Parliamentary Committees

Local Government and Other Legislation Amendment Bill 2012

Report No. 11

Transport, Housing and Local Government Committee

November 2012

Transport, Housing and Local Government Committee

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Abbreviations

BCC	Brisbane City Council
CEO	Chief Executive Officer
CoBA	*City of Brisbane Act 2010*
COI	Conflict of Interest
ECC	Establishment and Coordination Committee
GC Council	Gold Coast City Council
LGA	*Local Government Act 2009*
LGAQ	Local Government Association of Queensland
LGMA	Local Government Managers Australia (Qld Inc.)
MPI	Material Personal Interest
OBPR	Office of Best Practice Regulation
OQPC	Office of the Queensland Parliamentary Counsel
PNG	Papua New Guinea
Property Council	The Property Council of Australia
QIRC	Queensland Industrial Relations Commission
RCRPs	Regional Conduct Review Panels

Glossary

Torres Strait Treaty	Treaty Between Australia And The Independent State Of Papua New Guinea Concerning Sovereignty And Maritime Boundaries In The Area Between The Two Countries, Including The Area Known As Torres Strait, And Related Matters (Australian Treaty Series 1985 No 4)
BCC Report	Queensland Ombudsman's September 2012 Report on the operation of the BCC's councillor complaints system

Chair's foreword

This report presents a summary of the Committee's examination of the *Local Government and Other Legislation Amendment Bill 2012.*

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, whether it has sufficient regard to rights and liberties of individuals and to the institution of Parliament.

In undertaking this task, the Committee noted the comments by the Minister for Local Government, the Honourable David Crisafulli MP, when he introduced the Bill into Parliament:

> *From our active engagement with councils, we know it was important to introduce amendments to the local government legislation to:*
> - *put mayors and councillors clearly in charge of councils*
> - *give mayors the authority they need to take direct action for ratepayers*
> - *reinstate the body corporate status of local governments*
> - *restore clear, fairer conflict of interests provisions for councillors*
> - *enable better cooperation and sharing of resources between councils by strengthening joint local government arrangements*
> - *remove the prohibition on councillors standing for election to State Parliament and*
> - *cut unnecessary red tape and bureaucratic requirements and interference from the State Government.*[1]

The public examination process for the Bill allows the Parliament to hear views from the public and stakeholders they may not have otherwise heard from, which should make for better policy and legislation in Queensland.

On behalf of the Committee I thank those individuals and organisations who lodged written submissions on this Bill, and others who have informed the Committee's deliberations: the Committee's secretariat, officials from the Department for Local Government, and the Technical Scrutiny of Legislation Secretariat.

I commend the report to the House.

Howard Hobbs, MP
Chair

November 2012

[1] Minister for Local Government, Introduction Speech for the Local Government and Other Legislation Amendment Bill 2012, *Hansard*, 13 September 2012, p.1947.

1 Introduction

1.1 Role of the Committee

The Transport, Housing and Local Government Committee (the Committee) was established by resolution of the Queensland Legislative Assembly (the Assembly) on 18 May 2012. The Committee consists of both government and non-government members and its primary areas of responsibility include transport, main roads, housing, public works and local government.[2]

Section 93 of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for considering:

- the policy to be given effect by the Bill, and
- the application of the fundamental legislative principles to the Bill.

The Assembly referred the *Local Government and Other Legislation Amendment Bill 2012* (the Bill) to the Committee on 13 September 2012. The Committee is required to report to the Assembly by 6 November 2012.

The Committee commenced its examination of the Bill by calling for public submissions on Monday 17 September 2012 from all 73 Local Government Councils throughout Queensland and the Local Government Association of Queensland (LGAQ), and by emailing the 334 subscribers registered to receive information from the Committee. Thirty-two (32) submissions were received and considered by the Committee. A list of submissions is included at Appendix A.

The Committee held a public briefing on Monday, 8 October 2012 and heard from five witnesses, including representatives of the Department of Local Government (DLG) and of the LGAQ. A list of officials who attended is included at Appendix B. The Committee also received a written briefing from DLG on 19 October 2012.

The transcript of the public briefing, all submissions to the Committee and the DLG's written briefing are published on the Committee's webpage at http://www.parliament.qld.gov.au/work-of-committees/committees/THLGC/inquiries/current-inquiries/INQ-LG.

1.2 Policy objectives of the *Local Government and Other Legislation Amendment Bill 2012*

The Bill's objectives are to implement the Government's local government election commitments, as outlined in its "Six month action plan July-December 2012" and the *Empowering Queensland Local Government* Election Policy, by giving Queensland local governments the powers to deliver effective services to their respective communities, remove unnecessary regulation and interference from the State Government, streamline processes and reporting requirements and reduce red tape and the volume of the statute book.

The policy objectives of this Bill are to:

- restore body corporate status to Queensland local governments
- reinstate joint local government arrangements to enable local governments to work together to deliver better outcomes
- ensure that mayors and local councillors are clearly in charge of councils
- allow elected councillors to maintain their positions on nomination for State election
- provide for local governments to hold voter polls to inform council decision-making

[2] Schedule 6 – Portfolio Committees, Standing Rules and Orders of the Legislative Assembly as amended 14 September 2012.

- provide for advisory polls to be held in areas proposing de-amalgamation, and when establishing any new local government boundary, ensuring that there are appropriate transitional and financial arrangements in place to support the change
- streamline reporting and auditing regulation where local governments have demonstrated adequate financial planning and administration to reflect diversity of local governments
- ensure councils have the right to full consultation on the appointment of senior council staff and
- provide that local communities have the power to establish appropriate local laws through a responsible, accountable local government and ensure that the jurisdiction of local laws are complementary to, and do not replicate, the controls and management that already exist under Queensland legislation.

Recommendation 1

The Committee recommends that the *Local Government and Other Legislation Amendment Bill 2012* be passed.

2 Examination of the Local Government and Other Legislation Amendment Bill 2012

Amendments to LGA 2009 and CoBA 2010

2.1 Local laws

The Minister for Local Government, the Hon. David Crisafulli MP (the Minister) at the Local Government Budget Estimates hearing, stated that:

> *In many cases, a local law has taken councils over a year to adopt, because of waiting for various state agencies to sign off on that local law. When you think about that, it is not so local after all…One of the changes to the Act will ensure that councils sign off on their local law. By all means, they will be required to make sure that is not contrary to state law and we want them discussing that with communities. If we are truly to trust local government and truly understand that, in the vast majority of cases, they want to adopt a local law to be able to serve their community, surely we should just let them adopt local laws.*[3]

The Bill proposes amendments which will "empower local governments to establish appropriate local laws and to cut unnecessary bureaucratic requirements"[4]. In particular, the Bill proposes amendments which will:

- clarify the process for making model local laws
- simplify provisions about the publication of local laws
- enable a local law to be made to regulate matters in connection with 'party houses' and about a development matter in certain circumstances
- remove the need for Ministerial approval of proposed local laws
- remove the requirement for councils to regularly review their local laws and
- clarify that community engagement is not mandatory before making interim local laws.

The Committee has received submissions that raise concerns with a number of the new local law provisions.

2.1.1 Model local laws

The LGAQ submits that model local laws should be 'adopted' (as listed on the DLG's webpage[5]) rather than 'incorporated' as contained in the current Bill.[6] DLG advises that:

- *'adopting' a model local law as a whole does not provide councils with the flexibility to 'incorporate' only part of a model local law, or to incorporate in a model local law provision to repeal or amend another local law*
- *those parts of the local law that are incorporated model local law provisions […], do not require the public to be consulted before making the local law […] but if the proposed local law incorporates more than these provisions, the local government will have to consult before making the local law and*
- *the amendment does not have retrospective application therefore, existing model local laws will continue to be adopted but new local laws made after the amendment commences will 'incorporate' model provisions.*[7]

[3] The Minister for Local Government, Budget Estimates Hearing, 18 October 2012, p.56.
[4] *Explanatory Notes*, Local Government and Other Legislation Amendment Bill 2012, p.3.
[5] Accessed 31 October 2012, http://www.dlg.qld.gov.au/laws-and-codes/model-local-laws.html
[6] LGAQ, Submission No. 2, p.2.
[7] DLG, Advice on issues raised in submissions received by the Committee, pp.15-16.

Committee comment

The Committee believes it is important for local governments to have the option to only adopt parts of model local laws and therefore, supports the use of the term 'incorporates' rather than adopts.

The LGAQ also submits that a new section should be included in the Bill to clearly identify the model local law making process[8] "to improve the clarity and certainty about the process for adopting the local laws. Whilst the Bill provides for this, we believe this new section 26A will better describe and more clearly articulate the process involved."[9] DLG has advised that the Bill already makes clear that the process for incorporating a model local law is no different from the making of any other local law and clarifies that where part of model local law is incorporated, those model provisions do not require public consultation or state interest checks.[10]

Committee comment

The Committee believes that the model local law making process is sufficiently clear in the Bill.

2.1.2 Notice of new local law

Several submissions to the Committee expressed concern about the removal of the requirement to publish notice of a new local law in the newspaper circulating in the relevant local government area. Concerns centred on the importance of newspaper notification as mass communication of the proposed changes and pointed out that many community members struggle to navigate through local government websites and indeed, many community members do not have computers at all. Councillor Wendy Boglary states that:

> *I have concerns as there are many people within our communities who do not have computers or read government gazettes but rely on Councils to publish important information in the local paper. This could be seen as a means of changing laws without full public awareness.*[11]

Further concerns were expressed about the reduction in the specific types of information that local governments are required to publish about their new local law, in particular the removal of the existing requirement to publish "the purpose and general effect of the local law"[12]. The Environmental Defenders Office of Northern Queensland Inc. stated that:

> *…in particular, the 'purpose and general effect of the local law' is vital information that the public must continue to receive. This information allows members of the public to quickly ascertain whether the new law impacts on some economic, proprietary or other valuable interest that warrants closer examination.*[13]

DLG advises that the removal of this requirement is consistent with the Government's intention to reduce the administrative and cost burdens on local governments and that the change will save local government significant amounts of money in the long-term. DLG further advises that the change will

[8] LGAQ, *Submission No. 2*, pp.2-3.
[9] Mr Greg Hoffman (LGAQ), Public Briefing held on 8 Oct 2012, *Transcript of Proceedings*, p.2.
[10] DLG, *Advice on issues raised in submissions received by the Committee*, p.16.
[11] Councillor Wendy Boglary, *Submission No. 26*, p. 2.
[12] *Local Government Act 2009*, p.36.
[13] EDO-NQ, *Submission No. 21*, p.3.

not impact transparency and accountability given the range of options available to the public to access a made local law. Further, DLG advises that the omission does not mean a local government cannot publish its local laws in a newspaper – only that a local government does not have to.[14] DLG advises that since the gazette notice must still include key information (including the name of the relevant local government and local law), this is sufficient information to allow interested parties to obtain a full copy of the local law from the local government.[15]

Committee comment

While the Committee understands the concerns expressed in some submissions about the removal of the requirement to publish new local laws in a local newspaper, the Committee believes that the cost of such publication to local government exceeds the benefits drawn by the community.

2.1.3 "Party Houses"

Clauses 17 and 89 insert new sections 42B and 38B into *COBA* and the *LGA* respectively. The amendments provide that local governments may make a local law which makes the owner of a residential property liable to a penalty because of excessive noise regularly emitted from the property.

The Minister for Local Government, at the Budget Estimates hearing, stated that:

> *The amendments will enable the council to draft a local law to make the owner of a residential property liable to a penalty because of excessive noise which is emitted regularly from the property. We will empower the council through the local law to fix the number of times that noise might be emitted from a property, for example, before the owner is liable. If the matter goes to court we will say that the breaches issued by the police will be used as evidence that a misdemeanour did occur. It prevents the situation, which we have seen, where somebody can buy a house in a private street…and, to capitalise, they rent it out for a lot of money for a one-night visit.*[16]

Both the Gold Coast City Council (GCCC) and the Travel Stayz Group (an advertising website which allows property owners to list and promote holiday accommodation) have expressed concerns about the proposed 'party house' provisions in the Bill. The GCCC's concerns stem from the fact that it already has an existing licensing regime for rental accommodation and that a new 'party house' local law would sit outside its existing local law and would be considered an exclusive noise code (rather than addressing behavioural issues in short-term rental accommodation). The GCCC is concerned to retain a behaviour-related nuisance as a way of jeopardising the continuation of a license.

> *This provision does not appear to cover the behaviour of tenants beyond the making of excessive noise. For example, many complaints are received about adult entertainment in full view of adjoining residents and drunk/disorderly behaviour of tenants*[17].

The Travel Stayz Group has expressed concern that:

- the provisions breach the Fundamental Legislative Principles concerning the inappropriate imposition of responsibility

[14] DLG, *Advice on issues raised in submissions received by the Committee*, pp.17-18
[15] DLG, *Advice on issues raised in submissions received by the Committee*, p.17
[16] The Minister for Local Government, Budget Estimates Hearing, *Hansard*, 18 October 2012, p.64.
[17] Gold Coast City Council, *Submission No. 23*, p.2.

- the Bill is focused on short-term holiday rentals only and that this is discriminatory and will not address the whole problem
- the definition of 'owner' will not capture short-term renters as they are not tenants with exclusive rights to the property and
- the penalties are excessive.[18]

> *We submit that whatever provisions are proposed they should apply to all residential occupants whether short or long term or owner occupiers and Councils should not be entitled to discriminate.*[19]

The Committee supports the broad intent of the amendments i.e. to address the proliferation and impact of the short-term rental of houses or units as holiday accommodation and the use of that accommodation as so called 'party houses'. Further, the Committee is sympathetic to the permanent residents in these areas, whose amenity has been affected, and to the local governments in these areas which are under public pressure to address the problem. However, the Committee is concerned that, to make the owner of a property liable to a penalty for the actions of tenants of their property, is an interference with the rights and liberties of the owner and enables local laws to be made that would contravene the principle concerning the inappropriate imposition of responsibility.

The Committee also notes that while it is clear that the definition of 'owner' has been broadened to include tenants with exclusive rights to the property under a lease, it is less clear to the Committee whether or not this definition would capture those people who are short-term occupants of premises, using them as 'party houses' i.e. those people these amendments seek to target. The Committee is cognisant that "occupants under holiday and short term rentals are not (for legal purposes) tenants. They do not have exclusive possession or a lease. Instead they are guests who occupy under a licence granted by the Owner under contractual Terms and Conditions."[20]

Further, the Committee considers that local governments should be empowered to deal with noise and other nuisance in their communities, emanating from both short-term and longer-term types of residential accommodation. The Committee is aware that the Bill's definition of 'residential property' incorporates all the types of accommodation but expressed concern about the powerlessness of many owners to address the behavioural issues of their tenants. The Committee questioned the suitability of penalising owners for their tenants' behaviours where, in longer-term rental situations, they may be powerless to act.

The Committee's concerns were expressed by Committee member, Mr John Grant MP, who at the Public Briefing in relation to the Bill on 8 October 2012, stated that:

> *It seems to me…it is aimed at the wrong person inasmuch as tenants can give an owner a very, very difficult time in respect of their bad behaviour. An action made against an owner is just missing the mark altogether, in my view…what scope (does) the proposed amendments give the local government in making that new local law to target the tenant as distinct from targeting the owner?*[21]

Mr Logan Timms (Director, Special Projects, DLG) replied that:

[18] Travel Stayz Group, *Submission No. 28*, pp.1-3.
[19] Travel Stayz Group, *Submission No. 28*, p.2.
[20] Travel Stayz Group, *Submission No. 28*, pp.2-3.
[21] Mr John Grant MP, Public Briefing held on 8 Oct 2012, *Transcript of Proceedings*, p.8.

> *There are two responses to that. No. 1, the Director-General of the Department has organised a working group to make sure there is proper training for local governments with this new legislation…The second thing is how the local government implement their local law is a matter for them. It is just such a complicated issue.*[22]

DLG has further advised that it is State Government policy to empower local governments to make local laws about party houses, including penalising the owners of such premises for the behaviour of tenants, and that the breach of this fundamental legislative principle is justified because councils are best placed to make decisions about the nature and types of accommodation appropriate for their area.[23] Specifically, DLG states that:

- consistent with the current requirements for making local laws, it is up to the local government when making a local law about party houses to ensure the local law does not conflict with any existing state or local law i.e. "there is nothing to prevent the new local law from incorporating provisions about other matters, for example, disorderly behaviour"
- the Bill is focused on all residential property which is defined as "property of a type that would ordinarily be used, or is intended to be used, as a place of residence or mainly as a place of residence" and that a property is not precluded from being a residential property merely because the property is rented on a short-term basis
- the term "owner" includes a tenant if the tenant has the right of exclusive occupation of the property under a lease - the Bill does not intend to capture tenants who are not occupying the property under a lease, and
- the Bill does not set a specific penalty – this will be a matter for each local government to determine when drafting its local law. [24]

Committee comment

The Committee supports the general intent of the proposed amendments concerning "party houses" but is not confident that the current proposal will address the problem nor target the offenders with the necessary precision.

Recommendation 2

The Committee recommends that the section of the Bill relating to "party houses" be amended to ensure that local governments have powers to penalise whoever is responsible for the noise and anti-social behaviour (whether owners or tenants of both short-term and long-term residential accommodation) where noise and/or antisocial behavior are regular occurrences.

[22] Mr Logan Timms (DLG), Public Briefing – Held on 8 October 2012, *Transcript of Proceedings*, p.8.

[23] DLG, *Response to the Transport Housing and Local Government Committee's report on fundamental legislative principle issues arising from the examination of the Local Government and Other Legislation Amendment Bill 2012*, pp.7-8.

[24] DLG, *Advice on issues raised in submissions received by the Committee*, p.21.

Point of clarification 1

The Committee believes that the issue of "party houses" is far broader and far more complex than can be satisfactorily addressed within the local government jurisdiction and seeks clarification from the Minister for Local Government on whether this matter may be better dealt with in State legislation.

2.1.4 Development processes

In regard to the provisions enabling a local law to be made about a development matter in certain circumstances, the Sunshine Coast Council recommends inclusion of 'clearing vegetation' as a matter where local laws should be allowed.

> *A local law is still the most appropriate and efficient tool for managing the regulation and enforcement of vegetation clearing.*[25]

DLG advises that numerous State laws already regulate vegetation matters and that these regulations are far-reaching. Therefore, empowering local governments to expand their jurisdiction in relation to clearing vegetation could potentially result in local laws that are inconsistent with State laws.[26]

Committee comment

The Committee believes that there is already considerable regulation relating to the clearing of vegetation and that additional regulation at the local government level would risk causing confusion.

2.1.5 Ministerial power to revoke local laws

The Environmental Defenders Office of Northern Queensland Inc. has expressed concern about the unconstrained ability of the Minister to revoke a local law where it does not satisfactorily deal with State interests, the non-acceptance of liability for loss, expense or hardship cause by such revocation, and that the Minister's decisions under this section (38AB) are not subject to appeal, including judicial review.

> *…it appears to provide a relatively unconstrained discretion for the Minister to substitute value judgements of State Government for value judgements of the local government that is responsible – and responsive to – local citizens…Persons harmed by the Minister's action – including local governments that have invested time and resources in adopting a local law – should be able to have a court of competent jurisdiction review the grounds for, and validity of, the Minister's decision.*[27]

DLG advises that the proposed clause requires the Minister to hold a reasonable belief that the local law does not satisfactorily deal with State interests and that this belief must be reasonably held based on all of the information before the Minister at the time of making the decision. Further, the DLG confirms that the State has responsibility for local government under the *Constitution of Queensland 2001* and the Minister, on behalf of the State, may gather information to monitor and

[25] Sunshine Coast Council, *Submission No. 9*, p.1.
[26] DLG, *Advice on issues raised in submissions received by the Committee*, p.18.
[27] Environmental Defenders Office of Northern Queensland Inc., *Submission No. 21*, p.4.

evaluate whether a local government is performing its responsibilities properly under the legislation.[28]

Committee comment

The Committee is satisfied that there are sufficient safeguards in place in terms of the Minister's decision to revoke or suspend a local law and that the non-reviewability of the Minister's decisions is appropriate under the Constitution of Queensland 2001.

2.1.6 Making, recording and reviewing local laws

The Property Council of Australia (Property Council) has expressed concerns that the amendments will lead to an increase, rather than a reduction, of the burden of regulation in Queensland since the amendments will have the effect of making it easier for local governments to make local laws. The Property Council states that local government involvement is integral to the success of any State Government regulatory reduction program:

> *As much of the burden of regulation in Queensland is encountered at the local government level, it will be difficult for the Government to achieve its aim of 20% reduction without their involvement.*[29]

The Property Council supports the Office of Best Practice Regulation's (OBPR) - part of the Queensland Competition Authority - proposal, stated in its issues paper *Measuring and Reducing the Burden of Regulation*, to:

> *..enforce regular reviews of local government regulation, along with open and accountable consultation during their development.*[30]

DLG advises that the Bill's primary focus is on the reduction of red tape for local governments and further acknowledges "the ongoing role for local governments in reviewing their interaction with the community and industry and the need for continual commitment to determining ways in which it in turn can reduce red-tape on industry"[31].

Committee comment

The Committee does not agree that a reduction in red tape for local governments will necessarily mean an increase in red tape by local governments in the making of their own local laws. The Committee is supportive of the measures in the Bill which enable greater flexibility and responsiveness by local governments to their communities.

2.2 Corporatisation of business activities

To remove unnecessary regulatory duplication and red tape and to rely on the corporatisation processes within the *Corporations Act 2001* (Cwth), the Bill repeals provisions relating to corporatisation of business activities thus removing the ability of local governments to corporatize an activity under the CoBA/LGA. The Torres Strait Island Regional Council has raised concerns with these new provisions as they believe that they will prevent local governments from corporatising sections of their business. DLG has clarified that Clause 93 merely removes the legislative duplication and that councils may continue to corporatise an activity under the *Corporations Act 2001 (Cwlth).*

[28] DLG, *Advice on issues raised in submissions received by the Committee*, p.19.
[29] Property Council of Australia, *Submission No. 30*, p.2.
[30] Property Council of Australia, *Submission No. 30*, p.2.
[31] DLG, Advice on issues raised in submissions received by the Committee, p.37

2.3 Unmaintained Roads

The Bill makes a number of amendments to provide clarity for local governments about road maintenance, however, the Bill is silent on the matter of 'unmaintained roads' within local government areas. Mr David Gibson MP, Member for Gympie, submits that:

> *The Local Government and Other Legislation Amendment Bill does not address the paradox within the existing Act. Section 60 vests all responsibility for all roads in a local government area to the council, including to 'construct, maintain and improve roads' (Sect 60(2)(b)). Within my electorate the Gympie Regional Council has over 2,000km of roads that are registered as 'unmaintained' on Council records. Clearly it is unrealistic to expect the council to comply with the Act regarding the maintenance of these unmaintained roads as they do not have the resources to do so. However, many residents are concerned at the current state of the unmaintained roads and cite safety issues as a reason to take action. In some cases they are prepared to undertake the work themselves, however Section 75 of the existing Act prevents them from doing so.*[32]

Mrs Liza Cameron from McIntosh Creek states that:

> *Council will not make any road on their 'unmaintained' register safe regardless of the circumstances or history of how the road came into being…I have been informed the Council has no obligation to do anything to improve the safety of the road (providing access to her property) and I may carry out 'minor works' to make the road more accessible.*[33]

However, Section 75 of the LGA states that:

> *a person must not, without lawful excuse (including under another Act, for example), or the written approval of the local government –*
>
> - *carry out works on a road; or*
> - *interfere with a road or its operation.*[34]

Mr Gibson believes local governments are reluctant to provide written approval for work to be undertaken due to the potential liability issues so the roads remain unmaintained. [35] Mrs Cameron requests that the Amendment Bill clarify that local governments are responsible for the maintenance of 'unmaintained' roads in their local government areas to ensure the safety of constituents. [36]

DLG advises that this issue is "outside of the scope of the Bill" and that, even though Council may approve a person performing minor works on a road under section 75, local governments will still hold ultimate legal responsibility for any work performed. DLG has advised that it will consider these issues further, separate to the Bill. [37]

Committee comment

The Committee recognises the importance of unmaintained roads and notes that the Department of Local Government will be considering these issues further.

[32] Mr David Gibson MP, *Submission No. 7*, p.1.
[33] Mrs Liza Cameron, *Submission No. 6*, p.1.
[34] *Local Government Act 2009*, Section 75, p.76.
[35] Mr David Gibson MP, *Submission No. 7*, p.1.
[36] Mrs Liza Cameron, *Submission No. 6*, p.1.
[37] DLG, *Advice on issues raised in submissions received by the Committee*, p.22

Recommendation 3

The Committee recommends that the conflict between sections 60 and 75 of the *Local Government Act 2009,* in relation to road maintenance, be resolved.

2.4 Financial Management

The Bill repeals the long-term community plan and financial plan requirements to cut unnecessary red tape and streamline provisions about the financial sustainability and accountability of local governments. These proposed amendments have met with mixed reaction.

2.4.1 Removal of long-term community plan

The Minister stated, at the Local Government Budget Estimates hearing, that the issue of duplication of community planning was:

> *one of the most pressing issues that was raised in my visit of the 73 councils across the state…the reality is communities were not getting great benefit from these documents…My approach to community plans is simply that the best form of a community plan is to engage with your community. They will judge the councils on how they think they are heading on their expectations and they will pass judgement every four years rather than the state directing them to produce a document that looks like a carbon copy of the council beside them. That is how we can save councils real money.*[38]

The Moreton Bay Regional Council is supportive of the amendment to remove the long-term community plan requirement stating that:

> *Council considers this (current) requirement to have placed a substantial cost and regulatory burden on local government for little tangible benefit.*[39]

However, several local government councillors have argued that the requirement for the long-term community plan should remain, stating that it:

> *is an extremely important document that gives a clear direction on what is valued by communities…Wise planning is for more than 5 years so retaining a Community Plan is best practice.* [40] and

> *In a Council with the population, revenue and expenditure capacity of Brisbane City Council, long-term community plans and financial plans are vital to ensuring that Council has a forward vision for our City.*[41]

The Environmental Defenders Office of Northern Queensland Inc. agrees stating that:

> *Community plans are a valuable tool in ensuring that local governments "plan" and "plan best" for the area.*[42]

DLG advises that consultation with its stakeholders revealed that prescribed community plans were an expensive cost for local governments which did not give rise to proportionate tangible benefits. Further, DLG clarifies that removing the legislative requirement does not mean that a local government cannot develop a community plan appropriate to their local government area.

[38] The Minister for Local Government, Budget Estimates Hearing, *Hansard*, 18 October 2012, p.53.
[39] Moreton Bay Regional Council, *Submission No. 19*, p.1.
[40] Councillor Wendy Boglary, *Submission No. 26*, p.3.
[41] Councillor Milton Dick, *Submission No. 18*, p.1.
[42] Environmental Defenders Office of Northern Queensland Inc., *Submission No. 21*, p. 5.

Committee comment

The Committee is aware that the asset management plan and financial forecast documents will continue to be documents which take a 10-year view and believes that, in this context, the 5-year corporate plan is a sufficient minimum requirement for forwarding planning for local government communities.

2.4.2 Financial management documents

The LGAQ is concerned that the Bill deletes the definitions of 'long-term asset management plan' and 'long-term financial plan' (Clause 107) when those and similar terms are used in other sections of the Act and in the Regulation. Given the proposed removal of the requirement for local governments to develop long-term community plans, the LGAQ recommends that both of these long-term financial planning documents should still cover a period of ten years, a view shared by at least one other Councillor.[43]

DLG advises that:

> *Proposed amendments to the Local Government (Finance, Plans and Reporting) Regulation 2010 are to complement new s.103 by removing the existing prescription around long term financial forecasts and instead require financial forecasts to form part of the budget. Long term asset management plans and financial forecasts will continue to be for a period of at least 10 years.*[44]

Committee comment

The Committee is satisfied that the proposed revisions to the *Local Government (Finance, Plans and Reporting) Regulation 2010* will require both the asset management plan and the financial forecasts to continue to take a 10-year view.

2.4.3 New Corporate Plan (existing in CoBA, proposed to be added to LGA)

In regard to the introduction of a 5-year Corporate Plan, the Minister stated, at the Budget Estimates hearing that:

> *…the role of a corporate plan is an important part of guiding the way local government spends its money. I would sooner see local government focus on the corporate plan rather than the community plan. I think there is genuine benefit; if councils can tie some of the aspirations of a community plan into those operations plans, there is far more benefit in that…we see our role as empowering local government to be able to make a decision on how much investment and interest they put in these plans. I think that is the best way to get living, breathing documents that people can actually use.*[45]

The Cassowary Coast Regional Council suggests some form of transitional timing provisions be considered for the preparation of a 5 year Corporate Plan:

> *…given that many Councils have undertaken extensive community engagement process(es) in developing a Community Plan.*[46]

DLG points out that the Bill provides (in Clause 2) for prospective commencement of clauses 106 to 108 by proclamation to provide local governments time to establish new administrative processes.[47]

[43] LGAQ, *Submission No. 4*, p.4; and Councillor Wendy Boglary, *Submission No. 26*, p.2-3.
[44] DLG, *Advice on issues raised in submissions received by the Committee*, p.23-24.
[45] The Minister for Local Government, Budget Estimates Hearing, *Hansard*, 18 October 2012, p.55
[46] Cassowary Coast Regional Council, *Submission No. 12*, p.1.

The Moreton Bay Regional Council has sought clarification about the exact meaning of the words 'incorporates community engagement' in the requirement to prepare a 5-year corporate plan (Clause 107).[48] DLG advises that:

> *It is not proposed to add further prescription about community engagement in the regulation. The reference in this section to 'community engagement' does not prescribe how and to what extent the local government carries out this engagement, this is a matter for local governments to determine according to their specific circumstances. It should be noted that anyone performing a responsibility under the LGA… is required to do so in accordance with the local government principles (s. 4).*[49]

Committee comment

The Committee is satisfied that the new corporate plan requirements will be introduced by proclamation when local governments have had the opportunity to develop appropriate administrative systems and that there is sufficient clarity in the Bill (between the section 4 principles which require meaningful community consultation and clause 107) for local governments to consult during the development of their corporate plans.

2.5 Obstruction of officials

In relation to offence provisions about the obstruction of the enforcement of the Acts or local laws, the Bill amends the list of officials that a person must not obstruct in the exercise of a power under the Act or a local law to include 'mayors'. Councillor Wendy Boglary has expressed concern that the Bill does not provide a rationale as to why mayors need these additional powers and further points out that:

> *A Mayor has no specific training in any area such as disaster management or compliance where such powers maybe needed…*[50]

DLG advises that the proposal is in line with the Government policy to ensure mayors and councillors are in charge of local governments.

Committee comment

The Committee supports the proposed amendment to add mayors to the list of officials who must not be obstructed while exercising powers under the Act.

2.6 Councillors/senior councillors and other government jobs

> *To align with the* Government*'s policy to minimise State Government interference in the management affairs of local governments, the Bill repeals provisions relating to a person being unable to simultaneously be a councillor/senior councillor and hold a full-time government job.*[51]

Councillor Milton Dick believes it is not appropriate for Councillors to be able to hold an elected position as a Brisbane City Councillor and also hold a full-time government job stating that:

> *In my view, such a substantial salary should be sufficient reward for 'full-time' work as a Councillor, representing constituents 100% of their time…occasional work for any other level*

[47] DLG, *Advice on issues raised in submissions received by the Committee*, p.24.
[48] Moreton Bay Regional Council, *Submission No. 19*, p.1.
[49] DLG, *Advice on issues raised in submissions received by the Committee*, p.24.
[50] Councillor Wendy Boglary*, Submission No. 26*, p. 4
[51] *Explanatory Notes*, Local Government and Other Legislation Amendment Bill 2012, p.6.

> *of government…should be done on a pro-bono basis, rather than "double-dipping" into the public purse.*[52]

DLG advises that the removal of this provision will not negate the onus on councillors to comply with the local government principles (under section 4(2) of the *City of Brisbane Act 2010*) which provide that councillors observe very high standards of ethical and legal behaviour and make decisions in the public interest.[53]

Recommendation 4

The Committee supports the right of councillors to undertake government employment while representing their communities as elected councillors provided there is no conflict of interest, for example, a councillor employed in their own council.

2.7 Councillor requests for advice and information

To implement the Government's election commitment to ensure that mayors and councillors are clearly in charge of councils and to streamline provisions about a councillor's request for help or advice, the Bill makes the following amendments:

- the acceptable requests guidelines are to be made by the Establishment and Coordination Committee (ECC) (CoBA) and by resolution of a council (LGA)
- councillors may not ask the CEO to provide information that relates to any ward/division other than the ward or division the councillor represents
- a request must comply with the guidelines, except for requests from the mayor or council/committee chairperson *(*CoBA*),* or the mayor or committee chairperson and
- a request for advice will be broadened to allow the councillor to ask for advice to help the councillor perform their function and role as a councillor, as well as to help them make decisions.

Some of the proposed amendments to these sections of the Act generated the greatest level of concern from residents, councils and councillors, local government organisations and the Queensland Ombudsman.

2.7.1 Delegation to Establishment and Coordination Committee (CoBA)

Several submissions have raised concerns about the proposed delegation of responsibility for the development of acceptable requests guidelines to the Brisbane City Council's ECC. Currently, the CoBA acceptable requests guidelines are 'adopted by Council' (CoBA, section 171).

Councillor Milton Dick states that:

> *The decision to delegate the responsibility to the Establishment and Coordination Committee will leave information requests open to political influence…as it allows the Administration to determine what, if any, information will be provided to Opposition Councillors. It is noted that this amendment also removes the requirement to apply the guidelines to all Councillors equally. In effect, this opens the door to information requests being approved for some Councillors and not others. Legislation should apply to all Councillors equally.*[54]

The Queensland Ombudsman states:

[52] Councillor Milton Dick, *Submission No. 18*, p.2.
[53] DLG, Advice on issues raised in submissions received by the Committee, p.4
[54] Councillor Milton Dick, *Submission No. 18*, pp. 3-4.

> *In respect of amendments to s.244, I note that the acceptable requests guidelines are made by the Establishment and Coordination Committee. In other local governments the guidelines are adopted by resolution of the Council. I consider that, as the guidelines apply to all councillors, the full Council should approve them. No clear rationale is presented for the distinction between Brisbane and other local governments in this respect.*[55]

DLG advises that the ECC has been delegated significant responsibility by full BCC and operates under the delegated authority from the full Council. Therefore, DLG considers that it is appropriate for the ECC to make these guidelines.[56]

The Queensland Ombudsman has also queried why the BCC councillor conduct review panel documentation is exempt from disclosure under this provision[57] and DLG has advised that the amendment is simply to ensure consistency with s.170(6) of the LGA which currently exempts regional conduct review panel documentation from being disclosed.[58]

Committee comment

The Committee is satisfied that, since the Establishment and Coordination Committee of the BCC operates under the delegated authority of the full Council, it is an appropriate entity to develop the acceptable requests guidelines on behalf of the BCC. The Committee is also satisfied that conduct review panel documentation is exempted from disclosure as is the case with the *City of Brisbane Act 2010*.

2.7.2 Access to information

Clauses 43 (CoBA) and 125 (LGA) provide that a councillor's request for information "has no effect if the request relates to any ward (or division) other than the ward the councillor represents…This provision does not apply to the mayor, (the chairperson of BCC, in the case of CoBA) or the chairperson of a committee."[59] The Committee notes that the clause limiting councillors to only requesting information relating to their own ward, exists in the current CoBA *(s. 171(3))*. However, the clause limiting councillors to only requesting information relating to their own division will be new to the LGA.

The Minister for Local Government, at the Budget Estimates hearing, stated that:

> *Where a council is divided…I think it is important that…they should not be entitled to have the resources of somebody to sit through and go on a fishing expedition. I guess that is the balance. We want to give a greater ability for councillors to get information, but we do not want staff to be used for political purposes and I think the Act strikes a pretty good balance.*[60]

However, the commonly shared view amongst all who raised concerns with these amendments is that, in order for councillors to meet the requirements of section 12(3)(c) of the LGA and section 14(c) of CoBA (Responsibilities of Councillors) which states that all councillors have the responsibility to "participat(e) in council meetings, policy development, and decision making, for the benefit of the

[55] Queensland Ombudsman, *Submission No. 20, p*.2.
[56] DLG, *Advice on issues raised in submissions received by the Committee*, p.31.
[57] The Queensland Ombudsman, *Submission No. 20*, pp.1-2.
[58] DLG, *Advice on issues raised in submissions received by the Committee*, p.31.
[59] DLG, *Advice on issues raised in submissions received by the Committee*, p.4.
[60] The Minister for Local Government, *Budget Estimates Hearing*, 18 October 2012, p.62.

local government area"[61], they must have access to information pertaining to the whole of Council, not just their ward.

As Councillor Paul Tully states:

> *…even in Councils with divisions, the overriding duty of a councillor is to represent the public interest of the whole Council area. Limiting a councillor's right to inspect documents or access information pertaining solely to his or her division cuts directly across this legal duty and responsibility. It seems bizarre that a Councillor in …Mackay Regional Council(s) could have lawful access to information across their entire local government area, simply because they are undivided, but Councillors in Ipswich, Logan Councils would be denied access to Council-wide information."*[62]

The Queensland Ombudsman adds that:

> *I consider that the restriction on access to information is inconsistent with the local government principles in s.4 of the CoBA relating to transparent and effective processes and effective decision making in the public interest and democratic representation.*[63]

Mr Ian Hutchinson asks:

> *Aren't Councillors elected to represent the whole local government area, not just their respective divisions? How can they be expected to make informed decisions when they are only getting a small piece of the pie and not the whole pie to digest?*[64]

At the Public Briefing on the Bill, Committee member Mr Anthony Shorten, MP expressed his concern that "councillors could go on a bit of a fishing expedition and tie up council assets in seeking information outside their ward, or their division…for purely political reasons."[65]

Mr Greg Hoffman (LGAQ) responded that:

> *Anyone can seek information for that reason. There are means by which councils can manage or moderate that extreme use of information" and cited a case where a council resolved that, in the case of excessive requests, those requests by approved by council….but primarily and quite legitimately in the vast majority of cases councillors should be able to request information about wider matters that are of whole-of-council interest."*[66]

The LGAQ, in its submission, further states that:

> *If enacted, this subparagraph will, in the LGAQ's submission, directly conflict with subsections (1), (3) and (6) of section 12 of the Act. Specifically, it is submitted that a councillor will be unable to represent the current and future interests of the entire local government area, nor will they be able to participate in meetings, policy development and decision making for the benefit of the entire area, nor will they be able to serve the overall public interest of the whole local government area, if they are only entitled to seek help or access information relating to their division only.* [67]

DLG has advised that the issue of only being able to seek ward/division-specific information is a policy decision of the Government intended to "assist councils in managing numerous councillor

[61] *Local Government Act 2009*, Clause 12(3)(c), p.24
[62] Councillor Paul Tully, *Submission No. 13,* p. 2.
[63] Queensland Ombudsman, *Submission No. 20,* p.1.
[64] Mr Ian Hutchinson, *Submission No. 3*, pp.1-2.
[65] Mr Anthony Shorten MP (Committee member), Public Briefing – held on 8 October 2012, Transcript of Proceedings, p.4.
[66] Mr Greg Hoffman (LGAQ), Public Briefing – held on 8 October 2012, *Transcript of Proceedings*, p.4.
[67] LGAQ, Submission No. 2, p.5.

requests for information made to council employees"[68]. The Bill does not impose restrictions on councillors viewing council records, only on requesting them from a council employee.

Committee comment

While the Committee recognises the validity of the workload management argument, it strongly believes that all councillors under the *Local Government Act 2009* should have the right to request information relating to their whole local government area in order to properly acquit their obligations as councillors under the relevant Act.

Recommendation 5

The Committee recommends that the clauses in the Bill which propose to amend the *Local Government Act 2009* by limiting a councillors' ability to request information for divisions other than their own, be omitted.

2.7.3 Inequity of application

Concerns have also been raised in a number of submissions regarding the exemptions from these acceptable requests guidelines being granted to the Mayor, the Chairperson of the Council (in the case of CoBA) and the Chairperson of a committee.

Moreton Bay Regional Council believes these provisions should be broadened to other elected members, such as those councillors who are designated portfolio spokespersons.[69] The Local Government Managers Australia Qld Inc. (LGMA) however is unsupportive of the exemption for the committee Chairperson stating that:

> *The proposed Bill appears to arbitrarily elevate the role of committee Chairperson to a higher level by inference…yet fails to articulate the associated role and responsibilities.*[70]

Councillor Milton Dick notes that this amendment also removes the requirement for the clause to apply to all councillors equally creating "an entrenched inequity within the Council." [71]

DLG advises that the exemption for the committee Chairperson pertains only if the request relates to the role of the chairperson and further states that the terms 'roles' and 'responsibilities' should be interpreted in the normal plain English meaning.[72] DLG further advises that:

> *While a specific provision is not included that requires the acceptable requests guidelines to apply to all councillors equally, afford natural justice to councillors and be published, the intent of any such stipulation would be covered by the requirement for decision-makers to operate in accordance with the local government principles.*[73]

Committee comment

The Committee believes that, in order to restore control of councils to mayors and councillors, there must be equity of access to all relevant information pertaining to the broader local government area.

[68] DLG, *Advice on issues raised in submissions received by the Committee*, p.29
[69] Moreton Bay Regional Council, *Submission No. 19*, p.2.
[70] LGMA, *Submission No. 22*, p.5.
[71] Councillor Milton Dick, *Submission No. 18*, p. 2.
[72] DLG, *Advice on issues raised in submissions received by the Committee*, pp.31-32.
[73] DLG, *Advice on issues raised in submissions received by the Committee*, pp.4-5.

2.7.4 When are requests considered 'complied' with?

The LGAQ has also sought an amendment to link clause 79 (Responsibility of local government employees) with clause 125 (Requests by councillors for advice or information) in the Bill to make it "abundantly clear that the CEO's obligations with respect to councillor requests are complied with if section 170A (as proposed) is followed"[74]. DLG welcomes this suggestion as a way of further clarifying that requests made by councillors of council employees are to be in accordance with the acceptable request guidelines.[75]

Recommendation 6

The Committee recommends that the clauses in the Bill which relate to the Acceptable Request Guidelines (clause 125) and a Council CEO's additional responsibility to fulfil councillor requests for information (clause 79) (both in relation to the *Local Government Act 2009)*, be linked in order to clarify that councillor requests are considered "complied with" when the Acceptable Request Guidelines are followed.

2.7.5 Addition of requests for advice to help councillors carry out their responsibilities

The Bill broadens the definition of 'request for advice' to allow a councillor to ask for advice to help the councillor perform their function and role as a councillor, as well as to help them make decisions.

The Services Union has raised concerns not only about the potential workloads on Council employees of these additional entitlements being included in the Bill but also the blurring of the line between what is organisational work and political work.

> *The potential scope of responsibilities under this Act is enormous and could easily result in significant burdens being placed on Council employees by councillors. Further, the breadth of the amendment opens the very real possibility that employees will be burdened with what could only be considered to be political work.* [76]

The Services Union has suggested that this could be remedied in part by including additional words in the proposed section to ensure that the workload of employees is a relevant factor in establishing acceptable requests guidelines. [77]

DLG advises that:

> *The (current) provision is too narrow to enable a councillor to properly perform their responsibilities under the Act, as requests for advice may not necessarily relate to a decision that the councillor must make. In relation to the request that acceptable request guidelines include provision for the workload of employees…the guidelines are made by the Establishment and Coordination Committee, and as such it is for the committee to determine.*[78]

[74] LGAQ, *Submission No. 2*, pp.2.
[75] DLG, *Advice on issues raised in submissions received by the Committee*, p.14.
[76] The Services Union, *Submission No. 15,* p.1.
[77] The Services Union, *Submission No. 15,* p.1.
[78] DLG, Advice on issues raised in submissions received by the Committee, p.5.

Committee comment

Regarding the proposed provision to enable councillors to request advice to help councillors carry out their responsibilities, the Committee formed the view that the risk of councillors over-stepping the line between organisational and political work was mitigated by the local government principles laid out in both Acts which all councillors must observe in undertaking their duties.

2.8 Councillors' material personal interests and conflict of interests

The Bill makes the following amendments to streamline the material personal interest (MPI) provisions and the conflict of interest (COI) provisions, consistent with the Government's election commitment to provide fairer COI provisions for councillors:

- exempts councillors from disclosing a COI or MPI at a meeting with respect to an interest common to a significant number of electors or ratepayers
- exempts councillors from disclosing a COI at a meeting (MPI's are already exempted under these conditions) if the matter to be discussed is an 'ordinary business matter'
- repeals the requirement for a councillor to report another councillor's MPI, COI, or misconduct
- provides that a councillor only has an MPI in relation to their parent, child or sibling if the councillor knows, or should reasonably know, that their parent, child or sibling stands to gain a benefit or suffer a loss
- provides that a councillor does not have a COI because of any engagement undertaken by the councillor with community groups, sporting clubs and similar organisations undertaken by the councillor in their capacity as a councillor; membership of a political party; membership of a community group, sporting club or similar organisation if the councillor is not an office holder; their religious beliefs; or they were a student of a particular school or their involvement with a school as parent of a student at the school.

The Minister, at the Budget Estimates hearing, stated that:

> *The absurdity of the conflict of interest provisions has been highlighted by many things, but none more so than when you visit a rural council and you have a councillor leaving the room because they are a member of the Campdraft Association…It is my view that the sorts of people we want to be local councillors are exactly those sorts of people…I think we can make changes to make sure that we weed out the bad apples rather go after people for not leaving a room because some girl guides want a $50 helping hand.*[79]

The Bill proposes new provisions (in CoBA and LGA) for both MPI and COI which state that:

> *A councillor does not have a material personal interest in the matter if the councillor has no greater personal interest in the matter than that of other persons in the local government area.*[80]

The LGAQ is concerned that these new provisions are contradictory to the meaning of material personal interest and that they are:

> *Open to unintended noncompliance by councillors….A similar amendment is proposed to the conflict of interest provisions. We agree with it when it comes to talking about a conflict of interest, but when you are talking about a material personal interest it is about effectively money or money's worth in or out of a councillor's pocket.*[81]

[79] The Minister for Local Government, Budget Estimates Hearing, *Hansard*, 18 October 2012, p.57.
[80] Clauses 46-47 and clauses 127-128, *Local Government and Other Legislation Amendment Bill 2012.*
[81] Mr Greg Hoffman (LGAQ), Public Briefing – Held on 18 October 2012, *Transcript of Proceedings*, p.2.

In its submission, the LGAQ further stated that:

> *When it comes to matters of MPI, there is never going to be a circumstance where a councillor's interest is not greater than that of other persons in the council's area. In the view of the LGAQ, the inclusion of subsection (2A) will not assist councillors in determining whether or not they have a MPI. The LGAQ submit that the proposed amendment to s. 173 to redefine 'ordinary business matter' more than adequately addresses the issue when it comes to determining a MPI.*[82]

DLG advises that:

> *The amendment follows a recommendation of the Queensland Integrity Commissioner, that councillors be exempt from disclosing a COI/MPI at a meeting for an interest common to a significant number of electors or ratepayers. A similar exemption applies to Members of Parliament in relation to proceedings in the Parliament and the Queensland Ministerial Code of Ethics contains a similar exemption.*[83]

Committee comment

The Committee does not believe that the clause requiring councillors to compare their own interest in a matter with that of other persons in the local government area will add value in terms of councillors' clarity about what constitutes a material personal interest.

Recommendation 7

The Committee recommends the omission of the proposed clauses in the Bill which state that "*a councillor does not have a material personal interest in the matter if the councillor has no greater personal interest in the matter than that of other persons in the local government area".* The Committee recommends that 'ordinary business matter' form the basis for a councillor's clear understanding of what constitutes a material personal interest.

Councillor Paul Tully recommends that the new conflict of interest disclosure clause includes 'religious practice or membership' along with 'religious beliefs' to "put the issue beyond doubt".[84] The Department has advised that it will seek advice from the OQPC for consistency with the terms in the *Anti-Discrimination Act 1991*[85]. Councillor Paul Tully also recommends inclusion of 'or other places of education' after the word 'school' so as not to exclude TAFEs or universities etc. which a councillor may have attended or may have a child attending.[86] DLG has stated that the dictionary definition of school means a place or establishment where instruction is given and that this is sufficient indication.[87]

[82] LGAQ, *Submission No. 2*, p.5.
[83] DLG, *Advice on issues raised in submissions received by the Committee*, p.32.
[84] Councillor Paul Tully, *Submission No. 13*, p.3.
[85] DLG, *Advice on issues raised in submissions received by the Committee*, p.33.
[86] Councillor Paul Tully, *Submission No. 13*, p.3.
[87] DLG, *Advice on issues raised in submissions received by the Committee*, p.33.

Recommendation 8

The Committee recommends that the Department of Local Government liaise with the Office of the Queensland Parliamentary Counsel to ensure consistency between the terms in the *Anti-Discrimination Act 1991* and the terms proposed to be used in the conflict of interest and material personal interest clauses in the Bill.

The Moreton Bay Regional Council sought greater clarification between the terms 'patron' and 'office holder' in terms of conflict of interest[88] however DLG has advised the two terms are quite distinct and separate and need no further clarification.[89]

2.9 Conduct and performance of councillors

To cut unnecessary red tape and streamline provisions about the conduct and performance of councillors, the Bill makes the following amendments:

- enables the departmental chief executive to undertake a preliminary assessment of complaints made by a council's CEO about a councillor
- streamlines provisions relating to the assessment of complaints about councillors, including complaints about frivolous or vexatious matters, inappropriate conduct or misconduct
- provides the Regional Conduct Review Panels (RCRPs) and the BCC councillor conduct review panel (BCC panel) with specific penalty options
- provides for the BCC panel or a RCRP/tribunal to require a complainant, where a complainant is also a councillor, to appear before the body to confirm the complaint.

Several concerns have been raised by a number of councillors, a Council and the Queensland Ombudsman about the provisions in these clauses.

2.9.1 Process for assessment of complaints

Councillor Charlene Hall raised several concerns about the new provisions for preliminary assessment of complaints against councillors in her submission including that:

- the responsibilities of the assessor when undertaking a preliminary assessment of a complaint are not fully articulated
- the assessing of complaints lacks accountability and consistency
- there is no clear process in place to ensure that complaints are factually and objectively assessed by CEOs before a 'decision' is made
- the natural justice rights for a person against whom the complaint is made should be included in section 176C and
- a 'zero tolerance' approach to false/misleading or inaccurate complaints should be adopted in section 181A.[90]

DLG does not believe that it is necessary to impose specific legislative prescription on how an individual CEO may deal with a preliminary assessment of a complaint nor to prescribe the natural justice for the preliminary assessment process (a person who is the subject of a complaint is given the opportunity to respond to the complaint after the preliminary assessment is made). Further, DLG notes that sections 180(6)(c) and (7) in the Bill have introduced a penalty for making further complaints about matters that have already been assessed as vexatious or lacking in substance which is, in effect, a 'zero-tolerance' approach for complaints which have no substance.

[88] Moreton Bay Regional Council, *Submission No. 19*, p.2.
[89] DLG, *Advice on issues raised in submissions received by the Committee*, p.33.
[90] Councillor Charlene Hall, *Submission No. 24*, pp.1-3.

The Moreton Bay Regional Council states that:

> *The Council's concern with the current s.177 is that it obliges the Chief Executive Officer to determine the nature of complaints about councillors which, in turn, determines how and by whom the complaint is dealt with. The CEO is thereby placed in the invidious position of making decisions that may have real practical consequences for the subject councillor. The position is exacerbated when the complainant is also a councillor. Given the close working relationship that must exist between a CWO and all councillors, this arrangement is inappropriate and impractical. By the same token it is inappropriate and impractical for the Mayor to deal with complaints of inappropriate conduct by other councillors.*[91]

DLG believes that the CEO of the local government is best placed to make an assessment of a complaint about councillor behaviour. "The CEO has all the relevant information and background knowledge …(enabling)… an appropriate judgement."[92]

Recommendation 9

The Committee recommends that guidelines for the preliminary assessment of complaints by the CEO and the Departmental Director-General (in some cases) be more fully described in the relevant clauses of the Bill (in relation to both the *City of Brisbane Act 2010* and the *Local Government Act 2009)* to clarify the role of the CEO and the Departmental Director-General in carrying out their duty.

[91] Moreton Bay Regional Council, *Submission No. 19*, p.2

[92] DLG, *Advice on issues raised in submissions received by the Committee*, p.35.

2.9.2 Clarifications

The Queensland Ombudsman recently provided a confidential report (the BCC report, subsequently tabled by the Lord Mayor on 11 September 2012) to the Brisbane City Council on the operation of the council's councillor complaints process. In the report, the Ombudsman highlighted that the CEO's assessment decision-making included a default approach of categorising complaints as 'frivolous or vexatious' and dismissing them and the Brisbane City Council CEO responded that CoBA was not sufficiently clear in regard to categorising complaints. The Ombudsman recommends:

(a) defining the meaning of the terms 'frivolous' and 'vexatious' and

(b) clarifying the purpose of the assessment (…to ascertain whether the conduct is about inappropriate conduct, misconduct or official misconduct as distinct from (ascertaining) whether the conduct amounts to or is likely to amount to the particular type of conduct.)[93]

DLG does not endorse an approach of defining these terms as they are inherently broad terms and should be "interpreted by a decision-maker using plain English meanings"[94].

Committee comment

The Committee is satisfied that the proposed amendments make it clear that the preliminary assessment is to determine whether a complaint is about inappropriate conduct, misconduct or official misconduct. However, the Committee believes that the Acts need to be clear and precise in defining terminology that is used in the preliminary decisions in the councillor complaints system given the gravity of these early decisions.

Recommendation 10

The Committee recommends that the terms 'frivolous' and 'vexatious' be defined in both the *City of Brisbane Act 2010* and the *Local Government Act 2009*.

2.9.3 Non-appealable decisions

Clauses 49 and 131 of the Bill provide that the preliminary councillor complaints decisions made by the CEO are not subject to appeal.

Councillor Milton Dick has expressed his concern about the proposed process submitting that:

> *It is noted that …decisions made by the Council Chief Executive Officer, department chief executive or the BCC Councillor Conduct Review Panel cannot be appealed against, challenged, reviewed, quashed, set aside or call(ed) into question in any way…This is an unacceptable removal of 'natural justice' for Councillors. It is not appropriate to remove the right of appeal for a Councillor in any circumstance. All people have the basic right to question decisions and to make an appeal to the Courts.*[95]

DLG advises that:

> *The complaints process is to comply with natural justice principles including 'show cause' prior to any recommendation of a penalty. Deliberations are non-appealable in the same*

[93] The Queensland Ombudsman, *Submission No. 20,* p.4.
[94] DLG, *Advice on issues raised in submissions received by the Committee*, p.7.
[95] Councillor Milton Dick, *Submission No. 18*, P. 3.

way that the process for State Members of Parliament, where the decision of the Parliament on the review of an MP's conduct and any penalty is final.[96]

Committee comment

The Committee is satisfied that the proposed amendments will provide sufficient safeguards for councillors.

2.9.4 Public disclosure of complaints

Clause 53 provides that the CEO must keep a record of all written complaints received by the CEO and the outcome of each written complaint. Further, the CEO must ensure the public may inspect the part of the record that relates to the outcomes of written complaints at the BCC public office or on the website except for complaints that are frivolous or vexatious, or lacking in substance.[97]

Councillor Milton Dick states that complaints, including those considered to be frivolous, vexatious and lacking in substance, should be made available for publication[98]. DLG does not consider it necessary to publish insubstantial complaints and states that such complaints "only have one outcome – they are dismissed". Further, the public can only inspect the part of the record that relates to the outcome of a complaint.[99]

Committee comment

The Committee believes that there is sufficient transparency afforded by the publication of the outcomes of written complaints except in the case of frivolous and vexatious complaints and those lacking in substance. Further, the Committee does not see any value in publishing unsubstantiated complaints.

2.9.5 Head of power to condition disciplinary orders

The Ombudsman has also identified instances of BCC conduct review panels attempting to strengthen their orders by including conditions (to improve compliance). In regard to the Bill, the Ombudsman states that:

I consider that if conditions are to be placed on orders then an appropriate head of power to do so should be included in the legislation. The Bill does not presently contain such a head of power.[100]

DLG advises that the proposed section 183(2) is based on advice from the Office of the Queensland Parliamentary Counsel and that:

1. *the proposed section 183(2) provides a clear head of power for the BCC councillor conduct review panel to make certain orders*
2. *the additional power is not required and*
3. *the order is the order encapsulating any conditions.* [101]

[96] DLG, *Advice on issues raised in submissions received by the Committee*, pp.6-7.
[97] Explanatory Notes, *Local Government and Other Legislation Amendment Bill 2012*, p.57.
[98] Councillor Milton Dick, *Submission No. 18*, p. 3.
[99] DLG, *Advice on issues raised in submissions received by the Committee*, p.8.
[100] The Queensland Ombudsman, *Submission No. 20*, p.3.
[101] DLG, *Advice on issues raised in submissions received by the Committee*, p.7.

Committee comment

The Committee is satisfied that there is a clear head of power in proposed section 183(2) to enable the BCC councillor conduct review panel to make certain orders and that any conditions it may attach to orders, form part of those orders.

2.9.6 Councillor conduct during meetings (CoBA only)

The Ombudsman states that:

> *The BCC report also identified the need to safeguard councillors from arbitrary or capricious decisions by the Chairperson. As the proposed legislation provides that there is no basis for complaints about a Chairperson to enter the complaint process and the Chairperson's decisions are not subject to appeal other than under the rules of procedure, there is no mechanism to protect a councillor from arbitrary or capricious decision making. I believe that the Bill should be further considered to provide protections against arbitrary or capricious exercise of control by a Chairperson.*[102]

DLG has advised that the powers of the Chair in relation to disorderly behaviour under section 186A are "relatively low-grade powers"[103], designed to ensure the continued efficiency of meetings.

Councillor Nicole Johnston questions:

> *How can the Newman Government justify removing scrutiny of behaviour in the Council chamber, except in one specific case? How can the Newman Government justify excluding the Chairman of Council from the operation of the rules of procedure after specific criticism by the CMC that such action would "effectively prevent a legitimate complaint and disciplinary action being taken against the Chairperson of Council"?*[104]

DLG states that it believes that the Bill provides for strong scrutiny of councillor behaviour, whether the conduct occurs within the Council chamber or external to the chamber. Proposed section 186A of CoBA and proposed section 181 of the LGA provide powers to the Chair with respect to inappropriate conduct in the chamber.

Committee comment

The Committee agrees that the Chair's powers are moderate and reasonable, and supports the amendments in order to facilitate the smooth running of council meetings.

2.10 Councillor's Discretionary funding

The Bill proposes amendments (Clauses 31 and 110) which further define the meaning of 'Councillor's discretionary funds' as funds that are:

(a) budgeted for community purposes and
(b) allocated by a councillor at the councillor's discretion.

The LGAQ believes that the Bill should use the term 'community organisations' rather than 'community purposes' in this amendment since the latter is not defined (in the Act nor the Regulation) and the former term is defined in the Regulation.[105] Councillor Boglary believes that more information about discretionary funds is required by councillors[106] and Mr Ian Hutchinson expresses

[102] Queensland Ombudsman, *Submission No. 20*, p. 3.
[103] DLG, Advice on issues raised in submissions received by the Committee, p.9.
[104] Councillor Nicole Johnston, *Submission No. 10*, p.2.
[105] LGAQ, Submission No. 2, p. 4.
[106] Councillor Wendy Boglary, *Submission No. 26*, p.4.

concern about the LGAQ's recommendation for the funds to be only disbursed to community organisations and states that a clear definition of 'community purposes' is required.[107]

DLG advises that the definition in the Regulation relates specifically to the provision of grants and that the term 'community purposes' is deliberately undefined so that councillors may determine the community purposes on a case by case basis.[108]

Committee comment

The Committee believes that, given the differences between councils and council electorates, councillors should be afforded the flexibility to determine 'community purposes' for themselves provided the council adopts clear policies for expenditure.

2.11 Delegated CEO disciplinary powers and removal of appeal entity

To align requirements in CoBA and the LGA with arrangements at the State level, the Bill enables a council CEO to delegate their power to take disciplinary action against a local government employee to an appropriately qualified employee of the local government. The Bill also removes the head of power to establish an appeal entity for local government employee disciplinary action under a regulation. It is intended that the Queensland Industrial Relations Commission (QIRC) is the entity to hear local government employee disciplinary appeals in line with State arrangements. Commencement of this amendment is proposed to coincide with a complementary amendment to the *City of Brisbane (Operations) Regulation 2010* and the *Local Government (Operations) Regulation 2010*.[109]

Regarding the delegation of CEO disciplinary powers, the Services Union has suggested that the delegation should be limited to those appointed as 'senior executive employees' and only to contractors engaged by Council on a contract of service (where the delegation is made to an outside provider).[110] DLG advises that the changes are being proposed to reflect the arrangements at the State level whereby the Director-General is not always the decision-maker on disciplinary actions. DLG further advises that the legislation provides a safeguard in that the chief executive officer may only delegate the powers to an "appropriately qualified" employee/contractor which is defined to include having the qualifications, experience or standing to exercise the power and that, under the *Acts Interpretation Act 1954*, the delegator must ensure that function or power is properly performed or exercised.[111]

The Services Union has also expressed concern that it has not yet seen the proposed regulation outlining the types of disciplinary action that may be taken under this clause. [112] DLG advises that, as an additional safeguard, the Bill makes provision for a commencement of this amendment to coincide with changes to the regulations. The regulation to prescribe when disciplinary action may be taken against a local government employee and the types of action that may be taken against a local government employee are currently being developed. [113]

The Services Union is also concerned that, while the intention behind removing the head of power for appeals from the Local Government Appeals Board to an 'appeals entity' is to push them through

[107] Mr Ian Hutchinson, *Submission No. 3*, p.1.
[108] DLG, *Advice on issues raised in submissions received by the Committee*, p.28.
[109] Explanatory Notes, *Local Government and Other Legislation Amendment Bill 2012*, p.8.
[110] The Services Union, *Submission No. 15*, p.6.
[111] DLG, *Advice on issues raised in submissions received by the Committee*, p.10.
[112] The Services Union, *Submission No. 15*, p.6.
[113] DLG, *Advice on issues raised in submissions received by the Committee*, pp.10-11.

the QIRC, there are no provisions in the Bill to affect this intention.[114] DLG advises that the process set out in the *Industrial Relations Act 1999* automatically applies to local government workers just as it does for any other worker and therefore, local government workers have always had the option of going to the QIRC...The proposal will simply remove the duplicative process for appeals.[115]

Committee comment

The Committee is satisfied that:

- the requirement to delegate to 'appropriately qualified' persons is sufficient safeguard in the delegation of CEO disciplinary powers
- the delayed commencement of the disciplinary action amendment will enable the proposed regulation to be properly reviewed and
- the removal of the head of power for appeals from the Local Government Appeals Board will simplify and clarify the appeals process.

Amendments to CoBA 2010

2.12 Establishment and Coordination Committee

The Bill provides for:

- the Establishment and Coordination Committee to appoint the acting CEO and
- BCC powers to be delegated to the Establishment and Coordination Committee, by resolution of the council.

Councillor Milton Dick has expressed his concern that:

> *Key projects and decisions could, by resolution of Council, be delegated to the Establishment and Coordination Committee. This would mean that key decisions could by-pass a full Council meeting and instead have the decision made behind closed doors.*[116]

DLG has advised that, prior to the commencement of CoBA, the Establishment and Coordination Committee was a standing committee that could receive delegations. Subsequent to CoBA, the committee became a Statutory Committee and it became unclear whether the committee could retain its status as a standing committee. The Bill puts beyond doubt that the BCC may, by resolution, delegate a power to the Establishment and Coordination Committee. The Bill also provides that information relating to the delegation or the power to be exercised under the delegation is not included within the scope of the right to information exemptions, ensuring the committee is subject to transparency and scrutiny.[117]

Committee comment

The Committee is satisfied that there is sufficient transparency and safeguards in the delegation of powers from the BCC to the Establishment and Coordination Committee to support these amendments and that the amendments clarify once and for all that the BCC may delegate its powers to this committee.

[114] The Services Union, *Submission No. 15*, p.6.
[115] DLG, *Advice on issues raised in submissions received by the Committee*, p.11.
[116] Councillor Milton Dick, *Submission No. 18,* pp. 3-4.
[117] DLG, *Advice on issues raised in submissions received by the Committee*, pp.11-12.

2.13 Statutory requirement to review CoBA each Council term

Section 249 of the *City of Brisbane Act 2010* provides that the Minister must, within 4 years after the commencement of this Act, carry out a review of the operation and effectiveness of this Act.[118] The Bill proposes to remove this requirement.

Councillor Milton Dick has expressed concern about the removal of this statutory requirement[119] however DLG has advised that the approach to reviewing CoBA has been in accordance with the Council of Australian Governments' regulatory best practice principles, which recommend the periodic and systematic review of legislation.[120]

Committee comment

The Committee is supportive of the removal of the clause from the *City of Brisbane Act 2010* requiring the 4 yearly Ministerial review of the Act.

Amendments to the *Local Government Act 2009*

2.14 Re-corporatisation of local governments

To implement the Government's election commitment to ensure that Queensland local governments are recognised as bodies corporate in the LGA, the Bill makes amendments to restore body corporate status to Queensland local governments.

The Minister for Local Government, at the Local Government Budget Estimates hearing, stated that the reasons for the introduction of the Body Corporate status for local governments in this Bill were to:

- Provide certainty for councils when they are entering into a contract (in the case of when councils are embarking on a corporate reconstruction, it lessens the effect of stamp duty) and
- Provide protection to councillors (with a corporation it can be sued rather than the councillor).[121]

While these amendments were generally welcomed by those who submitted to this investigation, two respondents (the LGAQ and the Services Union)[122] both raised concerns about where such amendments would leave local governments in terms of industrial relations laws. Given that organisations with Body Corporate status fall under the jurisdiction of the Commonwealth *Fair Work Act 2009* (Fair Work Act), there is concern about any change to the current jurisdictional location of local government industrial relations.

As the LGAQ states:

> *Local Government in Queensland fully supports being covered by one industrial relations jurisdiction and welcome the LNP's stated policy that Local Government will remain in the state industrial system (as was the policy of the former government) and can ill-afford to be exposed to the anticipated industrial and legal challenges that will follow any return to an era of uncertainty. Contrary to what is inferred in the Explanatory Notes to the Bill, the issues of whether an individual council falls "under the ambit of the Commonwealth Fair Work Act 2009" will not be within the discretion of each Council to determine but is a matter of law and Councils can expect more "Etheridge-style" disputes and legal and*

[118] Section 249, *City of Brisbane Act 2010*.
[119] Councillor Milton Dick, *Submission No. 18*, p.4.
[120] DLG, *Advice on issues raised in submissions received by the Committee*, p.12.
[121] The Minister for Local Government, *Local Government Budget Estimates Hearing*, 18 October 2012, p.59.
[122] LGAQ, *Submission No. 2*, P.1; and The Services Union, *Submission No. 15,* p.3.

> *jurisdictional challenges as third parties test this issue of coverage for their own advantage.*[123]

DLG is aware that the LGAQ has approached the Department of Justice and Attorney-General to consider the option of seeking an exemption from the jurisdiction of the *Fair Work Act 2009*. DLG proposes that the Bill be amended to dictate that section 2 of the Bill (Commencement) be amended to ensure the restoration of body status provisions will commence upon proclamation. This would permit time for the LGAQ and the Department of Justice and Attorney-General to explore the option of an exemption from the *Fair Work Act 2009*.

Recommendation 11

The Committee recommends the Bill be amended to ensure that the commencement of the clauses relating to the re-corporatisation of local governments be delayed until the Department of Justice and Attorney-General and the Local Government Association of Queensland have the opportunity to resolve the outstanding matter of the industrial relations jurisdiction.

2.15 Budget development and approval

To better align the mayoral responsibility provisions under the *LGA* with those under CoBA, the Bill provides the mayor with the responsibility of preparing the budget for presentation to the local government. The Bill also provides that Councillors be given a copy of the budget at least two weeks before the local government is to consider adopting the budget.

2.15.1Mayoral responsibility for the budget

At the Budget Estimates hearing, the Minister for Local Government stated that:

> *We also want the mayor to be able to formulate the budget of the local government. Again, in many cases, I would imagine the mayor would use all of the resources that are at his or her disposal and would ask the CEO to work with the directors to formulate the budget. But, first and foremost, that budget must belong to the first citizen of the community – that is, the popularly elected mayor. That mayor should have the right to be able to prepare that budget and fulfil the vision they see in the community…for the first time the mayor will have control of the preparation of that budget*[124].

A large number of submissions raised concerns in regards to these amendments. Numerous councillors, councils and residents expressed concerns about the delegation of such considerable authority to the Mayor when councillors are the elected members.

Councillor Wendy Boglary from Ormiston states:

> *Many (elected representatives)…could be excluded from the pre-budget deliberation meetings (under these new provisions). There is no need for such arrangements to be instigated in other councils of Queensland. This will only divide councils and limit the communities' voices. We do not need political parties to be involved in local government but elected community voices to be heard.*[125]

Mrs Jennifer and Mr Maurice Horsburgh state that:

> *(the mayor's responsibility to compile the budget) …is far too much power in the hands of one person. We assume that he will put it before Council for approval, but that will be far*

[123] LGAQ, *Submission No. 2*, P.1; and The Services Union, *Submission No. 15,* p.3.
[124] The Minister for Local Government, Budget Estimates Hearing, *Hansard*, 18 October 2012, p.62.
[125] Councillor Wendy Boglary, *Submission No. 26*, p.1.

> *too late. Councillors will feel obliged to accept the budget because, if they reject it, then the major will make it clear that it will "all have to be re-done at great expense". There will be fat too much pressure placed on councillors to simply "rubber stamp" whatever the mayor has decided. This incredibly important job should be done in an collaborative way with all councillors having input before any decisions are made.*[126]

The Cassowary Coast Regional Council states that:

> *It does not consider it appropriate for the Mayor to undertake the preparation of the budget without involvement and input from the Councillors…the Council believes the budget development process has been and should continue to be a collective one involving all Councillors.*[127]

DLG advises that, while the mayor prepares and presents the budget, it is to be developed in accordance with best practice.[128]

Committee comment

The Committee does not believe that, in this matter, there is obvious benefit in requiring all local governments to adopt the same approach to budget development as is currently the case in the Brisbane City Council. The Committee is concerned about amendments which will remove the consultative and collaborative approach to budget development in local governments and is of the view that all elected councillors have joint rights and responsibilities to develop the area's budget. The Committee questions how the removal of councillors from the budget development process will 'hand councils back to mayors and councillors'.

Recommendation 12

The Committee recommends that the new provisions relating to budget development and approval be omitted from the Bill and that the Bill include a provision requiring a consultative and collaborative approach to budget development in local government.

2.15.2Two weeks' notice clause

The Minister for Local Government, at the Estimates hearing, also stated that:

> *For the first time, there will be a guarantee that councillors will see the budget for at least two weeks prior to the budget being delivered. That does not exist at present. So a councillor will have a safety net. They will have a two week period in which the mayor's budget will be distributed before a decision is taken.*[129]

While the LGAQ does not oppose the two weeks' notice clause for councillors to consider the mayor's budget, several councillors have raised concerns, including a joint submission from six GCCC Councillors who state:

> *In our own council, which is a very large and complex organisation, we would argue that it takes more than two weeks just to read and research the information presented or proposed within the budget. Such a short time frame does not allow for the appropriate*

[126] Mr and Mrs Horsburgh, *Submission No. 11*, p.1.
[127] Cassowary Coast Regional Council, *Submission No. 12,* p.2.
[128] DLG, Advice on issues raised in submissions received by the Committee, pp.13-14.
[129] The Minister for Local Government, *Local Government Budget Estimates Hearing*, 18 October 2012, p.62.

> *level of scrutiny and debate legitimately required for councillors to properly interrogate the material.*[130]

Several councillors (across a range of regions) have suggested that between four and six weeks' deliberation/consideration time is more realistic.[131]

DLG advises that the two weeks consideration timeframe does not prevent consultation with councillors during the development of the budget ie. the Bill prescribes the minimum mandatory requirements. The preparation and presentation of the budget is to be developed in accordance with best practice and the local government principles.[132]

Recommendation 13

If Recommendation 12 is not agreed to, the Committee recommends that clause 109 of the Bill (which provides that councillors be given a copy of the budget at least 2 weeks before government is to consider adopting the budget) be amended to ensure that councillors are given a copy of the proposed budget at least four (4) weeks prior to consideration to adopt the budget.

2.15.3Public Scrutiny

The Moreton Bay Regional Council has expressed concerns that the proposed amendments will open the annual budget process to public scrutiny prior to its adoption and is opposed to any such amendments because it will bring political pressures to bear on what should be sound financial considerations.[133] DLG advises that, under section 171, a councillor is prohibited from releasing information they know, or should reasonably know, is confidential to a local government. Councillors would be aware and the Mayor could ensure they are aware that the local government budget is confidential until it is adopted by council.[134]

2.16 Indigenous Councils

The Bill removes the prescribed residency and heritage qualifications for a person to be eligible to be the mayor or a councillor of the Torres Strait Island Regional Council. Currently, section 152 requires councillors to be a Torres Strait Islander or an Aborigine and to have been a resident of their division for two years before they are eligible to be a mayor or a councillor on the Torres Strait Island Regional Council.

The Minister for Local Government, at the Budget Estimates hearing, stated that this issue had been highlighted by some events in this current round of elections:

> *There was a challenge on three of the election results in the Torres Strait Island Regional Council….one of those challenges, (it) has been thrown out and that person will take their seat as a councillor. In the case of the other two, popularly elected people from their community will now not be able to serve because they were found to be in breach of the*

[130] Joint submission Gold Coast City Councillors, *Submission No. 8*, p. 1.
[131] Councillor Glen Tozer, *Submission No.4*, p.1; Joint submission Gold Coast City Councillors, *Submission No. 8*, p.1; and Councillor Daphne McDonald, *Submission No. 17I,* p.1.
[132] DLG, *Advice on issues raised in submissions received by the Committee*, p.25.
[133] Moreton Bay Regional Council, *Submission No. 19*, p.1.
[134] DLG, *Advice on issues raised in submissions received by the Committee*, p.27.

> *Local Government Act (2009)…if people felt so strongly that they had to live there for the two years preceding, that vote would be reflected on the day.* [135]

The Torres Strait Island Regional Council has expressed concerns about the removal of these requirements stating that:

> *The people of the TSI(RC) want(s) candidates that have walked in their shoes to represent them. You do not get an understanding of remote Island life until you have experienced it for quite some time. Further, 14 of our communities are respondent to the Torres Strait Treaty that is free movement between Papua New Guinea (PNG) and Australia, it is the councillors who sign the prior advice to allow this to happen, a non-Aboriginal or Torres Strait Islander cannot sign traditional visits as they are not traditional inhabitants further without living in the region you have no understanding the impact of an additional 29,000 visitors to the region can have.*[136]

Regarding the Torres Straight Treaty, DLG advises that it does not consider that clause 120 will negatively impact on the boundaries between Australia and PNG nor the use of the sea that is covered within the Treaty[137].

Regarding the removal of residency and heritage qualifications, DLG states that:

> *…electoral restrictions like this are anachronistic in a modern, liberal democracy and run counter to the Government's overall reform program to empower local governments and their communities)…restricting the candidate pool by discriminating against potential candidates purely on the basis of length of residency or heritage does not encourage good local governance, accountability or responsibility*.[138]

DLG also notes that Indigenous rights advocate Maluwap Nona was reported as saying that the requirement "*was a hangover from our colonialist past and an archaic remnant of racist laws of many years ago and had to change".*[139]

Committee comment

The Committee is cognisant of the sensitivity of these amendments and has given deep consideration to the issues. In the end, the view of Maluwap Nona resonated with the Committee and it formed the view that the amendments ensured the same democratic processes were afforded Indigenous people in their local elections as were afforded other Queenslanders elsewhere.

The Committee noted that, in light of Clause 120, which amends section 152 (Qualifications of councillors) of the LGA, it would seem logical to also omit section 156A (Disqualification about residence) from the LGA. The Bill does not currently make this amendment.

[135] The Minister for Local Government, Local Government Budget Estimates Hearing, *Hansard*, 18 October 2012, p.60.

[136] Torres Strait Island Regional Council, *Submission No. 31*, p.2.

[137] DLG, *Response to the Torres Strait Island Regional Council submission*, p.27.

[138] *Explanatory Notes*, Local Government and Other Legislation Amendment Bill 2012, p.24.

[139] Maluwap Nona in Torres News, 13-19 August 2012, p.12 in DLG, Background on the purpose of, and proposals in the Local Government and Other Legislation Amendment Bill 2012, p.32.

Recommendation 14

For consistency with the amendments to section 152 of the *Local Government Act 2009* (which will remove the prescribed residency and heritage qualifications for a person to be eligible to be mayor or a councillor of the Torres Strait Island Regional Council), the Committee recommends that section 156A (Disqualification about residence) also be omitted.

2.17 Power to direct, and the appointment of, local government employees

The Bill makes a number of amendments designed to align the LGA with CoBA and to ensure "that mayors and councillors are clearly in charge of councils".[140] Amongst the proposed amendments are provisions which will:

- enable a panel, constituted by the mayor, the CEO, and either the chairperson of a committee or the deputy mayor, to appoint senior executive employees
- give mayors the capacity to direct both CEOs and senior executive employees (existing in CoBA but proposed to be added to LGA)
- remove the requirement for the CEO to keep a register of directions that the mayor gives to the CEO and
- require the annual review of CEO delegations.

The Committee has received numerous submissions on these provisions from Councillors, local government associations and the Service Union. Each provision is considered in turn below.

2.17.1Powers to appoint

The Minister for Local Government, in the Budget Estimates hearing, stated that the amendments:

> *Ensure that those people at the higher level of a council organisation – the directors who directly report to the CEOs – understand that their job is to implement the vision of the council, of those who are elected…in many cases this reflects the relationship between a good CEO and his or her council at present. I think it is important that we clearly define in legislation the roles of those elected officials so they are able to have a great say in the way their vision is carried out.*[141]

The LGAQ believes that Councils themselves should decide whether Councils or CEOs are empowered to appoint senior executives.[142] The Services Union sees this new provision as an intrusion into the power of the CEO to manage the Council and "opens the unacceptable potential for the political side of the Council to foist their mates and cronies onto the Council as senior executives".[143] The LGMA agrees stating that the new provision is "fraught with risk. In situations where judicial or coronial scrutiny is brought to bear, the capacity of a panel to demonstrate its diligence as the 'appointer' is highly likely to be proven inadequate."[144] Both the LGMA and the Cassowary Coast Regional Council recommend providing greater flexibility to Councils in constituting the appointment panels.[145]

[140] *Explanatory Notes*, Local Government and Other Legislation Amendment Bill 2012, p.10.
[141] The Minister for Local Government, Budget Estimates Hearing, *Hansard*, 18 October 2012, p.62.
[142] LGAQ, *Submission No. 2*, p.6.
[143] The Services Union, *Submission No. 15*, p.5.
[144] LGMA, *Submission No. 22,* P.3.
[145] LGMA, *Submission No. 22*, p.3. and Cassowary Coast Regional Council, *Submission No. 12,* p.2.

DLG advises that:

> *Government policy is to ensure local governments have the right to full consultation on the appointment of other senior council staff (Empowering Queensland Local Government Election Policy 18.2).*[146]

Committee comment

The Committee is supportive of the amendments to empower councils to appoint senior executives.

2.17.2Powers to direct

The LGAQ does not oppose the proposal that Mayors be empowered to direct senior executive employees[147] however the Services Union and the LGMA are concerned about these new provisions. Both organisations have expressed their concerns about the 'muddy' lines of authority and accountability created for senior executive employees who could find themselves "being directly accountable and respondent to more than one 'master'."[148] The Services Union states that "what is proposed is inconsistent with standard management practice of ensuring clear lines of authority in an organisation".[149] The LGAQ believes that "it is a fundamental principle of organisational dynamics that multiple and/or parallel lines of direction/accountability in any management structure inherently create the potential for confusion, duplication and insubordination."[150] Mr Ian Hutchinson further states that "this is widening the mayor's powers and restricting the input of elected local councillors."[151]

The Services Union has suggested that additional safeguards should be provided such as requiring that directions given to senior executives must be in writing and copied to the CEO, and ensuring that the CEO can refer mayoral directions, where they conflict with a direction given by the CEO or with a policy already adopted by Council, to Council.[152]

Further, the LGMA points out that several other Acts (such as the *Work Health and Safety Act 2011*) specifically exclude local government elected members from the definitions of both "person conducting a business undertaking" and "officer" and that additional amendments will need to be made in all Acts where they are excluded, to delete the explicit exemption for local government elected members.[153]

DLG does not provide a rationale for this amendment to the LGA but advises that s.170 of the LGA is being amended to*:*

> *Give mayors the capacity to direct both the chief executive officer or senior executive employees, in line with CoBA. Under section 170 (currently) no councillor, including the mayor, may give a direction to any other council employee.*[154]

[146] DLG, *Advice on issues raised in submissions received by the Committee*, p.35.
[147] LGAQ, *Submission No. 2*, p. 4.
[148] LGMA, *Submission No. 22*, p.3.
[149] The Services Union, *Submission No. 15*, p.4.
[150] LGMA, *Submission No. 22*, p.3.
[151] Mr Ian Hutchinson, *Submission No. 3*, p.1.
[152] The Services Union, *Submission No. 15*, p.4.
[153] LGMA, *Submission No. 22*, pp.3-4.
[154] *Explanatory Notes*, Local Government and Other Legislation Amendment Bill 2012, p.93.

Committee comment

The Committee recognises that this amendment will bring the LGA into alignment with CoBA but does not support the change. The Committee is of the view that, for accountability and transparency, senior executive staff should be directed by the CEO. Further, a council may authorise the mayor to direct the CEO or other senior executive staff.

Recommendation 15

The Committee recommends that clause 124 of the Bill (which amends the *Local Government Act 2009* to enable mayors to direct senior executive staff as well as the CEO) be omitted from the Bill and that the existing provisions be retained, that is, the mayor is able to direct the CEO (only).

2.17.3Removal of CEO record of mayoral directions

Regarding the removal of the requirement for the CEO to keep a record of mayoral directions (Section 13), the LGMA believes that this provision is contrary to the Government's intention of increasing accountability and transparency.

> *There is potential for undocumented directions by an elected member to be less than transparent and in some senses not accountable to anyone.*[155]

Councillor Wendy Boglary agrees:

> *A Mayor under these changes has greater powers but to prevent abusing such privileges directives should be kept in a record which is open to public scrutiny if needed*.[156]

Councillor Paul Tully concurs stating:

> *With the expansion of a Mayor's power to give directions not only to the CEO but in the future to senior executive employees, it is imperative that all Councillors area ware of what directions are being given*.[157]

DLG advises that:

> *The obligation on the chief executive officer under s.13(3)(e) is considered inconsistent with the government's objectives of removing red tape and associated legislative burdens on local governments. Consistent with government's policy objectives, there is nothing the Bill to prevent local governments from establishing their own record keeping requirements, it is a matter for each local government. The Bill simply sets the minimum requirements.*[158]

Committee comment

The Committee believes that to ensure transparency within councils, CEOs should continue to keep and publish a record of mayoral directions.

[155] LGMA, *Submission No 22*, p.3.
[156] Councillor Wendy Boglary, *Submission No. 26*, p.2.
[157] Councillor Paul Tully, *Submission No. 13*, p.1.
[158] DLG, *Advice on issues raised in submissions received by the Committee*, pp.14-15.

Recommendation 16

The Committee recommends that clause 79(1) (which removes from the *Local Government Act 2009* the requirement for CEOs to keep and publish records of mayoral directions) be omitted from the Bill.

2.17.4Annual review of CEO delegations

Councillor Paul Tully and the Ipswich City Council submit that the requirement to annually review council delegations to the CEO is too onerous for councils and unnecessary. Both suggest it would be more prudent to require such a review during each council term, that is, every four years.[159] DLG advises that the clause is consistent with government policy and that the requirement to review delegations ensures they are kept up to date and remain appropriate.[160]

Committee comment

The Committee believes that an annual review is important to ensure that councils are regularly reminded of the powers they have delegated to their CEOs.

2.18 Superannuation

To reduce the level of regulation of LG Super Board's operations and growth plans the Bill will allow the appointment of auditors to be determined in LG Super's trust deed.[161] In its submission, the Queensland Audit Office clarifies that the Auditor-General could continue to perform the financial audit of LG Super, subsequent to this amendment, under section 36 (By-arrangement Audits) of the *Auditor-General Act 2009.*[162]

[159] Councillor Paul Tully, *Submission No. 13*, p.3; Ipswich City Council, *Submission No. 29*, p.2.
[160] DLG, *Advice on issues raised in submissions received by the Committee*, p.37.
[161] *Explanatory Notes*, Local Government and Other Legislation Amendment Bill 2012, p.11.
[162] Queensland Audit Office, *Submission No. 14*, p.1.

3 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of parliament.

The Committee considered the fundamental legislative principles issues stemming from the *Local Government and Other Legislation Amendment Bill 2012* and identified several departures from these principles which are explored below.

3.1 Individuals' rights and liberties

3.1.1 Prohibited conduct by councillor in possession of inside information

Clauses 45 and 126 insert new sections 173A and 171A into COBA and the LGA respectively. The new sections apply to a person who is, or has been, a councillor (the *insider*) if the insider—
(a) acquired inside information as a councillor and
(b) knows, or ought reasonably to know, that the inside information is not generally available to the public.

The new sections prohibit the insider from causing the purchase or sale of an asset if knowledge of the inside information would be likely to influence a reasonable person in deciding whether or not to buy or sell the asset. The new sections also prohibit the insider from causing the inside information to be provided to another person if the insider knows, or ought reasonably to know, will use the information in deciding whether or not to buy or sell an asset.

The Committee expressed concern that these new offences contain elements that appear to be broad and vague and which affect the certainty of the provisions. For example:

- 'Inside information' - this term includes a proposed local government policy, proposed local government policy change and a decision or proposed decision of the local government or any of its committees
- 'Likely to influence a reasonable person in deciding whether or not to buy or sell the asset'
- 'Cause the purchase or sale of an asset' and
- 'Knows or ought reasonably to know' - it is possible for a councillor to be convicted under one of these proposed sections without actual knowledge that the inside information is not generally available to the public.

DLG considers that the definition of inside information in the Bill is "exhaustive and is meant to encompass information about council's activities that an ordinary citizen wouldn't have." Further, DLG advises that the application of the phrase 'ought reasonably to know' would ultimately end up being decided by the court and that, in the case of prosecution, DLG would prosecute the matter which would be heard in the Magistrates Court. [163]

[163] DLG, Response to the Transport Housing and Local Government Committee's report on fundamental legislative principle issues arising from the examination of the Local Government and Other Legislation Amendment Bill 2012, p.1.

Committee comment

The Committee believes that legal certainty is especially important for criminal law offences (such as those proposed in this Bill), so that people will know what conduct is prohibited and so that offences can be effectively prosecuted in the Courts and noted that the concept of 'inside information' is more precise in section 1042A of the *Corporations Act 2001*.

Recommendation 17

The Committee recommends that all terms used in the 'Prohibited conduct by councillor in possession of inside information' clauses in both the *City of Brisbane Act* 2010 and the *Local Government Act 2009* should be unambiguously defined so that Councillors have legal certainty about these provisions

The Committee also recommends that the Department of Local Government develops a mechanism to ensure that all Councillors (current and future) have a clear understanding of the parameters of these clauses.

3.1.2 Suspending or revoking particular local laws

Clause 88 inserts new section 38AB 'Suspending or revoking particular local laws' into the LGA. The clause enables the Minister to suspend or revoke a local law where it's contrary to any other law, is inconsistent with the local government principles or does not satisfactorily deal with the overall State interest. The Committee questioned whether this clause has sufficient regard for the rights and liberties of individuals because a person who had obeyed a local law may be adversely affected by the suspension or revocation of the local law. The Committee discussed the benefits of a transitional period in such situations.

DLG advises that a transitional provision is not required because the clause will not operate respectively and because the revocation of a local law will not affect any action taken under the local aw in good faith up to the time of the revocation.[164]

Committee comment

The Committee considers that the 'good faith' provision satisfactorily addresses the potential dangers of this clause.

3.1.3 Fines for councillors

Clause 52 amends CoBA, section 183 and clause 134(1) amends the LGA, section 180 to provide that a conduct review panel may, in circumstances of misconduct, impose a fine on a councillor of up to 50 penalty units. The Committee questioned whether this clause has sufficient regard to the rights and liberties of councillors and was advised by DLG that the potential FLP issues is reasonably justified in order to provide flexibility to the conduct review panels to impose a monetary fine on a councillor appropriate and commensurate to the nature of the offence. Currently under the

[164] DLG, Response to the Transport Housing and Local Government Committee's report on fundamental legislative principle issues arising from the examination of the Local Government and Other Legislation Amendment Bill 2012, p.3.

legislation, conduct review panels are restricted to taking only prescribed disciplinary action and may be prevented from taking more appropriate disciplinary action.

Committee comment

The Committee considers that conduct review panels should be enabled to take appropriate and commensurate disciplinary action and is supportive of this amendment.

3.2 Administrative power

Clause 130(4) amends section 176(10) of the *LGA* to add to the list of decisions not subject to appeal, decisions made by DLG's chief executive. These decisions could include dismissal decisions or referral of complaints. The Committee questioned whether this clause would subject the exercise of such administrative power to appropriate review. DLG advises that the new provisions "arise from changes to the complaints process rather than the expansion of the types of decisions or decision makers not subject to appeal" and that the Office of the Queensland Parliamentary Counsel "noted that the changes do not in effect provide for anything broader than what is currently in the Acts".[165]

Committee comment

The Committee is satisfied that this exemption from appeal is within keeping with the other listed exemptions and that alternative avenues for recourse exist should they be required.

3.3 Delegation of administrative power

Clause 181 amends section 34 of the *Local Government Electoral Act 2011* to provide a new subsection 34(6) which requires the Electoral Commission to fix, by gazette notice, a new polling day for an election where proceedings for an election must start again because either no-one is nominated as a candidate for a particular election or the number of candidates nominated was less than the number required to be elected. Given that the current section 36 of the Act empowers the Electoral Commission to fix a new polling date by gazette notice in circumstances where the election process is started again because a candidate dies between the nomination date and the polling date, it is considered likely that the Parliament would also approve the Electoral Commission as an appropriate delegate to fix a new polling date in the circumstances envisaged by section 34.

Committee comment:

The Committee is satisfied that this limited extension to the powers of the Electoral Commission under this amendment is appropriate.

[165] DLG, Response to the Transport Housing and Local Government Committee's report on fundamental legislative principle issues arising from the examination of the Local Government and Other Legislation Amendment Bill 2012, p.5.

3.4 Clear and precise

The Committee also notes that a juxtaposition error appears to have been made in in Clause 182 in reference to subsection 36(2)(a) and subsection 36(2)(b).

Recommendation 18

The Committee recommends that the juxtaposition error in Clause 182 in reference to subsection 36(2)(a) and 36(2)(b) be corrected.

3.5 Delegation of legislative power

3.5.1 Party Houses

See section 2.1 of this Report, pp.5-7.

3.5.2 Implementation

Clause 168 inserts new section 260F 'Implementation' into the LGA. Section 260F provides that the Governor in Council may implement the de-amalgamation of the local government area under a regulation. Section 260F also sets out the matters for which a regulation made under this section may provide. The Committee is aware that, under the LSA, section 4(5)(c), subordinate legislation should contain only matter appropriate to that level of legislation.

DLG advises that implementation by regulation is to provide the necessary flexibility to deal with the variety of legal, administrative and financial arrangements and potentially allow legislative responses to be tailored to the particular circumstances of a local government area. Furthermore, the involvement of the Governor in Council to implement de-amalgamation change demonstrates the importance of the constitution of local government areas and representation.[166]

Committee comment

The Committee considers this clause provides for an appropriate delegation of legislative power and agreed that Section 260F(2) is consistent with general principles of delegated legislation.

3.5.3 Definition of 'ordinary business matter'

Clauses 176(8) *(LGA)* and 72(9) *(*CoBA*)* amend the definition of 'ordinary business matter' to include 'another matter prescribed under a regulation'. The term 'ordinary business matter' (currently defined in schedule 4 of the LGA and the Schedule of the CoBA) is used in both Acts to deal with councillors' conflicts of interest. Breaches of these sections attract a penalty of a fine of up to 200 penalty units or 2 years' imprisonment.

DLG considers that "it is important to enable a regulation to add to the definition in the Acts to ensure that legislation keeps pace with the changes in the business of local governments."[167]

[166] DLG, Response to the Transport Housing and Local Government Committee's report on fundamental legislative principle issues arising from the examination of the Local Government and Other Legislation Amendment Bill 2012, p.8.

[167] DLG, Response to the Transport Housing and Local Government Committee's report on fundamental legislative principle issues arising from the examination of the Local Government and Other Legislation Amendment Bill 2012, p.10.

Committee comment

The Committee considers this an inappropriate delegation of legislative power and believes that where sanctions could apply for breaching a section of an Act, then terms used in that section should be defined (including revised) in the Act rather than having part of the definition prescribed by regulation.

Recommendation 19

The Committee recommends that the term 'ordinary business matter' should be defined in the *City of Brisbane Act 2010* and the *Local Government Act 2009*, and that the definition should not be able to be amended in any way by regulation.

3.6 Amendment of an Act only by another Act

Clause 178 amends section 18 of the *Local Government Electoral Act 2011* in respect of the cut-off day for compiling a voters' roll. Subsection 18(1) provides that 31 January in a polling year is the cut-off day for the voters' roll. The new subsection 18(2) provides that a regulation may fix a different cut-off day for a particular year. The new subsection 18(2) is a Henry VIII clause in that it allows a regulation to change a date otherwise set under the Act.

Committee comment

The Committee is satisfied that regulations made under new section 18 of the *Local Government Electoral Act 2011* will not interfere with individual rights and liberties or the institution of Parliament to such an extent that it would be preferable for this to be done by an Act of Parliament rather than by a regulation.

Appendices

Appendix A – Witnesses at public briefing – 8 October 2012

Witnesses
Mr Greg Hoffman, General Manager – Advocacy, LGAQ
Mr Tim Fynes-Clinton (LGAQ Legal Advisor)
Mr Stephen Johnston, Acting Director-General, Department of Local Government
Mr Logan Timms, Director, Special Projects, Department of Local Government
Ms Bronwyn Blagoev, Director, Policy, Legal and Corporate Support, Department of Local Government

Appendix B – List of Submissions

Sub #	Submitter
1	Brisbane City Council
2	Local Government Association of Queensland
3	Mr Ian Hutchinson
4	Councillor Glen Tozer
5	Councillor Donna Gates
6	Ms Liza Cameron
7	Mr David Gibson, MP
8	Councillor Chris Robbins (joint submission six Gold Coast City councillors)
9	Mr John Knaggs, Sunshine Coast Council
10	Councillor Nicole Johnston, Brisbane City Council
11	Ms Jennifer and Mr Maurice Horsburgh
12	Mr Terry Brennan, Cassowary Coast Regional Council
13	Councillor Paul Tully
14	Queensland Audit Office
15	The Services Union
16	Ms Diane Fawcett
17	Councillor Daphne McDonald
18	Councillor Milton Dick, Brisbane City Council
19	Mr Sean Fitzgerald, Moreton Bay Regional Council
20	Queensland Ombudsman
21	Environmental Defenders Office of Northern Queensland Inc.
22	Local Government Managers Australia (Qld) Inc
23	Mr Mark Harvey, Gold Coast City Council
24	Councillor Charlene Hall
25	Mr Albert Fawcett
26	Councillor Wendy Boglary
27	Kepnock Residents Association Group
28	Travel Stayz Group

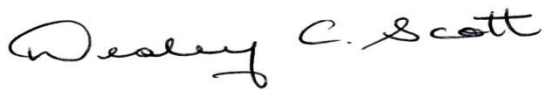
29	Mr Carl Wulff, Ipswich City Council
30	Property Council of Australia
31	Mr Rodney Scarce, Torres Strait Island Regional Council
32	Sunshine Coast Music Council

Statement of Reservation

Local Government and Other Legislation Amendment Bill 2012

Statement of reservation

The Opposition wishes to notify the committee of its reservations about aspects of the Local Government and Other Legislation Amendment Bill 2012. Due to the shortened timelines allowed for consideration of the report on the bill, we have had insufficient time to provide a detailed statement of our reasons. We will detail the reasons for our dissent upon the resumption of the second reading debate.



Desley Scott

Member for Woodridge