

9.1 - Notice of Motion – Validity of elections policy (SJ4082)

Councillor	Councillor Mack
Disclosure of Officers Interest:	No Officer involved in the preparation of this report has an interest to declare in accordance with the provisions of the <i>Local Government Act 1995</i> .

Notice of Motion

A Notice of Motion was received from Councillor Mack via email on Thursday, 6 April 2023.

The Notice of Motion is “That Council REQUESTS that the Chief Executive Officer prepare a policy for Council’s consideration by 30 June 2024 regarding the validity of elections under Part 4, Division 10 of the *Local Government Act 1995*.”

Officer Comment

Section 4.80 of the *Local Government Act 1995* (the Act) provides that a person who is dissatisfied with the result of an election or with the way in which an election was conducted may make an invalidity complaint. Section 4.81 of the Act goes on to provide that a complaint is to be made to a Court of Disputed Returns, constituted by a Magistrate, but can only be made within 28 days after notice is given of the result of the election.

The provisions concerning challenging the result of an election through the courts is a consistent feature of Australia’s political system and is used in Federal, State and local government across Australia as well as other democracies internationally.

Anecdotally, Officers understand that in Western Australia local government challenges to the validity of elections are not common but do occur from time to time.

Officers are of the understanding that the majority of invalidity complaints relate to matters such as the electoral material and eligibility of candidates (particularly candidates that are eligible by virtue of leases).

The threshold for declaring an election invalid is high. Section 4.83 of the Act states that:

“An election is not invalid because of —

- (a) a failure to do something in connection with the election within the time, or for the period or before the date allowed or required under this Act, so long as the failure does not affect the result of the election; or*
- (b) an irregularity or defect in the appointment or authorisation of an electoral officer; or*
- (c) a formal omission, irregularity or defect in a document, declaration, publication or other thing that a person has made, issued or done in good faith.”*

Contact Us

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In 2021, the election result in the Shire of Serpentine Jarrahdale's north ward was challenged in two separate applications to the Court which were heard jointly by the Magistrate. One of these challenges was initiated through resolution of the Council which Officers were advised by the Department and the Western Australian Electoral Commission was unusual.

The publicly available Officer Reports prepared for Council at the time noted that prior to presenting the matter to Council that Officers had sought advice from a legal firm, the Department and the Western Australian Electoral Commission. However, neither Officers nor Council had a Council Policy that could be used to inform decision making in this complex and sensitive matter.

In this case, the offenders pleading guilty for theft was an important threshold for Officers in bringing a report to Council. These circumstances appear unusual and are not typical to invalidity claims.

While invalidity complaints are uncommon and even less frequently upheld, the preparation of a policy in regards to this matter could aid the Shire into the future. The types of matters that a policy could include are:

- the process, criteria and threshold for determining if an invalidity complaint should be lodged by the Shire of Serpentine Jarrahdale with the Court of Disputed Returns;
- the process, criteria and threshold in scenarios where an action is commenced by another person and the Shire of Serpentine Jarrahdale could join as party to the matter to oppose an invalidity complaint;
- the process; criteria and threshold in scenarios where another person seeks the Shire to commence an action or join as party to a matter on their behalf;
- what investigation the Shire would perform to ascertain the robustness of claims made by a person seeking that the Shire commence an action or join as party to a matter either independently or on their behalf;
- the process for determining what evidence can be collected and presented by the Shire and/or its legal representatives;
- the mechanics associated with action where one or more Councillors may be impacted by the action and the capacity of Council to act as a decision maker in these circumstances; and
- the process for informing Council on the matter and the ongoing role of Council if it agrees that the Shire is to lodge or become a party to an invalidity complaint in support or opposition.

A policy must simultaneously provide a framework for where the Shire will take action and protect the Shire from costs and reputational damage associated with appeals for the Shire to join an action or commence an action on behalf of another person where the reasons for the claim are spurious, politically motivated or unsubstantiated.

Costs can occur even when a local government is drawn into claims of election invalidity and does not resolve to join as a party. In 2022 the Town of Cambridge resolved not to join as a party to an invalidity complaint made by a sitting councillor concerning the election of another councillor. While the Town resolved not to join the action, the Town's legal costs dealing with the matter were publicly reported to be in excess of \$50,000.

A robust policy for the Shire could assist Council and Officers to navigate this challenging domain.

The timetable proposed by the notice of motion reflects the inherent complexity of preparing such a policy. Preparation of a draft policy will require considerable investigation, engagement with State Government, local government peak bodies and obtaining legal advice.



Continued

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Such an approach would accommodate the organisation's activities in this regard which include embedding the Shire's project management framework, planning and delivery of the 2023-24 audit program, preparing the draft 2023-24 Corporate Business Plan, annual delegations review, progressing the policy review schedule, and making preparations for the 2023 ordinary local government election.

While the absence of a policy for the 2023 ordinary local government election is a risk, Officers are of the view that a policy prepared in an expediated fashion to commence in time for the 2023 ordinary local government election could represent a greater risk, particularly if that policy creates an obligation for Council to commence or join an invalidity complaint, especially those actions that are commenced or joined on another person's behalf, that may not be in the best interests of the district at large and may conflict with Officer's and Councillor's legal obligations.

Voting Requirements: Simple Majority

Councillor Recommendation

That Council REQUESTS that the Chief Executive Officer prepare a policy for Council's consideration by 30 June 2024 regarding the validity of elections under Part 4, Division 10 of the *Local Government Act 1995*.