

Dear Professor Eccleston, Ms Smith and Local Government Board members,

Future of Local Government Review: Focus Group Case for a prescriptive local government employee code-of-conduct

A major challenge, yet to be addressed, is how future consumer welfare can be enhanced. The monopolised sector, where local government service delivery is not consumer driven, necessitates stronger consumer protection for ratepayers, residents, contractors and users of local government services. Consumer protection needs rigidity to withstand the longevity of the new legislation.

1. Councillors have an extensive mandatory code governing their behaviour. It is counter-productive that local government employees are held to a lesser standard.
2. Council culture is heavily influenced by employee behavioural norms, particularly during the time when many first time councillors are newly elected and strategy for the forthcoming four year term is being developed.
3. Tasmanian Public Servants are governed by a universal code and standards that contribute to the promotion of ethical conduct, provide best practice benchmarks, produce high administrative standards, and additional safeguards for consumers.
4. For good reason a majority of other states (NSW, Queensland, South Australia and West Australia) have codes-of-conduct prescribed in legislation for local government employees (often the same code as for public servants).
5. A prescriptive code-of-conduct is more easily utilised to assess behaviour; especially by lay people as new (and arguably most continuing) councillors are. A principles-based code requires a second level of inquiry and interpretation to determine whether particular conduct is appropriate or not.
6. Problems with the Carver-based corporate governance model used by local government have been highlighted by international research and various Australian Royal Commissions (e.g. banking and aged care)
7. Hard evidence exists that discretionary disciplinary processes do not work at local government level.¹ From a consumer perspective, employee conduct self-regulation is very subjective, perhaps even a facade: it does not meet the reality of seriously addressing consumer concerns.

¹ *Oversight – Governance and Accountability Submission to Kingborough Council’s Audit Panel*, Kingborough Ratepayers Association Inc., 2020

Discussion

1. Standards for councillors

Councillor conduct is governed by a code of practice which is prescriptive in nature.² An independent tribunal enforces this code.³ Standards are rigorous, and many cases have been taken to the tribunal since the legislation was passed.

This legislative package reflects community expectations to a degree.

However, no equivalent code exists to govern the conduct of over 4,000 local government employees in Tasmania. Each council has its own guidelines (or not), and ultimately discretion rests with the General Manager.

2. Council culture

From observing various council meetings online, it is obvious that each council has its own cultural norms. When dealing with a council as a consumer, there can be large differences in approach by staff to the matter at hand: planning is a classic example, with significant variation even within the southern metropolitan councils.

Post-election, new councillors are inducted into an organisation (often informally) by observing and copying current practices and protocols. These procedures are effectively set by staff, especially long-term senior staff, and the General Manager. Whilst many new councillors may commence duties with great enthusiasm for particular policies, promoting the views they expressed to get elected, the administrative mechanisms to achieve these are pre-existing. The various ways and means are seldom fully specified, in that written procedures form a framework within which “how it’s done here” can vary according to staff preferences. Councillors may not be aware of administrative alternatives, let alone be inclined to challenge the prevailing methodology. Many councillors may have little or no experience of administrative management.

Accordingly, staff behaviour collectively is significant in shaping not so much the guiding council policies, but the means by which these are achieved (or not, as the case may be). It is the means by which things are done that has a direct effect on consumers.

Good culture and proper governance cannot be implemented by passing a law. Culture and governance are affected by rules, systems and practices but in the end, they depend upon people applying the right standards and doing their jobs properly.⁴

The right standards can be enforced via a prescriptive code for local government employee conduct.

² The *Local Government (Model Code-of-Conduct) Order 2016*, and the *Local Government Amendment (Code of Conduct) Bill 2022* introduced in mid-November 2022.

³ See *Local Government Act 1993*, S.28K

⁴ The Banking Royal Commission, 2018

3. Standards for Tasmanian Public Servants

Consumers expect interactions with any government administration to be conducted without fear or favour, ethically, effectively, and respectfully. Prescriptive codes-of-conduct are of mutual interest to both consumers and governments.

The Tasmanian code-of-conduct for Public Servants addresses the broader issue of ethical responsibility, it encourages transparency and accountability, provides commitments to high standards of ethical and professional behaviour and outlines the principles in which individual responsibilities are based.

4. Standards for local government employees in other Australian states

All states have similar codes governing public servants' conduct. Most are prescriptive.

In early November 2022, West Australia joined Queensland, South Australia and New South Wales in regulating local and regional government employees under state-based laws. Approximately 23,000 local and regional government employees in West Australia will be covered by state employment laws from 2023.⁵

5. Prescriptive v principles-based codes

A prescriptive code-of-conduct is more easily utilised to assess behaviour, especially by lay people in the community, and new (and arguably continuing) councillors. Few councillors have extensive administrative and managerial experience – even those running small businesses. As recent history shows, relatively simple principles such as conflict of interest have not been properly understood by some elected members.

A principles-based code requires a second level of inquiry, and interpretation, to determine whether particular conduct is appropriate or not. This is appropriate in organisations with experienced managers, arguably including councils vis-à-vis staff managing staff. However, consumers and elected representatives have a right to independently assess employee conduct.

6. The Carver model of corporate governance and non-financial risk

The effectiveness of any corporate governance model is only as good as the knowledge and skill of the people using it.

The Carver-based local government governance model works best when boards and trusted executives both exhibit a high level of understanding of the governance process, and the boards consist of experienced, highly skilled professionals who are able to take the time needed to fully understand and utilise the conventions of the model.

It is not so useful when boards:

- a) have been poorly trained and consist of well-intentioned but skill-deficient directors who do not understand the nuances of crafting policy statements according to the model; and

⁵ <https://www.governmentnews.com.au/wa-local-govt-to-come-under-state-employment-laws/>

- b) are daunted by the challenging investments - of time and considerable financial resources - necessary to sufficiently train both board and management in the development, implementation and effective execution of policy governance.⁶

Criticisms of the current Carver-based local governance model,⁷ are well documented.⁸

For example:

- (i) *Its tendency to create excessively powerful CEOs;*⁹
- (ii) *The limitations it imposes on a board's ability to offset management's natural tendencies towards over-optimism, over-confidence, confirmation bias, and conformity;*¹⁰and
- (iii) *... when Policy Governance is adopted by inexperienced and unqualified boards of directors who lack the training and skills to craft appropriate policies and work within them, organizations put themselves at significant risk of violating their fiduciary and ethical responsibilities. And when CEOs push for adopting Policy Governance as a way to gain more freedom from the board, to withhold negative information from the board, or to somehow detach accountability for effective operational management from board review, trust in both the board and the CEO is compromised.*¹¹

Additionally, as recent Royal Commissions (e.g. banking, aged care) have highlighted, this model is ineffective in achieving appropriate governance standards where there is no corollary support: independent regulatory oversight coupled with staff accountability via a set of mandatory conduct standards.

Whatever the form of governance, it should never become a substitute for the substance of governance. Take, for example, non-financial risk.

In 2019 an ASIC Corporate Governance Taskforce into Australia's largest financial services companies highlighted important shortcomings in governance practices in large, listed entities. These entities should have had mature procedures and the highest standards of governance and accountability in relation to non-financial risk. ASIC noted oversight of non-financial risks

⁶ <http://johnbauerconsulting.com/carver-policy-governance-its-only-as-good-as/#:~:text=Numerous%20challenges%20have%20been%20cited,structures%2C%20and%20infighting%20among%20factions>.

⁷ "... the contemporary board style of governance ... with a clear divide between the strategic (councillors) and operational (staff) components of council activity. Re: *Local Government Legislative Review*, LGAT, 4/3/2019, p.3

⁸ "There are plenty of examples over the past couple of decades that demonstrate how adherence to the Carver Model has failed ...". <https://www.rsm.global/australia/insights/restructuring-insights/should-nfp-boards-move-away-carver-model>

⁹ *The Many Failings of the Carver Board Governance Model*, by Tom Coyne
http://www.k12accountability.org/resources/Accountability-committees/Carver_Governance_Model_Failings.pdf

¹⁰ *Ibid.*

¹¹ <http://johnbauerconsulting.com/carver-policy-governance-its-only-as-good-as/#:~:text=Numerous%20challenges%20have%20been%20cited,structures%2C%20and%20infighting%20among%20factions>

had received insufficient attention. "Boards cannot afford to ignore the oversight of non-financial risks. We have seen first-hand the damage that can result when it is not made a priority."¹²

ASIC's advice is as relevant to the local government sector as it is to the corporate sector.

ASIC urged boards of all listed companies to review governance practices and accountability structures with reference to its findings. Particularly:

*All too often, management was operating outside of board-approved risk appetites for non-financial risks ...;*¹³*and*

*Boards need to actively position themselves to hold management accountable to operate within their stated appetites.*¹⁴

ASIC defined three key component elements of good non-financial risk management include:

1. *Operational risk - process failure in either design or execution;*
2. *Compliance risk - not meeting the obligations of the law; and*
3. *Conduct risk - unethical or illegal activity (which can include failing to meet societal expectations).*¹⁵

*Effective non-financial risk management requires distilling what is important across a broad spectrum of matters and business processes, including how decisions are made, how things are done, and their cause and effect. These are more qualitative and not as direct as adding and subtracting debits and credit.*¹⁶

In Tasmania, the current local government policy framework predates ASIC's findings. A combination of the *Local Government Act 1993* (the Act), the local government governance model, and the *Local Government (Audit Panels) Order 2014* combine to effectively block oversight of non-financial risks.

The Act provides for elected members to collectively monitor the performance of the General Manager: they are responsible for oversight.¹⁷ As oversight is a critical governance function, it

¹² <https://asic.gov.au/regulatory-resources/find-a-document/reports/corporate-governance-taskforce-director-and-officer-oversight-of-non-financial-risk-report/forward>

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ <https://insync.com.au/insights/practical-advice-boards-oversight-non-financial-risk/>

¹⁶ *Ibid.*

¹⁷ Oversight is a critical governance function performed by boards of directors, committees, councils, and external bodies. Oversight refers to the actions taken to review and monitor public sector organizations and their policies, plans, programs, and projects, to ensure that they: are achieving expected results; represent good value for money; and are in compliance with applicable policies, laws, regulations, and ethical standards. <https://www.caaf-fcar.ca/en/oversight-concepts-and-context/what-is-oversight-and-how-does-it-relate-to-governance>

is surprising that only mayors have specific responsibilities under the Act for good governance.¹⁸

Mayors are tasked to "promote good governance by, and within, the council."¹⁹ Their task would be much easier if all local government employees were held accountable by a regulatory conduct code.

The current local government governance model provides too much power to General Managers in the absence of a specific regulatory authority for non-financial risk oversight: a matter compounded by the absence of an enforceable employee conduct code.

When discipline is left to the General Manager's discretion, the only control council has under the present regime is to remove the General Manager. This exceedingly blunt and expensive instrument is highly unlikely to be utilised where the General Manager's conduct is not at the extreme end of the spectrum. Kingborough Ratepayers Association Inc has documented not only poor staff behaviour, but also deflecting conduct by the General Manager, who is responsible for maintaining quality administrative and service standards.

7. Current standards

The Kingborough Ratepayers Association Inc was formed several years ago to both combat excessive annual rates increases and to improve governance at council. It quickly became apparent that anecdotal stories of poor staff behaviour were insufficient to encourage councillors to take formal action to improve performance. Consequently, we asked members to provide proper evidence (documents, statutory declarations) demonstrating inappropriate staff conduct. This documentation motivated development of the KRAI's *Oversight: Governance & Accountability* report.

The report established several instances of serious staff misconduct: none of which were denied or disputed by management. Following the report being presented - to the Audit Panel, all Councillors, and the General Manager – occasions have occurred where staff have continued to mislead Council in answers to questions on notice, on the record.

There is no reason to believe that Kingborough Council, with a generally good reputation, is any worse than any other council in Tasmania with regard to employee misconduct.

As good governance is reliant on conduct and practice, misconduct and lack of due process can significantly result in unethical decision making, and poor workplace practices. When misconduct is revealed, it should be acted upon.

¹⁸ *Governance encompasses the system by which an organisation is controlled and operates, and the mechanisms by which it, and its people, are held to account. Ethics, risk management, compliance and administration are all elements of governance. Good governance is reliant on conduct and practice.*

Misconduct and lack of due process can significantly result in unethical decision making and poor workplace practices.

¹⁹ The Act, S.27 (1) (c)

*Misconduct will be deterred only if employees believe that misconduct will be detected, denounced and justly punished.*²⁰

Consumers expect regulator acknowledgement of this issue, which has been addressed at length in interim and final reports of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

CONCLUSION

Local government elected representatives and employees both serve the community. Whilst council employees interact more with consumers, only elected representatives are held to account with a legislated code-of-conduct.

In circumstances where a monopoly for service delivery exists, such as the local government sector, greater justification exists for legislative intervention to ensure enhanced consumer welfare.

Sector-led argument, that principle-based (flexible) standards of employee conduct are essential to enable administrative efficiencies and effectiveness, fails to acknowledge the sector's privileged monopoly position. In the absence of competition, this argument has little merit.

Prescriptive employee codes-of-conduct are increasingly being used by local governments and industry as an alternative means of promoting ethical conduct. The codes advance consumer confidence in services and products, and promote high administrative practices. High administrative standards provide additional safeguards for consumers.

Weaknesses of the Carver-based local government corporate governance model are exacerbated by legislation prioritising only financial risk. Non-financial risk, that includes conduct risk, has been proven to cause significant consumer exploitation and maltreatment.

Self-regulatory industry codes-of-conduct have limited impact in raising administrative and service-delivery standards, as documented in recent Royal Commissions and KRAI's *Oversight: Governance and Accountability 2020* report.

The need for greater efficiencies throughout the sector will in future drive resource sharing between local governments and collaborative projects with other industry sectors. A sector-wide, uniform code for local government employee conduct will provide an ethical and professional foundation from which greater administrative and service-delivery benefits can be realised for both local government and consumers.

Previous local government legislation pre-dates ASIC's recent findings relating to non-financial risk. Justification exists for legislative intervention. That intervention should not only be desirable from the perspective of consumer rights, but also the combined mutual interests of the community, other related business sectors, and state and local governments.

²⁰Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Vol.1, Commonwealth of Australia, 2019, p.38

In Tasmania, state and local government employees are paid by the public purse. Both should be accountable to the same conduct code and standards.

Yours faithfully,

John McDonald,
28th November 2022