

EXPLANATORY PAPER

Statutes Amendment (Local Government Review) Bill 2020

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Government of South Australia
Department of Planning,
Transport and Infrastructure

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Introduction

The Statutes Amendment (Local Government Review) Bill 2020 (the Bill) was introduced into Parliament on 17 June 2020.

This Explanatory Paper provides a general overview of the reforms to the system of local government in South Australia that are in the Bill, with references to the relevant clauses. This Paper included information on the major reforms that are contained in the Bill's four 'reform areas' that were the basis of the Local Government Reform Program that ran over 2019–2020—

1. Stronger council member capacity and better conduct
2. Cost savings and financial accountability
3. Efficient local government representation
4. Simpler regulation.

Background Material

The Bill, this explanatory paper and other background material can be found on the Office of Local Government (OLG) website at www.dpti.sa.gov.au/local_govt/local_government_reform.

Please note that a 'marked-up' version of the *Local Government Act 1999*, showing the amendments to it that the Bill proposes, is also available on the OLG website.

Disclaimer: The marked-up version of the *Local Government Act 1999* is provided for reference purposes only and should be read in conjunction with the Statutes Amendment (Local Government Review) Bill 2020.

The Bill itself can also be accessed from www.legislation.sa.gov.au.

REFORM AREA 1 | STRONGER COUNCIL MEMBER CAPACITY AND BETTER CONDUCT

New council member conduct management framework

This reform creates a new conduct management framework for council members. This new framework changes the focus of the *Local Government Act 1999* (the Act) from ‘conduct’ to more clearly delineated ‘behavioural’ and ‘integrity’ matters, to separate poor behaviour from matters that can affect the integrity of council decisions. The new framework also provides clearer pathways for the investigation and resolution of issues that arise within these areas.

As is currently the case, the conduct management framework is chiefly within two parts of the Act. Chapter 5 Part 4 (currently ‘member conduct and registers’) will become ‘member integrity and behaviour’. It will contain all matters that are the standards that apply to council members. Chapter 13 Part 1 of the Act contains the processes by which alleged breaches of these standards may be dealt with, and, if necessary, investigated and sanctions applied.

Managing behavioural matters

Councils will continue to have responsibility for managing behavioural matters in the first instance. The current Code of Conduct for Council Members—that details all behavioural standards for all councils—will be replaced with ‘behavioural standards’ that will be published by the Minister, and that all members will be required to observe.

The intent is that the Ministerial standards will be relatively high level, rather than detailing specific behavioural instructions, which councils may establish themselves in ‘behavioural support policies’. These will be policies in which councils decide themselves what actions, behaviours and standards their members should adhere to (for example, appropriate use of social media). While councils will not be required to have a ‘behavioural support policy’, the Bill proposes that councils must consider whether they will have a policy or not, and what it could contain, within six months of each periodic election. This ensures that every council, when it has settled into a new term, will have this important conversation about the standards and behaviours that they will hold themselves and their fellow members to.

Councils will also continue to have the chief responsibility for managing instances where behavioural standards are not met. The current Code of Conduct requires councils to have policies for managing breaches of the ‘Behavioural’ Part of the Code (Part 2)—this will be continued through a requirement for councils to have a ‘behavioural management policy’. This is contained within a new section to be inserted into Chapter 13 (new sections 262A-262D).

As is the case with the current Code, councils can determine what processes best suit their needs to manage behavioural matters. Unlike the current Code, however, the Bill provides significantly more detail as to what councils’ policies may contain. A new section, 262B, clarifies that councils can deal with complaints as each council considers appropriate. This can be by utilising mediation, conciliation, arbitration, by undertaking an inquiry through such methods as written submissions, or interviews, or by a more formal investigation. Councils can also conduct an inquiry itself, or appoint a person to do so on its behalf.

The Bill also includes proposed provisions to clarify that a council need not inquire into a complaint, if there is good reason not to. This could be that the complaint is trivial, frivolous or vexatious; that it is

not made in good faith; that the person making the complaint does not have a sufficient personal interest in the matter; or that the matter has already been investigated through other means.

Finally, the Bill provides a range of actions that a council can take in response to a behavioural issue. These are similar to the sanctions that are contained within the current Code of Conduct for Council members – censure motions, apologies, training and removal from an office within council.

Managing serious behavioural matters

The most significant change in the conduct management framework that the Bill proposes is the introduction of a 'Behavioural Standards Panel' to deal with repeated or serious misbehaviour, or where a council member has failed to comply with a council's processes or resolved actions (clause 126 of the Bill). The introduction of the Panel is to enable more efficient resolution of difficult issues that can arise between council members, with an expanded range of sanctions, including the suspension of members for a maximum period of 3 months.

Managing integrity matters

The SA Ombudsman and the Independent Commissioner Against Corruption will continue their respective roles in the investigation of matters relating to council member integrity, maladministration, misconduct and corruption.

Clause 130 of the Bill will amend section 263B of the Act to expand Ombudsman's recommendation powers to include the ability to recommend suspension (maximum 3 months) of a council member and to apply some recommendations directly to a council member.

More significant sanctions will remain with the South Australian Civil and Administrative Tribunal (SACAT), which will be able impose suspensions for up to 6 months or disqualification from the office of council member (see clauses 131-133).

The main provisions for the new conduct management framework in the Bill are—

- Clauses 24–38 — Amends Chapter 5 Part 4 Division 1 to set out the 'Member integrity' provisions. These include amendments to the general duties in section 62 and a simplification of the conflict of interest provisions (further detail below).
- Clause 39 — Inserts Chapter 5 Part 4 Division 2 which deals with 'Member behaviour'—
 - New section 75E provides the Minister with the power to establish 'Behavioural Standards' that will specify the standards to be observed by council members. This will replace the Behavioural Code in the current Code of Conduct for Council Members.
 - New section 75F provides for councils to be able to adopt 'behavioural support policies', which are in addition to but must not be inconsistent with the Behavioural Standards.
 - New section 75G introduces health and safety duties for council members to take reasonable care not to adversely affect the health and safety of other council members or council employees (for example, bullying). Council members must also comply with any reasonable direction given by a responsible person in accordance with this section. This section is in addition to and does not limit the operation of the *Work Health and Safety Act 2012*. A failure by a council member to comply with these duties is considered 'serious misbehaviour' (under new section 262E) and is grounds for referral to the Behavioural Standards Panel.
- Clause 126 — Inserts Chapter 13 Part A1 — Member behaviour—

- Division 1 — Sets out that councils are to deal with member behaviour and that complaints are to be dealt with under a council's 'behavioural management policy'. New section 262B sets out what must or may be in a council's behavioural management policy and new section 262C sets out the actions that may be taken by a council in relation to a complaint.
- Division 2 — Establishes the Behavioural Standards Panel (see new sections 262E–262Y), including—
 - New section 262F — Provides that the Panel will consist of three members (with specified collective qualifications, knowledge, expertise and experience under section 262F(5)) appointed by the Governor with:
 - A member nominated jointly by the Minister and the LGA (Local Government Association of SA) to be the presiding member of the Panel; and
 - A member nominated by the Minister; and
 - A member nominated by the LGA.
 - New section 262N — The primary function of the Panel is to assess and deal with complaints referred to the Panel under Subdivision 3, which are complaints alleging 'misbehaviour', 'repeated misbehaviour' and 'serious misbehaviour' (these are defined under section 262E).
 - New section 262Q — Complaints may be referred to the Panel by resolution of the council; the principal member; at least three members of the council; and the Minister.

Suspension

The Bill also clarifies what suspension means (see clause 146, which inserts Schedule 9) and introduces new processes and the ability for the suspension of council members at the council level in certain specified circumstances—

- Clause 33 — Provides that if a council member fails to submit a return (for the Register of Interests) to the chief executive officer before the expiration of 1 month from the end of the allowed period, the member is suspended from office. This suspension provision replaces the current process where a failure triggers a casual vacancy.
- Clause 43 — Provides for the suspension of a council member who fails to comply with the prescribed mandatory requirements unless the member satisfies the chief executive officer that there were good reasons for the failure to comply.
- Clause 44 — Provides the ability for the chief executive officer to suspend a council member who has an intervention order against them, where the protected person is another council member or a council employee.

Health and safety duties

The Bill introduces new provisions into the Act (clause 39 — inserting a new section 75G) to clarify that council members must take reasonable care that their acts do not adversely affect the health and safety of other members or council employees. Members must also comply with reasonable directions that may be given to them by a responsible person to protect the health and safety of other members and employees.

The responsible person will be the principal member, the deputy principal member (or other member nominated by the council) or the chief executive officer, depending on who the reasonable direction should be given to.

These clauses have been included in response to a concern that councils lack some powers to give reasonable directions to members that may need to be made to protect the health and safety of other members and employees, given that members are not considered to be ‘workers’ under the *Work Health and Safety Act 2012*. The Bill is clear that these new powers do not limit the operation of this Act (new section 75G).

Conflict of interest

The Bill amends the sections of the Act that set the conflict of interest rules for members. The current division between more significant, or ‘material’ conflicts (for which members are required to not participate in the matter) and less significant matters (for which members make their own decision on how best to deal with the interest) is kept, however, the current 3 different categories (material, actual and perceived) have been reduced to 2 (general and material)—refer clause 38.

All exemptions have been consolidated into one section.

Presiding Member additional meeting management powers

Clause 48 of the Bill includes amendments to section 86 to provide an additional new power for the presiding member at council meeting to direct that a member—who is behaving in an improper or disorderly manner or causing an interruption or interrupting another member who is speaking—be excluded from the meeting room, for a period not exceeding 15 minutes. A matter must not be put to a vote while the member is excluded.

Council employees

Chief Executive Officer

The Bill contains a number of changes to the employment and management of council chief executive officers (CEOs). Clause 60 of the Bill inserts a new role for the Remuneration Tribunal of South Australia to determine the minimum and maximum bands for the remuneration of chief executive officers. The Tribunal will do this with regard to any factor, as determined by the Remuneration Tribunal. This could include factors such as the size, the location and the level of growth of any council.

Clauses 57, 58 and 61 of the Bill amend sections 97 and 98, and inserts new section 102A, to require councils to receive and consider independent advice when appointing, undertaking performance management, and, if necessary, terminating its CEO.

Employees

Reflecting a long standing policy to have similar conduct schemes apply to both council members and employees, the Bill amends Chapter 7 Part 4 to deal with ‘Employee integrity and behaviour’ through a similar structure as it proposed for members – separating behaviour and integrity matters. The Bill does not provide for behavioural matters to be set in regulation, as per the current Code of Conduct for Council Employees, but allows councils to adopt ‘employee behavioural standards’ (clause 77 — inserting a new section 120A).

Integrity matters that employees must comply with will be in the Act. These include a number of matters that are already in the Act (such as the duty to protect confidential information) and other matters that are currently within the Code of Conduct (such as the proper management of gifts and benefits).

The Bill also increases the maximum penalties for council employee offences to \$15 000 in line with similar offences for public sector employees under the *Public Sector (Honesty and Accountability) Act 1995*.

REFORM AREA 2 | LOWER COSTS AND ENHANCED FINANCIAL ACCOUNTABILITY

Rate monitoring system

The Bill introduces a rate monitoring system that will require all councils to receive, consider and publish independent advice on proposed changes to their general rate revenue each year from a designated authority.

The intent of this requirement is to provide and make public, independent advice on councils' critical rating decisions and improve accountability and engagement with councils' annual business plans.

Clause 79 amends section 123 of the Act which sets out the requirements for council annual business plans. The Bill inserts a new section 123(2)(ea) requiring the inclusion of the following matters in draft and adopted annual business plans—

- (i) a statement on the change in total revenue from general rates for the financial year and, if an annual business plan sets out a growth component in relation to general rates, it may only relate to growth in the number of rateable properties (and must not relate to growth in the value of rateable properties); and
- (ii) an explanation of how the change is consistent with the council's long-term financial plan; and
- (iii) a summary of any other reasons for the change; and
- (iv) details of the impact of the change on average rates for each land use category (if relevant); and
- (v) the advice received from the designated authority under subsection (3a); and
- (vi) the council's response to the advice, which must set out whether the change in total revenue from general rates is consistent with the advice and, if not, the reasons for the inconsistency.

In preparing a draft annual business plan (and before finalising the draft plan and undertaking consultation on it), councils must provide critical information to the designated authority by 31 December. This includes the proposed change in total revenue from general rates and the reasons for this proposed change, the council's view of the impact of the proposed change on ratepayers, information as to whether consideration has been given to alternatives to the proposed change in total revenue from general rates, and information as to how the proposal is consistent with the council's long-term financial plan and infrastructure and asset management plan.

The Bill provides that the designated authority must provide advice to councils on the appropriateness of the proposed change in total revenue from general rates for the financial year compared to the previous financial year by no later than 31 March.

This advice must be included in draft and adopted annual business plans, together with the council's response to the advice. Councils are not required to comply with the advice, however, the annual business plan must include an explanation of whether the change in total revenue from general rates is consistent with the advice and, if not, the reasons for the inconsistency.

If the designated authority is of the view that a council has not responded appropriately to its advice, it may report this to the Minister. The Minister may then consider making recommendations or a direction to the council on the basis of this advice.

Audit and Risk Committees

The value of audit committees is widely recognised in the local government sector. Many councils have taken additional steps, beyond those required by the Act, to improve the independence of audit committee members, and to expand the role of audit committees.

Clause 83 of the Bill therefore amends section 126 of the Act to expand the role of audit committees to a new role as ‘audit and risk committees’, consisting of a majority of independent members. The intention of these amendments is to provide better quality, independent advice to councils on a range of critical financial and risk management matters.

The Bill provides that the purpose of an audit and risk committee is to provide independent assurance and advice to the council on accounting, financial management, internal controls, risk management and governance matters.

Clause 83(6) sets out the expanded functions of an audit and risk committee, including —

- (a) reviewing annual financial statements to ensure that they present fairly the state of affairs of the council; and
- (b) proposing, and providing information relevant to, a review of the council's strategic management plans or annual business plan; and
- (c) monitoring the responsiveness of the council to recommendations for improvement based on previous audits and risk assessments, including those raised by a council's auditor; and
- (d) proposing, and reviewing, the exercise of powers under section 130A; and
- (e) liaising with the council's auditor in accordance with any requirements prescribed by the regulations; and
- (f) reviewing the adequacy of the accounting, internal control, reporting and other financial management systems and practices of the council on a regular basis; and
- (g) —
 - (i) if the council has an internal audit function—
 - (A) providing oversight of planning and scoping of the internal work plan; and
 - (B) reviewing and commenting on reports provided by the person primarily responsible for the internal audit function at least on a quarterly basis; or
 - (ii) if the council does not have an internal audit function, reviewing and commenting on an annual report provided by the chief executive officer in relation to the policies and processes adopted by the council to evaluate and improve the effectiveness of its internal control practices and procedures; and
- (h) reviewing and evaluating the effectiveness of policies, systems and procedures established and maintained for the identification, assessment, monitoring, management and review of strategic, financial and operational risks on a regular basis; and
- (i) reviewing any report obtained by the council under section 48(1); and
- (j) performing any other function determined by the council or prescribed by the regulations.

Given the expanded role of audit and risk committees, the Bill also prescribes the required skillsets, knowledge and experience for committee members (when considered as a whole), requires meetings to be held at least quarterly, and sets out reporting requirements to councils.

The Bill enables councils to establish regional audit and risk committees through the insertion of new section 126A, to ensure that this is available to councils who are of the view that a regional committee can be an effective and resource effective option.

The Bill also amends section 128 of the Act, by requiring councils to change audit firms at least every five years (rather than the current requirement to change auditors).

Public and Finance Act

The Bill includes a number of amendments to the *Public Finance and Audit Act 1987* (PFA Act) that relate to the activities that the Auditor-General can undertake in regard to councils and other local government bodies (refer Part 8).

Currently, under section 32 of the PFA Act, the Auditor-General can undertake an examination of a council's accounts and the efficiency, economy and effectiveness of its activities. The Bill also allows for the Auditor-General to undertake a review, to allow for a less detailed and therefore lower resource impact activity. The Bill also enables the Auditor-General to audit the accounts of a council, effectively becoming a council's auditor (clause 87 of the Bill amends section 129 of the Act to clarify that if this is the case, the relevant council auditor is not required to have provide an audit for that period).

The Bill does not change the way in which the Auditor-General undertakes these activities. They will continue to be as the Auditor-General deems advisable, or on the direction of the Treasurer or the Independent Commissioner Against Corruption.

Basis of rating

Clause 93 removes the ability of councils under the current section 151(3) of the Act to use the site (unimproved) valuation of land as the basis of rating, to provide for a consistent approach across the State. If passed, it is expected that some time will elapse before this change would commence, given that the 7 councils that currently use site valuation as the basis of rating will need to make significant changes to their rating structures and policies.

REFORM AREA 3 | EFFICIENT AND TRANSPARENT LOCAL GOVERNMENT REPRESENTATION

Council representation

The Bill proposes two significant changes to council representation. The first of these (contained in clause 9) will require all councils to have no more than 12 elected members. It is proposed that these change will be progressed through representation reviews, given that it may also necessitate consideration other internal council representation structures, such as wards. Councils that undertake a representation review between the commencement of the section and 1 January 2022 will have the maximum number of members before the 2022 periodic elections. All other councils will make this change prior to the 2026 elections.

The Bill also proposes that all councils have a directly elected principal member, who will be called a mayor (clause 18). As with the change to elected member numbers, this change will occur through the representation review cycle.

Supplementary elections

The Bill proposes a range of changes to supplementary elections to reduce the impact these can have on councils, particularly shortly before and after periodic elections.

Clause 139 of the Bill amends section 6 of the *Local Government (Elections) Act 1999* (the Elections Act) so that a supplementary election will no longer need to be held to fill a casual vacancy if the vacancy occurs within twelve months of the next periodic election or general election. Currently, a supplementary election does not need to be held to fill a casual vacancy if the vacancy occurs on or after 1 January of a year in which a periodic election is due to be held.

Clause 139 also provides that a supplementary election will not be held to fill a maximum of two casual vacancies if it arises in a council without wards which has a total of nine or more elected members.

Clause 140 inserts a new section 6A into the Elections Act, allowing the last excluded candidate at the most recent periodic election to be elected, if a vacancy arises within twelve months of this periodic election, and the candidate still meets the relevant eligibility criteria and they formally 'accept' the election within one month. This provision will not apply to the vacancy of a directly-elected principal member.

Simplified nominations

Clause 146 of the Bill amends section 19A of the Elections Act so that ECSA will be responsible for the nominations process. ECSA will manage an online nomination process, and provide councils (and publish online) with a list of accepted nominations relevant to their council area within 24 hours after close of nominations (which will also be published online).

Increased disclosure by candidates

One reform that has been discussed at length is a requirement for candidates to provide more information that is of interest to voters. It is intended that these requirements will be set in regulations,

and will include an indication of whether the candidate is a resident of the council area (or ward) in which they have nominated (although this will not apply to candidates standing in City of Adelaide elections).

Candidates will also need to include the names of any political party, any body or association formed for political purposes of which the candidate is a member or has been a member within the past 12 months.

The Bill also proposes some changes to the declaration of campaign donations, to provide voters with a better opportunity to be aware of significant donations that have been received by candidates before the close of voting. The Bill inserts a new section 81A into the Elections Act to require candidates that have received 'large gifts' to provide a return with information about it within the 'prescribed period' (proposed to be 5 days). The Bill does not set the value of a large gift, but it is anticipated to be \$2,500.

REFORM AREA 4 | SIMPLER REGULATION

Community engagement charter

Currently, section 50 of the Act requires all councils to have a community engagement policy that, at a minimum, must include publication of a notice and a period of 21 days for submissions to be made for all matters where public consultation is prescribed. The Bill proposed to replace this approach with a new ‘Community Engagement Charter’, which will support a more modern, flexible approach to engagement (clause 17).

The Charter will relate to community consultation and participation with respect to any decision, activity or process where compliance with the charter is required by the Act. It will be published by the Minister (noting that the Minister is required to consult with the LGA before any publication proceeds).

It is anticipated that the Charter will set some minimum standards for more significant council tasks, such as the annual business plan, but will be largely focused on a ‘principles based approach’ to allow councils to determine the exact activities they will undertake to best engage with their communities on their business. This will also allow for a more flexible approach to the publication of notices.

Information and briefing sessions

The Bill proposes to remove ‘informal gatherings and discussions’ from section 90 of the Act, and insert a new section 90A — ‘information sessions and briefings’ (clause 52). This responds to commonly heard concerns from councils that the current approach to ‘informal gatherings’ is overly prescriptive, and can be understood to prevent council members from discussing matters between themselves.

‘Information sessions and briefings’ are defined as any meetings held or arranged by the council or the CEO, inviting one or more council members, for the purposes of providing information or a briefing to attendees. This recognises that meetings arranged for council members to be better informed on matters of council business is a standard, and effective, tool to assist them to perform their role.

The Bill also removes the lengthy regulations that currently apply to ‘designated informal gatherings’, and the requirement for councils to have a policy that complies with these regulations. Councils will have more discretion as to whether to hold sessions in public or not.

However, the Bill retains the critical direction that these meetings should not replace decisions made at formal meetings of council, where debate and decisions take place in the open charter. To ensure this, new section 90A(3) requires information sessions and briefings that are being held to discuss matters that are, or are intended to be on a council meeting agenda, must be open to the public (unless there is a reason under section 90(3) for the matter to be discussed in confidence).

Internal review of council decisions

Internal review of council decisions (or ‘section 270 reviews’ as they are known) are an important tool for members of the public to utilise if they wish to a council to review a decision. They provide confidence in council decisions and actions, and can assist councils to determine better and more effective administrative and decision making practices. However, while councils value them, there was feedback that some members of the public can misuse this tool, creating a costly administrative burden for councils.

The Bill (clause 135) therefore provides some changes to assist councils to better manage these requests. These will allow councils to decline to undertake a review if the decision was made more than six months prior; to decline if the matter has, or has substantially been dealt with in another process (such as a conduct investigation); and to charge a small fee for a request (anticipated to be in the order of \$20).

Community land revocation

Currently, councils must apply for the approval of the Minister before they make a decision to revoke the community land status of any community land. While this degree of oversight may be appropriate for significant changes, it can be excessive for small pieces of land that often have limited future uses.

The Bill therefore proposes to establish two ‘categories’ of community land for the purposes of the revocation process. The Minister’s approval will only be necessary where the land is—

- the land is owned by the Crown or an agency or instrumentality of the Crown (or adjoins such land)
- the council knows, or should reasonably know, that State Government financial assistance was given to the council to acquire or improve the land
- the land is used as a community space, and the council proposes to sell or dispose of the land.

All other community land may have its status removed simply by a council resolution, after following the steps laid out in the legislation.

Clause 102 of the Bill contains these changes.

Simplification of registers

The intention of this reform is to compile all council members’ registers of interest into one, simple plain English form, which is then published on the council website. This removes the current requirement for councils to maintain one return with all details (for provision on request) and another, shorter return, for publication online. However, council members’ principal residential address will not be published online, for safety reasons.

Simplification of council publications

There are many provisions scattered through the Act that require councils to publish material online, to have material available at the council office for inspection, or for provision of copies on request. These provisions will be replaced with a single list of all council documents that must be published online in Schedule 5 of the Act. Councils will not be required to have any documents available for inspection, but must make copies available on request (and may charge a fee for these copies).

FURTHER INFORMATION

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