



## **Submission to**

### ***Exposure Draft of the Local Government Bill 2018***

**Adopted by Council on 6 March 2018**

**DRAFT**

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## Introduction

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In our submission to the Discussion Paper in December 2015, Yarra City Council welcomed the opportunity to be involved in the long overdue review of the Local Government Act 1989. We looked forward to a review with outcomes that would support the basic principle of enabling local communities and their elected representatives to make decisions about those matters of importance to them. We also looked forward to our participation in the review.

In September 2016, we expressed disappointment that the Directions Paper showed little attempt at genuine reform and a piecemeal and limited attempt at legislative change.

We now make this submission in response to the release of the Exposure Draft of the Local Government Bill 2018. Our submission is in three parts:

### **Part One: A Missed Opportunity?**

This review presents a once in a generation opportunity to restructure and modernise the enabling legislation for local government, and to respond to the desire of the sector for an Act that provides for flexibility and responsiveness to local communities. It is a chance for a reduction in prescriptive legislation and regulation and a streamlined, minimalist Act that fosters community self-determination.

This section sets out a number of concerns we have with the structure of the intended legislative framework, the process thus far and intended way forward.

### **Part Two: Getting the Policy Settings Right**

The Exposure Draft provides the mechanism to implement those policy shifts first canvassed in the Directions Paper. In addition, the draft puts in place a number of changes which were not considered in the Directions Paper and have not been the subject of broad consultation with the sector.

This section highlights a small number of specific matters which we feel warrant reconsideration before the Exposure Draft is finalised and presented to Parliament.

### **Part Three: Practical Difficulties**

Setting aside for the moment Council's views regarding the intent of elements of the Exposure Draft, we have reviewed the legislation and considered how it might be implemented in our organisation. This process has identified a number of specific matters which warrant further review. We have also identified a number of matters which may cause difficulties with interpretation or where there appears to have been errors or omissions

This section sets out some specific issues where the Exposure Draft would be confusing, conflicting or unworkable. For consideration, we have suggested a solution in each of the identified issues.

## Part One: A Missed Opportunity?

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*This review presents a once in a generation opportunity to restructure and modernise the enabling legislation for local government, and to respond to the desire of the sector for an Act that provides for flexibility and responsiveness to local communities. It is a chance for a reduction in prescriptive legislation and regulation and a streamlined, minimalist Act that fosters community self-determination.*

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### **DECREASED LEGISLATION IN FAVOUR OF GREATER REGULATION**

In her Ministerial Statement on Local Government in August 2015, the then Minister for Local Government said:

*“Since its creation there have been over 90 amending Acts resulting in hundreds of individual amendments to the Local Government Act 1989. The result is an Act that is poorly structured and unclear – even contradictory - in some places. It contains historic and redundant clauses which obscure meaning and can be an obstacle to efficient administration by councils.”*

It seems that the primary response to this issue is to restructure the proposed new framework to rely more heavily on Regulations in an attempt to streamline the Act. While this is effective at first glance, it potentially leads to a confusing and cumbersome legislative framework that is increasingly impenetrable to the public, to Councillors and to the professionals in the sector.

Further, the process for developing new and updated Regulations does not have the same level of Parliamentary rigour as a change to the Local Government Act would require, and we have concerns that this new framework will result in more frequent change and adjustment – something the 1989 Act has been criticised for in recent years.

### **UNFINISHED BUSINESS**

Many provisions of the Local Government Act 1989 have not been translated into the Exposure Draft, as it is intended to include those provisions in later amendments to other Acts. The road safety and road management provisions for example, do not find a home in the Exposure Draft. Further, the increased reliance on Regulations rather than the Act itself means that it is essential that both the proposed act *and* its supporting Regulations be the subject of stakeholder consultation and feedback.

On this basis, it is impossible to form a clear position on whether the Exposure Bill can be supported, as it is not yet clear which of the now missing provisions will find a home elsewhere, or what form they will take if they are translated.

The Yarra City Council looks forward to an opportunity to be involved in further stages of this review.

### **TAKING TIME TO GET IT RIGHT**

We are advised that it is currently planned to bring the Bill to Parliament in May 2018, enabling sufficient time for the first elements of the legislation to come into effect on 1 July 2018. This timeframe does not, in our view, enable sufficient time to resolve the significant number of outstanding issues – particularly those that were not canvassed in the Directions Paper.

Given the magnitude of the changes being proposed, it is the preference of the Yarra City Council that further time be taken to further consider the impacts of the proposals and the feedback of stakeholders before bringing the bill to Parliament.

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## **Part Two: Getting the Policy Settings Right**

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*The Exposure Draft provides the mechanism to implement those policy shifts first canvassed in the Directions Paper. In addition, the draft puts in place a number of changes which were not considered in the Directions Paper and have not been the subject of broad consultation with the sector.*

*This section highlights a small number of specific matters which we feel warrant reconsideration before the Exposure Draft is finalised and presented to Parliament.*

## **THE ROLE OF LOCAL GOVERNMENT**

The 1989 Act set out in Part 1A the role, purpose, objectives, role and functions of Councils – a series of high level statements that still reflect the contemporary role of local government. Indeed, it was this transition away from the service delivery obligations in the 1958 Act that empowered local government to truly take its place as one of the three levels of government in Australia.

In the Exposure Draft, these clear statements are gone – replaced by a role statement and a series of governance principles by which Councils must abide. These principles, self-evident as they mostly are (surely it serves no purpose to include an obligation on Councils to comply with the law) contain a clear omission and a worrying insertion.

The omission – a statement in support of Council’s significant advocacy role – leaves Council vulnerable to accusations that they have no role in public policy discourse, and play no part in lobbying or otherwise seeking the best outcomes for their communities. The insertion – a requirement that Councils “cooperate with other governments and public bodies” – suggests that Councils are no longer in control of their own destiny, and in many ways, are worse off than they were in 1958.

The Exposure Draft speaks at length at the value of community participation, and underpinning Council’s decision-making and policy development with comprehensive community engagement. It is hard to see how this is supported by the governance principles in the Exposure Draft.

The Yarra City Council does not support these changes.

## **CHANGE TO THE STATUS OF MAYORS**

For as long as local government has been in existence, Mayors have been the ‘first among equals’, with no distinction in legislative power between Councillors and the Mayor. Mayors have played an important ceremonial role and provided leadership to both the Council and the community but, aside from the ability to have a casting vote, have had the same power in the Chamber as every other Councillor. Even that casting vote power has been qualified by the long standing convention that the vote be used to maintain the status quo.

The Exposure Draft seeks to establish a role for Mayors that is more akin to a “Lord Mayor”, with proposals to provide certain executive powers to the Mayor and introduce the role of Deputy Mayor. These new Mayors are envisaged to have new powers in the Council Chamber and the ability to make a range of decisions without the support of the Council. Many of these powers are not intended to be subject to any ability for Council review.

The following specific powers have been enumerated for the Mayor, and are not supported by the Yarra City Council:

- to appoint Chairpersons to delegated committees and to override any appointment made by the Council;
- to lead engagement with the municipal community on the development of the Council Plan;
- to advise the Chief Executive Officer on the setting of Council Agendas;
- to direct a Councillor to leave a Council meeting in certain circumstances;
- to require the Chief Executive officer to report on the implementation of a Council decision.

Further, all of these powers are conferred on the Deputy Mayor in the absence of the Mayor. The Yarra City Council does not support this proposal.

This extraordinary departure from a model of collective decision-making to one of executive authority is anathema to the very ideal of representative local government and potentially disenfranchises hundreds of local Councillors.

#### **REMOVAL OF ABILITY TO DETERMINE VOTING METHOD**

An important element of local government autonomy is that communities have the flexibility to determine the democratic representation model that suits their circumstances. Yarra City Council has concerns that the Exposure Draft sets out a vision for local government elections that:

- Places an inflated value on consistency in voting method between municipalities, while placing no value on consistency between local and state or federal elections.
- By mandating a consistent voting method across Victoria, effectively spells an end to local attendance elections and makes the introduction of a future trial of electronic elections almost impossible.
- Fails to implement a number of key recommendations of the Georgiou review into the electoral franchise in local government.
- Places key decisions about the manner of the election, the number of Councillors and the electoral structure in the hands of the Minister and the Victorian Electoral Commission, with no obligation for community consultation.

Elections in the City of Yarra have long been conducted by attendance voting, and the Yarra City Council is disappointed that the Exposure Draft makes this unlikely to continue.

### **LAND USED FOR CHARITABLE PURPOSES**

The Directions Paper canvassed the application of a rate exemption to land owned by a for-profit organisation but leased to a charitable organisation. This direction was not supported by Yarra City Council, and we are pleased that it has not progressed. That said, we did make the observation that the treatment of land used for charitable purposes would be best managed through Council's powers to apply concessions and rebates, as well as direct grants. In this way, it would be possible to better reflect the contribution these landowners are making to the wellbeing of the local community.

The reason for this is that the simple application of a rate exemption is far too blunt an instrument to adequately reflect the contribution that charitable organisations make to a local community. In Yarra, by way of example, there are two very large private hospitals – both exempt from rates and both serving a catchment well beyond the City of Yarra. Their contribution to the City of Yarra is unquestioned, but is no more remarkable than their contribution to municipalities across Melbourne and indeed, Victoria. The removal of these two high value property owners from the rate pool essentially means that ratepayers across the City of Yarra are contributing more in order to offset these losses.

### **REQUIREMENT TO MOVE TO THE CAPITAL IMPROVED VALUE SYSTEM**

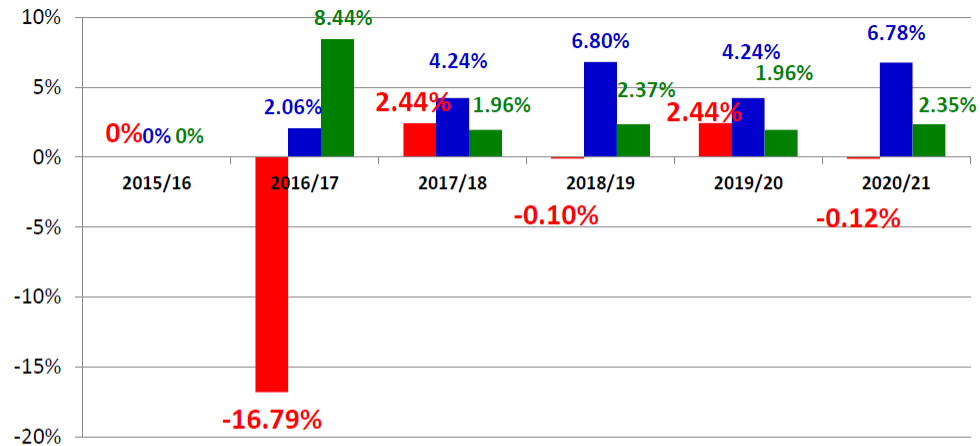
A significant change to the Exposure Draft is the extent to which local communities are involved in decision-making. Gone is the reliance solely on the four year election cycle for communities to have their say, and in its place is a requirement to have a community engagement policy that gives effect to the community engagement principles. Councils must consult with communities in the development of budgets, and must be able to demonstrate community support if applying for a special Order to increase the Council's average rate cap.

Given this strong commitment to community involvement, the removal of flexibility in distributing rate obligations is puzzling, as it reduces the ability of Councils to put in place a rate distribution that reflects community desires.

Yarra City Council currently allocates rate charges using the Net Annual Value of properties. In 2015, Council undertook a comparison of NAV and CIV which quantified the impact of moving from one system to the other. The analysis showed that without the introduction of differential rates, residential rates in the municipality would increase in the first year by an average of 8.44%, with a reduction in commercial rates of 16.79%.



### Analysis of the impact of moving to CIV



#### IMPACT OF CHANGE TO CIV

(Year-on-Year change to Ave. Rates & Charges per assessment) Inc. any charges

■ Commercial ■ Industrial ■ Residential



Mach 2 Consulting, 2015

While the impact of this change could be partially addressed through the introduction of differential rates, the analysis further showed that the distribution within each rating class would change in a way that could not be addressed through differential rates. In both commercial and industrial properties, the relative gap between low and high value properties would decrease (effectively transferring rate charges from high value commercial properties to small businesses in Yarra’s shopping strips). In residential properties, the gap would increase (placing a greater share of the rate on those income poor, asset rich residents of Yarra’s inner city suburbs).

Yarra City Council is disappointed that the Exposure Draft includes a requirement to use Capital Improved Value in future. We are further concerned that there are inadequate transition provisions to enable this change to be made over a number of years – softening the blow on those property owners most affected.

### **EXTRAORDINARY POWERS FOR THE MINISTER**

Yarra City Council has a concern with the large number of measures in the Exposure Draft which will undermine the role of local government as a distinct and essential tier of government as set out in the Constitution Act 1975.

The Exposure Draft establishes significant and potentially far-reaching powers for the Minister for Local Government. Yarra City Council has concerns about the Minister's powers to:

- determine the level of allowances for the Mayor, Deputy Mayor and Councillors at an individual Council level;
- set Councillor numbers and representative structures without a requirement for community consultation;
- retain the ability to set a general rate cap for the sector;
- direct a Council to submit detailed financial statements and supporting information without providing grounds for the request;
- place a Council into administration following the creation of two or more vacancies;
- make orders in relation to the restructure of municipal districts (including amalgamation, abolition and alteration of boundaries).

It is hard to see how local government could be considered "distinct" if its empowering Act includes these provisions.

### Part Three: Practical Difficulties

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*Setting aside for the moment Council's views regarding the intent of elements of the Exposure Draft, we have reviewed the legislation and considered how it might be implemented in our organisation. This process has identified a number of specific matters which warrant further review. We have also identified a number of matters which may cause difficulties with interpretation or where there appears to have been errors or omissions.*

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Exposure Draft section	Feedback
<p>3 Definition of confidential information</p>	<p>The existing Act includes a mechanism for Council (or the CEO for 50 days) to declare information to be ‘confidential’. There is also a provision for a Council to determine that information that once was confidential is no longer so, and can therefore be released. The Exposure Draft does not contain these provisions.</p> <p>By taking the determination of whether information is confidential out of the hands of the Council and relying solely on the definition, the Exposure Draft seeks to narrow the scope of the confidentiality provisions and improve transparency. However, with no provision for Council to determine whether information is confidential, it leads to the perverse outcome that information which a Council wishes to release is caught by the inflexible provisions and cannot be released.</p> <p>For example, it is arguable that the practice now followed by many Councils of releasing details of successful tenders (after the decision has been made) could be interpreted as disclosure of ‘private commercial information’ and would be prohibited. Similarly, there is no mechanism to address the situation where confidential information has become available in the public domain, and Council wishes to be able to participate in public discussion about that information.</p> <p>Further, the definition of confidential information in this way makes it impossible to give full effect to Recommendation 1 of the Victorian Ombudsman in the December 2016 report <i>Investigation into the transparency of local government decision making</i> that the Act include “a requirement for councils to include a ‘sunset’ provision in relation to all items discussed in closed meetings.”</p> <p><b>Solution</b></p> <p>It is suggested that the definition of ‘confidential information’ include a provision to enable Council to determine that information is not confidential, regardless of the fact it falls within categories (a) through (g) and where appropriate, category (j); including an ability for information to automatically become public when a sunset provision is triggered.</p>

Exposure Draft section	Feedback
<p>3</p> <p>Defining 'unreasonable disclosure'</p>	<p>The Exposure Draft defines 'confidential information' in a manner roughly akin to the provisions in the Freedom of Information Act. Among the definitions is a provision for 'personal information', which requires a test as to whether disclosure would be 'unreasonable'. While the FOI Act [at s33(2A)] provides guidance as to what constitutes 'unreasonable', the Exposure Draft omits this guidance.</p> <p><b>Solution</b></p> <p>It is suggested that the definition of 'personal information' include guidance as to what constitutes 'unreasonable disclosure'. Alternatively, consideration could be given to calling directly upon the provisions of the FOI Act (plus any necessary additions which are specific to the sector), rather than creating a new definition for this purpose.</p>
<p>10</p> <p>CEO's power of sub-delegation</p>	<p>The Exposure Draft includes restrictions on the power of delegation at s10(2). The wording of s10(2)(a) differs from the existing Act in that it reads "<i>the</i> power of delegation" rather than "<i>this</i> power of delegation". This wording change arguably has the effect of limiting the ability to delegate authority for matters only to those specifically delegated by the Council [s46(1)] or conferred under the Act [s46(2)]. For example, the Freedom of Information Act confers specific powers upon the Chief Executive Officer to make determinations on applications. The Exposure Draft does not appear to provide a mechanism for the CEO to delegate this authority to a member of Council staff.</p> <p><b>Solution</b></p> <p>It is suggested that the wording "<i>this</i> power of delegation" be used.</p>

Exposure Draft section	Feedback
<p>10(4)</p> <p>Delegation must include a maximum monetary limit</p>	<p>This section is unnecessary. Given it could essentially be circumvented by the setting of a comically large limit, it adds nothing to the Act and serves only to suggest that a financial limit is the most appropriate condition to place upon this delegated power. Further, it raises questions about whether multiple payments to a single vendor should be cumulatively assessed against the limit, or whether each individual contract should be assessed separately.</p> <p>Given Councils will be developing their own procurement policies which set out matters like quotation and tender thresholds, it is appropriate that Councils should determine whether a financial restriction in the CEO's Instrument of Delegation is appropriate, and how this should be structured.</p> <p><b>Solution</b></p> <p>Removal of section 10(4) from the Exposure Draft.</p>
<p>14(1)(e)</p> <p>Governor may order the number of Councillors to be elected in each ward</p>	<p>This section adds nothing and is adequately covered by 14(1)(a) and 14(1)(c).</p> <p><b>Solution</b></p> <p>Removal of section 14(1)(e) from the Exposure Draft</p>
<p>14(2)(a) and 14(2)(b)</p> <p>Minister must seek to ensure balance between wards</p>	<p>The words 'per Councillor' in both clauses are unnecessary, as all wards in any Council will have equal numbers of Councillors.</p> <p><b>Solution</b></p> <p>Remove the words 'per Councillor' from sections 14(2)(a) and 14(2)(b) in the Exposure Draft</p>

Exposure Draft section	Feedback
<p>18(1)(a) Mayor to appoint Chair of Committees</p>	<p>The City of Yarra has a delegated Committee comprised of three of Yarra’s nine Councillors, on a rostered basis. This produces 84 different Councillor combinations (or 336 combinations if the possibility of absences is considered). The current process provides for the Committee to elect a chairperson at the commencement of each meeting. It would be unworkable to appoint a chairperson in advance of each meeting. Further, section 61(2)(b), which requires that appointment cannot be made by the committee itself, reduces the flexibility to appoint a chairperson in the event of absences.</p> <p>It is Yarra City Council’s position that a decision to empower the Mayor to appoint the chairs of committees should be one for the Council to make, and it is a matter best set out in that Council’s Governance Rules. This is the current situation at the City of Melbourne, where the Council has the ability to delegate the power to make Committee appointments to the Lord Mayor. This arrangement eliminates the risk of a Mayor (in this case, the Lord Mayor) making appointments in opposition to the wishes of the Council.</p> <p><b>Solution</b></p> <p>Section 18(1)(a) be reworded to read <i>“to appoint a Councillor, subject to any procedures or limitations specified in the Governance Rules, to be the chair of a delegated committee;”</i></p> <p>Section 61(2)(b) be removed from the Exposure Draft, and a new section 61(2A) be added, reading:</p> <p><i>“(2A) A delegated committee must be chaired by a Councillor appointed -</i></p> <ul style="list-style-type: none"> <li><i>(a) by the Council or the Mayor;</i></li> <li><i>(b) if no Councillor has been appointed by the Council or the Mayor, by the Committee; or</i></li> <li><i>(c) if the Councillor appointed by the Council or the Mayor is absent, by the Committee.</i></li> </ul> <p><i>(2B) For the purposes of the appointment of a Chairperson in circumstances described in sub section 2A(b) and (c), the meeting is to be chaired by the Chief Executive Officer or their delegate until an appointment is made.”</i></p>

Exposure Draft section	Feedback
<p>19(2)(c) Appointment of an Acting Chief Executive Officer</p>	<p>If a CEO is planning to be absent for a few days, the practice at the City Yarra is for the CEO to appoint a replacement. In the event of an extended absence, the Council would be asked to make an appointment by resolution.</p> <p>Section 10(2)(c) of the Exposure Draft removes the ability of the CEO to appoint a replacement CEO for short absences, and will require the convening of an urgent Council meeting on each occasion of an unexpected absence (such as due to illness), or placement of all duties on hold until the CEO's return.</p> <p><b>Solution</b></p> <p>It is suggested that this restriction on short-term appointments be removed and the clause read <i>"the power to appoint a permanent Chief Executive Officer or an acting Chief Executive Officer for any period greater than 28 days;"</i></p>
<p>20 and 26 Replacing a Mayor after declaring the office vacant</p>	<p>The Exposure Draft includes provisions at s20 for Council to declare the office of Mayor to be vacant. In these circumstances, it would be advantageous for a Council to immediately elect another Councillor to be Mayor. Currently, the only requirement is at s26(6) which requires the election of a new Mayor occur within one month.</p> <p><b>Solution</b></p> <p>It is suggested that a clause be inserted either at s20 or s26 which requires the election of a Mayor <i>"immediately after declaring the office of Mayor to be vacant at a meeting under s20(3)"</i>.</p>
<p>22 Declaring the Deputy Mayor's office vacant</p>	<p>The Exposure Draft includes provisions at s20 for Council to declare the office of Mayor to be vacant. There are no equivalent provisions for ending the term of the Deputy Mayor. While the effect of s22(a) would be that the Deputy Mayor's term would end upon the election of the Mayor (which also avoids the possibility that a Councillor could hold both offices simultaneously), there is no standalone provision for the removal of the Deputy Mayor.</p> <p><b>Solution</b></p> <p>It is suggested that a clause modelled on s20 be inserted into the bill immediately following s22, and set out a mechanism for declaring the office of Deputy Mayor to be vacant and that a s22(f) be inserted (modelled on s19(f)).</p>



Exposure Draft section	Feedback
<p>27(2) and 26(8)</p> <p>A casual vacancy in the office of Deputy Mayor</p>	<p>The Exposure Draft requires that a casual vacancy in the office of Deputy Mayor be replaced within one month of a vacancy occurring. In these circumstances, section 26(3) requires that the Council first determine whether the Deputy Mayor is to be elected for a 1 year or a 2 year term. This is clearly not the intention, and would be of no effect in any case, as the Deputy Mayor's term would effectively come to an end upon the election of a new Deputy Mayor under the provisions of section 27(1).</p> <p><b>Solution</b></p> <p>It is suggested that s27(2) be modified to include a reference to s26(8).</p>
<p>27(2) and 26(3)</p> <p>Mayoral and Deputy Mayoral term lengths</p>	<p>The Exposure Draft enables Council to determine the term of appointment for both the Mayor [s29(3)] and the Deputy Mayor [s27(2)]. Notwithstanding the Department's advice that "<i>the deputy mayor's term parallels the term of the mayor, that is either one year or two years, as agreed by the council</i>", the wording of section s27(2) is that there is no requirement that these terms be of the same length, meaning it would be open to a Council to appoint a Mayor for one year and a Deputy Mayor for two years, or vice versa. This presents a number of problems with the construction of the Exposure Draft. It is understood from discussions with the Department that this was not the intended outcome.</p> <p><b>Solution</b></p> <p>It is suggested that s27(2) be modified to exclude the reference to s26(2) and s26(3) and that a further section be added at 27(1A) reading "<i>The Deputy Mayor must be elected for the same term as the Mayor</i>".</p>
<p>28(3)</p> <p>Councillor's duties do not include CEO's duties</p>	<p>Section 28(3) has the effect of contradicting s28(2)(e), which requires a Councillor to support the Mayor.</p> <p><b>Solution</b></p> <p>The role of a Councillor does not include the performance of any responsibilities or functions of the Chief Executive Officer.</p>

Exposure Draft section	Feedback
<p>33(1)(e) &amp; 33(2)</p> <p>Councillor ineligible if absence without leave for 4 months</p>	<p>The Exposure Draft uses the word ‘leave’, which is widely misinterpreted by the sector and interpreted akin to ‘annual leave’. Further, it is suggested that the wording be altered to make in unambiguous that such permission can only be granted by a resolution of the Council at a meeting, not by the CEO under delegation.</p> <p><b>Solution</b></p> <p>Section 33(1)(e) be reworded to: <i>“subject to this section, is absent from meetings of the Council for a period of 4 consecutive months without permission obtained by a resolution made at a Council meeting.”</i></p> <p>Section 33(2) be reworded to <i>“The Council must not unreasonably refuse to grant permission.”</i></p>
<p>33(3) and 33(4)</p> <p>Circumstances where a Councillor is not taken to be absent</p>	<p>Both provisions include the phrase ‘A Councillor is not to be taken to be absent’. It is arguable that this could have the effect of requiring a Councillor to be recorded as in attendance for the purposes of determining whether a quorum has been reached. Similarly, it could be interpreted as meaning that a Councillor should not be recorded as ‘absent’ in the minutes of a meeting held during a period of suspension or parental leave.</p> <p><b>Solution</b></p> <p>Both section 33(3) and 33(4) be reworded to commence <i>“For the purposes of this section, a Councillor is not to be taken to be absent...”</i></p>
<p>33(4)</p> <p>Provision for 6 months’ parental leave</p>	<p>This clause should be sufficiently flexible as to allow a Councillor to commence the period of leave upon commencing responsibility for the care of a child. For example, if a Councillor assumes primary care responsibilities for their child at six months of age, they are unable to draw on this provision.</p> <p><b>Solution</b></p> <p>Section 33(4) be reworded to <i>“A Councillor is not to be taken to be absent from meetings of the Council during an unbroken period of 6 months within 12 months after the Councillor—“</i></p>

Exposure Draft section	Feedback
<p>33(4)(b)</p> <p>When parental leave provisions are triggered.</p>	<p>The wording of this clause suggests a Councillor could take leave upon the establishment of a relationship with a person with a child of any age (even an adult), provided ‘responsibility for the care’ can be established. It is suggested that this is not the intention of this section.</p> <p><b>Solution</b></p> <p>Section 33(4)(b) be reworded to <i>“becomes the spouse or de facto partner of a person who is a natural parent of a child under the age of 16 years; or”</i></p>
<p>33(4)</p> <p>When parental leave provisions are triggered.</p>	<p>The wording of this clause does not include the scenario where a Councillor becomes the spouse or de facto partner of a person who has adopted a child under the age of 16 years.</p> <p><b>Solution</b></p> <p>Section 33(4) include a provision at 33(4)(d) reading <i>“becomes the spouse or de facto partner of a person who has adopted a child under the age of 16 years.”</i></p>

Exposure Draft section	Feedback
<p>43</p> <p>Dismissal of the Chief Executive Officer</p>	<p>For the first time, the Local Government Act will include a provision to enable a Council to cut short the term of a sitting Mayor. These provisions introduce a new concept of ‘a majority of at least three-quarters of all of the Councillors in office’. Given the significance of ending a Mayoral term early, this is an important provision to ensure that a Mayor is only ousted from office with the support of a significant majority of the Councillors, rather than only slightly more than half.</p> <p>While a decision to shorten the term of a Mayor is undoubtedly significant, a decision to terminate a CEO before the expiry of their contract arguably has a greater impact on the organisation, and almost certainly has a more significant financial impact.</p> <p>It is important that any provision requiring a greater level of support among Councillors before a CEO’s contract is terminated, not limit the ability of a Council to determine not to re-appoint a CEO once their contract has expired. Further, if it is desired to summarily dismiss a CEO (due to fraud or some other malfeasance), the Act should not prevent the Council from issuing a lawful direction to a CEO that they take leave until such time as a formal decision on their employment can be made.</p> <p><b>Solution</b></p> <p>It is suggested that a provision similar to that dealing with the Mayor be introduced into the new Act after section 43. The provision would read:</p> <p><b><i>Dismissal of a Chief Executive Officer</i></b></p> <ol style="list-style-type: none"> <li>(1) <i>A Council may only dismiss a Chief Executive Officer in accordance with this section.</i></li> <li>(2) <i>A notice of motion to dismiss a Chief Executive Officer must be—</i> <ol style="list-style-type: none"> <li>(a) <i>signed by an absolute majority of the Councillors; and</i></li> <li>(b) <i>lodged with the Mayor at least 14 days before the day on which the meeting to consider the motion is proposed; and</i></li> <li>(c) <i>provided to each Councillor by the Mayor without delay.</i></li> </ol> </li> <li>(3) <i>The Chief Executive Officer can only be dismissed if the motion to dismiss the Chief Executive Officer is passed by a majority of at least three-quarters of all of the Councillors in office.</i></li> <li>(4) <i>For the purposes of subsection (2)(a), absolute majority means the number of Councillors which is greater than half the total number of the Councillors of a Council.</i></li> <li>(5) <i>Nothing in this section affects the ability of a Council to determine not to re-appoint a Chief Executive Officer upon the expiry of their contract of employment.</i></li> </ol>

Exposure Draft section	Feedback
<p>47(2) Definition of a senior officer for the purposes of the Evidence Act.</p>	<p>This clause refers to the power to witness statutory declarations, but not the power to take affidavits. It further creates a situation where a Chief Executive Officer would need to authorise themselves before exercising this power.</p> <p><b>Solution</b></p> <p>Section 47(2) be reworded to read <i>“For the purposes of sections 107A(1)(o) and 123C(gc) of the Evidence (Miscellaneous Provisions) Act 1958, a senior officer of a Council is the Chief Executive Officer or a senior member of Council staff who is authorised in writing by the Chief Executive Officer to witness statutory declarations and take affidavits.”</i></p>
<p>63(5) Recording confidential decisions in the minutes</p>	<p>The Exposure Draft at section 63(5) requires that where a meeting is to be closed to the public, the Council or delegated committee must record the reason for determining to close the meeting to the public in minutes of the meeting that are available for public inspection. A literal reading of this clause is that the reason can only be one of the three circumstances set out in section 63(2). It would appear that this clause is intended to apply only to circumstances where the meeting is closed to consider confidential information, and the requirement is that the minutes record the applicable classification from section 3(1).</p> <p>Further, it is arguable that the Exposure Draft does not give full effect to Recommendation 1 of the Victorian Ombudsman in the December 2016 report <i>Investigation into the transparency of local government decision making</i> that the Act include “a requirement for more detailed reasons in relation to the closure of meetings to be specified in the minutes”.</p> <p><b>Solution</b></p> <p>It is suggested that clause 63(5) read:</p> <p><i>“If a Council or delegated committee determines that a meeting is to be closed to the public in order to consider confidential information, the Council or delegated committee must record the classification of the confidential information from section 3(1) and summary of the matter considered in minutes of the meeting that are available for public inspection.”</i></p>

Exposure Draft section	Feedback
<p>63(5) Closed meetings are not confidential</p>	<p>The narrow definition of confidential in the Exposure Draft means that the proceeds of meetings that are closed to the public under the new section 63(2)(a) are not, in themselves, confidential. This removes an important and long standing tradition on local government regarding the confidentiality of decision-making in relation to sensitive matters.</p> <p>By way of example, if a meeting were held to consider the appointment of a Chief Executive Officer, and the minutes recorded the names of the Councillors who were opposed to the appointment, the Exposure Draft would not prevent a Councillor from disclosing an extract from the minutes of the Council meeting showing the names of the Councillors who are opposed to the appointment. This information would not fall within any of the definitions listed in section 3(1).</p> <p><b>Solution</b></p> <p>It is suggested that the definition of confidential information at section 3(1) include:</p> <p><i>“the official record of any deliberation or decision of a closed meeting or part of a closed meeting (other than the official record under section 63(5) in the minutes of a meeting)”</i></p>
<p>66 Repeated reference to avoiding ‘Council decisions’</p>	<p>The term ‘Council Decision’ is used repeatedly in this clause without definition. The 1989 Act has a similar provision, prohibiting ‘inappropriate decisions made by a Council’. Given the fact that all delegated decisions are, in effect, ‘made by a Council’, this clause has always been problematic in application. For example, on its face, the wording of the Exposure Draft (and the 1989 Act) would prohibit a Council officer from ordering stationery during an election period, provided there are enough supplies to keep going until the next Council is in place (as this decision could be ‘reasonably deferred’).</p> <p><b>Solution</b></p> <p>It is suggested that the term ‘Council Decision’ be defined for the purposes of this section as:</p> <p><i>Council decision means a decision taken by Council resolution or delegated authority during an election period, but does not include a routine administrative and operational decision by a Council officer under delegation.</i></p>

Exposure Draft section	Feedback
<p>66(2)(c) &amp; (d)</p> <p>Council must not make a decision on a matter if it 'considers' it could be deferred.</p>	<p>Council cannot 'consider' anything without a resolution, and the Exposure Draft does not impose any positive obligation on a Council to undertake the necessary consideration. On this basis, it is difficult to see how this provision could be given effect.</p> <p><b>Solution</b></p> <p>It is suggested these clauses be reworded to require a resolution by Council at each caretaker meeting that Council considers that the matters to be considered at that meeting cannot be reasonably deferred and should be made during the election period. This would also then allow section 66(4) to be expanded to reference both 66(2)(c) &amp; (d).</p>
<p>162(3)(c)</p> <p>Misuse of position includes directing staff</p>	<p>This section has been carried over from the current Act, with one important difference. In the 1989 Act, the clause was listed under the heading "Improper Direction", which had the effect of permitting Councillors to give "proper direction".</p> <p>For example, if a Mayor walked into their office and said to their personal assistant: "Hi Chris, please get me a meeting with CEO next week", this would now fall under the definition of 'Misuse of position'.</p> <p><b>Solution</b></p> <p>Section 162(3)(c) be reworded to read "<i>improperly directing or influencing, or seeking to improperly direct or influence a member of Council staff; or</i>".</p>
<p>179(7)</p> <p>Code of Conduct cannot be inconsistent with human Rights Charter</p>	<p>A subordinate instrument cannot be incompatible with the Human Rights Charter unless it is "empowered to be so by the Act under which it is made" (see s32(3)(b) of the Charter of Human Rights and Responsibilities Act 2006). This basic principle of legislative construction need not be restated here.</p> <p><b>Solution</b></p> <p>Removal of section 179(7) from the Exposure Draft.</p>

Exposure Draft section	Feedback
<p>180(1)</p> <p>A Council may review or amend a Code of Conduct</p>	<p>Council may review or amend any of its policy documents or rules at any time. The inclusion of this clause specific to the Code of Conduct serves no purpose.</p> <p><b>Solution</b></p> <p>Removal of section 180(1) from the Exposure Draft.</p>
<p>182(2)</p> <p>Council must table the findings of an arbiter</p>	<p>It is not clear from this wording whether it is intended that the findings be published in the minutes of the meeting. It is suggested that the wording specify that they are to be included in the minutes, and that the minutes are available to the public.</p> <p><b>Solution</b></p> <p>Section 182(2) be reworded to read <i>“A Council must table the findings of an arbiter at the next Council meeting after the findings have been made and include them in the minutes of the meeting.”</i></p>
<p>182(3)</p> <p>Council may table the reasons with the findings of an arbiter</p>	<p>This clause provides a mechanism to table the reasons, except where they contain confidential information. The effect of section 181(4) (which defines what internal resolution information is confidential) and section 3(1) (which sets out what information is confidential) is that the reasons themselves cannot be confidential.</p> <p><b>Solution</b></p> <p>Removal of section 182(3) from the Exposure Draft.</p>