

SUBMISSION TO THE LOCAL GOVERNMENT ACT 1995 REVIEW

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Executive Summary

Shelter WA welcomes the opportunity to provide a submission into the review of the *Local Government Act 1995* (The Review) and its respective discussion papers (Discussion Papers).

Shelter WA views the Local Government sector as a critical player in the development of social and affordable housing solutions and helping to end homelessness in our communities at a local and regional level. This reflects the many roles and responsibilities that Local Government has through its statutory powers and in the provision of community development, and community services functions. Local Government has the remit to create inclusive communities and economic opportunities for its citizens. Local Governments operate under the *Local Government Act 1995* which gives them a general competence provision to provide the services they see fit for their locale.

The second part of The Review provides Shelter WA as the peak body for social and affordable housing and ending homelessness, the opportunity for input from the perspective of our members and the non-government sector.

This submission responds to the following areas within the discussion papers under the Agile, Smart, Inclusive banner:

- Beneficial enterprises;
- Rates;
- Local laws; and
- Community engagement.

Throughout this submission private sector organisations refers to any private organisation and not-for-profit (NFP) refers to a community sector organisation.

Summary of recommendations

Recommendation 1	In principle support for the creation of BEs only once competitive issues and concerns are addressed, with a particular focus on the impact on the viability and sustainability of the community sector.
Recommendation 2	Ensure that the Western Australian Policy Statement on Competitive Neutrality 1996 is applied to any WA BEs.
Recommendation 3	No change to rate exemptions for charitable organisations.
Recommendation 4	That local laws are prevented from being punitive and unfair to those most vulnerable in our community. This includes people who experience homelessness.
Recommendation 5	Look at ways in which co-design and the voices of local citizens, in particular marginalised people, can be used to engage with local government and contribute to the design, development and the strategies and priorities of Council.

Shelter WA

Shelter WA is the independent peak body, based in Perth, Western Australia, that advocates for social and affordable housing and ending homelessness.

Our vision is that all people living in Western Australia have housing that enables them to thrive.

Shelter WA brings together a strong coalition committed to diverse and affordable housing choice for all. With a focus on housing for people on low to moderate incomes and groups that experience housing insecurity.

Shelter WA undertakes research and policy development, engagement, and advocacy to drive solutions to build an effective housing system and alleviate housing-related poverty.

Housing unlocks opportunity, enhances health and well-being, provides access to education and employment options. It enables people to fully participate in community life. We believe housing is a basic human right. Everybody has a right to a place to call home.

Our Vision: All people living in Western Australia have housing that enables them to thrive.

Introduction

Local government's get their powers under Acts of the Western Australian State Parliament. In WA this is the *Local Government Act 1995*. Local governments in WA have an important and often critical role to play in the operation and governance of its own business, as well as the wellbeing and economic outcomes of its citizens in how they provide services and programs to them.

Aside from the *Local Government Act 1995*, local governments in Western Australia must also have regard to several other Acts of State Parliament. For example, the *Public Health Act 2016*, the *Planning and Development Act 2005*, the *Public Sector Management Act 1994* and the *Local Government Grants Act 1978*. These acts provide further direction on the functions of local government within local government areas.

Shelter WA views the local government sector as a critical player in the provision of social and affordable housing solutions and helping to end homelessness at a local level. Local Government through various Acts has a key role in the facilitation of social and affordable housing and ending homelessness. Under the general competency powers there are roles that Local Government can play from the planning and provision of services through to a more community development role, working in partnership with the community sector to ensure that their communities have access to the services that they require.

Having a safe, secure and stable place to call home is something which many of us take for granted. This basic human right remains out of reach for some of the most vulnerable members of our broader community.

Social housing is affordable rental housing supported by the government and community housing sectors to assist people who are unable to afford accommodation in the private rental market. It includes public housing, state owned and managed Indigenous housing (SOMIH) and community housing. Public housing is owned and managed by state and territory governments, while community housing is housing that is either owned or managed by not-for-profit community sector organisations.

Local government can have a positive or negative impact on the provision of social and affordable housing and homelessness through the implementation of their statutory responsibilities and their policy approaches. This is not just through their planning schemes or responsibilities under the *Public Health Act 2016* but also through the *Local Government Act 1995*.

The policy approach taken by local governments in the planning, design and facilitation of affordable housing and homelessness services and programs, and whether this is done by council or through partnerships with the community sector, is an important policy decision in terms of maximising value and harnessing expertise and ensuring that local communities have access to the services that they need. Leadership by elected members and staff across all functional areas is critical.

AGILE: Beneficial enterprises

The Review's discussion paper on beneficial enterprises (BE) presents the opportunity for feedback on what benefit could arise from a BE; how would it be formed; what the objectives and scope are; what are the risks and how are they mitigated and what is the governance structure supporting the BE.

Shelter WA's overarching position on the formation of BEs, is that, if constructed with the right governance controls and reporting requirements, and risks are clearly articulated and mitigated against and the principles of competitive neutrality are assigned to BEs, then there could be potential to create them for commercial opportunities that do not disadvantage private sector competition, or competition with the community service sector, such as community housing providers, who provide critical social and affordable housing in WA.

The WA Local Government Association (WALGA) in their 2018 Position Paper highlight the scope to assist in the creation and development of affordable housing in our community. Whilst this is an absolute opportunity the question needs to be asked is Local Government

best placed to develop and manage a community housing organisation. We strongly recommend that a partnership approach is taken utilising the strengths and expertise of the community housing sector. It is critical that if local governments were to progress with a BE that they have held discussions with the community sector to see how they could meet local needs together. Also, it is critical that there are safeguards in place that do not create uncompetitive environments through outpricing strategies and access to subsidies that disadvantage the community sector in meeting local needs.¹

Firstly though, what is a beneficial enterprise? The Discussion Paper uses the definition from Victoria and Queensland which defines a BE as a business or trading activity undertaken by local governments. What does it mean in the context of local government? The premise is that the BE, in the relevant structure, enables local government through more efficient mechanisms to serve their communities better. Importantly, it is about providing services which the private sector or State Government are ill-equipped or unable to do so. This can be a result of the existence of a nascent market, low returns on investment or no market for the product or service.

The Discussion Paper outlines the current situations in other Australian States and Territories and their approaches to BEs. From the analysis in the Discussion Paper, it is evident that WA is the only state that doesn't allow some form of BE. This is not a reason to establish a legislative arrangement for BEs, but it does provide some context as to how a BE framework can be established in WA.

Before a decision to legislate for a BE framework can take place, core issues to the discussion of why, how and when to form BEs need to be determined. The Discussion Paper points to six key issues that this submission will now respond to. The six key issues are:

1. Competition with the private sector.
2. Types of corporate structure.
3. Concerns with privatisation
4. Risk approach.
5. Which Local Government can form a BE?
6. Role of State Government.

¹ WALGA, 2018, *Council Controlled Organisations as a Means of Improving Local Government Efficiency – A Position Paper*, Perth.

We believe it is critical to consider the role of the community sector in consideration of the establishment of a BE.

Competition with the private and community sectors

Revisiting competitive neutrality is an important aspect in the discussion of the implementation of a BE in the Western Australian context. As outlined in the Discussion Paper, the Australian States and Territories in 1996 signed up to the National Competition Policy and framework. One aspect of this, was ensuring that Government Business Entities (GBEs) competed without advantage over private sector and community sector organisations.

WA has a policy statement on competitive neutrality formed in 1996 which outlines what competitive neutrality is and how it is applied. It defines competitive neutrality from the original National Agreement as:

“The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government business should not enjoy any net competitive advantage simply as a result of their public sector ownership.”²

This same principle needs to be applied if BEs are decided to be formed under the Review.

The Property Council of Australia in an opinion piece in *The West* on 3 April 2019, highlighted their concerns around development of land and core business of local government. WA Executive Director said, “We are opposed to allowing local government to pursue new commercial opportunities that should properly be delivered by commercial enterprises in a competitive marketplace, particularly property development.”

As the peak body for social and affordable housing and ending homelessness it is important that any move to create BEs is not done in order to create new revenue streams and outprice existing service providers who compete the housing market already, especially community housing providers in a stretch operating environment.

What needs to be determined is how will the State Government apply National Competition Policy and competitive neutrality to Local Government Authorities that create BEs? And in what instruments, if any? This will provide some clarity for private and community sector organisations who may be concerned with competition issues such as those outlined by the Property Council of Australia and Shelter WA.

² Government of Western Australia, 1996, *Policy Statement on Competitive Neutrality*, accessed 4/3/2019, <https://www.treasury.wa.gov.au/Economic-Policy/Regulatory-Reform/Competitive-Neutrality/>, Perth.

Types of corporate structure

The Discussion Paper seeks guidance on whether a local government should be restricted to certain types of corporate structures. The position is that restrictions may place limitations on what efficiency benefits and service delivery that the local government could provide through the BE.

The other question is whether the local government should be able to guarantee the debts of the BE. In other Australian States and Territories, the Discussion Paper points out that local governments can guarantee the debt. In New Zealand the local governments cannot. Shelter WA's understanding of WALGA's proposed Council Controlled Organisation (CCO) does not endorse government guarantees on debt.

Shelter WA doesn't have a specific view on these two issues, but it would make sense for BEs to be treated similarly to the Corporations Act 2001 as part of the need for transparency and open competition between the BEs and private and community sector organisations. It becomes an issue of signalling to the private and community sectors versus controlled outcomes.

Concerns with privatisation

The BE should be required to address any community concerns about privatisation of assets and services as part of the determined community engagement process.

Risks involved

The risks involved in the establishment of the BE in Shelter WA's view is one of the more critical aspects that needs to be determined. Risk and governance structures and frameworks will be critical in how the BE is viewed by the private and community sector organisations.

As all business ventures there is a risk of failure. A BE is no different. The core issue here though is, who bears that risk and how can it be mitigated. The Discussion Paper presents five different ways in which a local government should have the ability to form a BE. Below are some comments and concerns related to each option.

Which Local Government can form a BE

- Ability to form a BE based on percentage of annual expenditure.

This approach seems inherently risky and potentially inequitable between local governments, as it is pointed out in the discussion paper, that revenues and expenditure vary greatly across all local government authorities in WA.

- Ability to form a BE based on an assigned salaries and allowances band.

This approach is also risky in that the Salaries and Allowances Tribunal does not take into considered investment or financial risks within that council in their determinations on remuneration in the council. As pointed out earlier in this submission, the identification and mitigation of risks, including financial and governance will be crucial to the way in which BEs are considered and received by the community and private sector organisations.

- Ability to form a BE based on the Financial Health Indicator (FHI).

This approach seems to carry some merit in that the process of the FHI is well understood by local government. It is important to consider what type of average measure is used and the time frame that the average is applied to. For instance, is the average, an average over a static five-year period? Or is it a median (i.e. mid-point) across a static five-year period? Or is it a moving average over five-year lots? The threshold in this option would need to be made clear.

It's possible that this approach could be used in conjunction with the risk-based approach outlined below.

- Ability to form a BE based on a risk assessment.

As the Discussion Paper points out, this option is the most sophisticated of all assessments and is equally the most complex to administer. However, just because a compliance methodology is complex to administer doesn't mean it shouldn't be considered, especially if it gives the best outcome in determining which local governments should create BEs.

From a risk-based perspective it is proper for all risks to be included in the assessment, from financial, governance, administrative etc.

- Ability to form a BE based on local government expenditure.

Like the first option of assessment presented in the Discussion Paper, this approach seems risky and fraught with danger. Relying on expenditure base as the method could result in negative outcomes and lumpy decision making depending on the time period used for assessment.

Role of State Government

There is clearly a role for State Government in this process, whether it be through approval of a BE, auditing of the BE or both and other aspects. This needs to be determined clearly and upfront for certainty and trust in the BE policy if it goes ahead.

When would it be appropriate for local governments to create a beneficial enterprise?

Shelter WA understands that the WA Local Government Association (WALGA) has put forth a proposal for a certain type of BE, namely, a Council Controlled Organisation (CCO) as outlined in the Discussion Paper. The CCO proposal has been adopted from the New Zealand model. WALGA is proposing several legislative reforms to support the creation of BEs in the *Local Government Act 1995*.

What are the risks and opportunities to the community sector?

The main risk to the community sector is the possibility of being priced out of the market due to net competitive advantages of the BE that are gained through cross-subsidies or other mechanisms. It will be critical for these competitive neutrality issues to be ironed out before any legislative change is made.

The main opportunity for the community sector is the possibility to partner in a way with local government that is currently prohibited that leads to the increase of supply of affordable housing in WA, that cannot otherwise be brought to market.

Other questions to consider in the context of BEs:

- If legislated, how is the BE enforced to pay taxes, fees and charges?
- How does the market failure be addressed through the proposal to set up a BE? Is it done in the proposed Statement of Intent and Business Plan as per WALGA's proposal? Or is it addressed elsewhere and through another mechanism?
- Role of the local government in service delivery versus facilitating development at a local level?

Recommendations:

1. **In principle support for the creation of BEs only once competitive issues and concerns are addressed, with particular focus on the impact on the community sector.** In any case, BEs should only occur where a local government authority provides a service or product that cannot otherwise be provided by the private and community sectors. Or to create joint ventures with the private and community sectors to deliver, for example, affordable housing supply when and where the either sector cannot achieve the return on investment required to proceed without an incentive (e.g. provision of land to community housing providers).
2. **Ensure that the Western Australian Policy Statement on Competitive Neutrality 1996 is applied to any WA BEs** when established. Including the ability for competitors or potential competitors to lodge complaints to the Public Sector Management Sub-Committee of Cabinet (PSMSC).

AGILE: Rates

The current regime of rates, fees and charges under the *Local Government Act 1995*, allows for exemptions to rates charged for land in the local area. An exemption applies to a charitable organisation. Shelter WA supports the retention of this provision and exemption in the Act as part of this review process.

Why is the rates exemption important?

Rates exemptions are a critical issue for Shelter WA and the charitable sector. The exemption from paying rates on land in local areas provides organisations, like community housing providers, the ability to keep costs low so that the provision of social and affordable housing, and the wrap around services are available in local communities.

Currently, the *Local Government Act 1995*, requires “that all land is rateable unless it is listed as exempt”³. There are six types of ownership that are listed as exempt from paying rates. The land ownership exemptions of critical importance to the NFP sector and for-purpose organisations are:

- Land used or held exclusively for churches (religious bodies); and
- Land used exclusively for charitable purposes.

The Discussion Paper highlights a critical issue, in that the terms ‘for charitable purposes’ is not defined in the Act. It is this lack of clarity that concerns Shelters WA members and the broader community sector. As CHIA WA points out in their submission, “the lack of clarity has not been to the benefit of either community housing providers or local authorities.”⁴ What concerns Shelter WA is that, this uncertainty can create operational difficulties for those, charitable organisations who provide social and affordable housing, and homelessness services, to be able to get projects over the line and into development.

Without the rates exemption many charitable organisations who provide social housing (i.e. community housing providers) and services to people on low incomes would need to find the lost rate exemption dollars from somewhere else. More realistically this change may require providers to reduce their service offering to the most vulnerable in our community redirecting funds to pay rates rather than use these funds for service provision.

Many charities that provide social and affordable housing and homelessness services are under financial pressures. Recognising the importance of these services to local communities, a number of a local governments provide support through grants, peppercorn leases or undertaking strong advocacy for an increase in funding. This type of support, whilst welcome,

³ Department of Local Government, Sport and Cultural Industries, 2018, *Discussion Paper: rates, fees and charges*, Perth, page. 3.

⁴ CHIA WA, 2019, Submission to Local Government Act Review, page.3.

can be ad hoc and difficult for services to plan around. The provision of a rate exemption for charities provides certainty in terms of service planning and budgeting.

There is also the issue of commercial (non-charitable) business activities of charitable organisations. This can refer to retail outlets like opportunity shops. There are also hospitality outlets like cafes, which may be social enterprises such as employment programs to support people into work. These forms of commercial operations run by charitable organisations or NFPs have a social purpose, and community benefit, and may not significant in terms of commercial ventures in comparison to other agencies, such universities who, can be structured as a charitable organisation and thus be exempt from rates.

It is also our understanding that the State Government, through Crown land is not required to pay rates for its properties, and land that is exempted by the Minister for local government. However, Shelter WA understands that in some cases State Government agencies do pay ex gratia rates for their public housing stock. We understand that a concern may be when the stock is transfer from the State to community services organisations with charitable status. This creates a revenue impact on local government. This needs to be viewed within the broader context of the services that these charitable organisations provide to residents of the local government area, in particular, people who are vulnerable or in a lower socio-economic bracket. It is appropriate that local governments support access for their citizens to housing and homelessness services, and that these when operated by charities who are mission driven, are exempt from rates.

An option that has been undertaken on a case by case basis by local governments is with the rate exemptions in place, there may be the opportunity to negotiate ex gratia payments with charities on a case by case basis which takes into account the nature of the charity and the circumstance of the Council.

Shelter WA reinforces the need for clarity on rates exemptions categories and what constitutes commercial activity. As outlined, there is a difference between a the operations of a a registered charitable organisation, and organisations like universities, who may operate large commercial operations.

Shelter WA supports the findings and recommendations in the submissions of CEWA and CHIA WA regarding this issue of rates and exemptions to rates. Shelter WA highlights the following points made in those submissions:

- There is a lack of clarity on the meaning of “land used exclusively for charitable purposes” in the Act. This leads to lost time when a local government is considering if an exemption is due or not and it creates administrative burden for community housing providers through this process (CHIA WA submission).

- If charities are not sustainably supported and not financially viable, there will be risks to expenditure for local and state government to step in and fill the void of service provision (CEWA submission).
- It is understood that some concern exists for a small group of ‘quasi’ not-for-profits who aren’t charities and are receiving exemptions. If there was appetite to address this cohort, it is critical that there be no impact to charitable social services organisations (CEWA submission).

Recommendation:

3. **No change to rates exemptions for charitable organisations**, as the sector is already under financial pressures to deliver the existing services, let alone provide opportunities for the unmet need for social and affordable housing and community services in our community.

SMART: Local laws

Local laws can be created under the *Local Government Act 1995*, and these laws give local government powers of various activities or issues within their area. It is critical that local laws are not overly punitive or unfair in particular to vulnerable people within the community such as those people who experience homelessness.

Shelter WA understands that some local governments have issued move-on orders and/or infringement notices to people experiencing homelessness. Whilst other local councils handle the situation in a more compassionate way with the view of linking people into services and support, rather than through a fine or infringement. It is important to note that people do not choose to be homeless and they are some of the most vulnerable people in our community. Furthermore, homelessness is a deep community and social issue that impacts on local governments and their communities. Taking a partnership approach with the community, other spheres of government and the community sector is a more appropriate course of action than the use of a local law.

Recommendation:

4. **That local laws are prevented from being punitive and unfair to those most vulnerable in our community. This includes people who experience homelessness.**

INCLUSIVE: Community engagement

The Discussion Paper sets out some pathways to improving community engagement within local government areas. There is certainly anecdotal evidence that current methods of community engagement are unsatisfactory, glib and not inclusive. We need to set a new level of engagement in our community.

The WACOSS submission highlights some useful approaches to community engagement, creating inclusive environments and community wealth. Shelter WA is supportive of the WACOSS submission.

A key question though is, how do we determine the key issues facing people in our local communities? And how we do engage in a meaningful and impactful way to ensure joined up outcomes? Also how do more marginalised voices within the local government area be harnessed and heard through engagement processes.

One way in which Shelter WA and the broader community sector is undertaking engagement is to create the opportunity for a co-design approach to be used which involves deep conversations and engagement with people who are impacted by local government policies and services. An example to consider includes, how community groups can be engaged through deliberative democratic functions like citizen juries.

Recommendation:

- 5 Look at ways in which co-design and the voices of local citizens, in particular marginalised people, can be used to engage with local government and contribute to the design, development and the strategies and priorities of Council.

Conclusion

Shelter WA appreciates the opportunity to provide comment on the Discussion Papers of The Review. Given the significance of this review opportunity, Shelter WA congratulates the Department and Minister for their open consultative approach and encourages the reforms to consider the impact of the reform agenda on the community services sector and the people that they serve.

Our hope is that through the reform process that local governments can work in partnership with their communities and the community sector, building communities with long lasting social, environmental and economic outcomes for all.

References

CEWA, 2019, Submission to Local Government Act Review, Perth. (Shared with Shelter WA).

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Government of Western Australia, 1996, *Policy Statement on Competitive Neutrality*, accessed 4/3/2019, <https://www.treasury.wa.gov.au/Economic-Policy/Regulatory-Reform/Competitive-Neutrality/>, Perth.

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