State or Territory that corresponds to that Act or those regulations), or

(j) makes a complaint about a workplace matter that the person considers is not safe or a risk to health, or exercises functions under Part 5 (Consultation, representation and participation) of the *Work Health and Safety Act 2011* , or

(k) assists the Independent Pricing and Regulatory Tribunal or Scheme Administrator in the exercise of its functions under the *Electricity Supply Act 1995* .

(2) In any proceedings under section 213 to enforce the provisions of this section, it is presumed that an employee or prospective employee who suffers any detriment as a result of action by the employer or industrial organisation was victimised because of a matter referred to in subsection (1) that is alleged by the applicant to be the cause of the detrimental action. That presumption is rebutted if the employer or industrial organisation satisfies the Commission that the alleged matter was not a substantial and operative cause of the detrimental action.

Finally, what cost integrity?

depa acknowledges that there are significant costs in such a comprehensive and focused process as that recommended but the last ten years of ICAC hearings have damaged the industry's reputation, made local government employment less attractive than it should be, and can be distressing for staff.

The recommendations would create a proper process with integrity, protection for employees and for the first time provide confidence to the public, officials and employees of the industry.

Always happy to participate in continuing discussions.

Ian Robertson
Secretary