

9.2 - Notice of Motion – Electoral reform advocacy (SJ3929)	
<b>Councillor</b>	Councillor Mack
<b>Disclosure of Officers Interest:</b>	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 14 November 2022.

The Notice of Motion is “That Council REQUESTS that the Shire President write to the Minister for Local Government requesting that the Minister review the legislation related to:

1. Electoral offences in local government elections to ensure that the authority to undertake investigations of electoral offences and commence prosecutions related to electoral offences are clearly assigned and appropriate.
2. Complaints which call into question the validity of an election and the process in which those complaints are investigated ensuring an appropriate authority completes an investigation prior to the cut off for a complaint to be made to the Court of Disputed Returns.
3. The report which is to be provided under the current legislation to the Minister by the Western Australian Electoral Commission after an election to be done in greater depth to include complaints and the results of the subsequent investigations.”

### Officer Comment

This Notice of Motion seeks that the Shire write to the Minister for Local Government to consider amending the *Local Government Act 1995* (the Act) to change the way that complaints related to the conduct of elections are dealt with principally by the Western Australian Electoral Commission.

If Council was to approve the Notice of Motion, it would be a matter for the Minister to consider the appropriateness of the reforms proposed. The reforms proposed require amendments to the Act through Parliament with associated processes that the State Government would need to progress.

Such complex Act reforms would have impacts across local governments in the State and the impacts would need to be considered by the State Government in consultation with local governments and based on the advice of the State Solicitors Office and Parliamentary Counsels Office.

There are three separate but intertwined issues within the notice of motion. The first relates to investigations of electoral misconduct. The second and third relate to investigations of the validity of elections.

### Contact Us

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*Part 1 - Investigations and prosecutions related to electoral misconduct*

In relation to investigations of electoral misconduct, the Electoral Commissioner and the Returning Officer has powers to investigate electoral misconduct through section 4.96 of the Act.

Section 4.96 provides that the Electoral Commissioner or the Returning Officer may investigate whether misconduct, malpractice or maladministration has occurred in relation to an election and that an investigation can be carried out on the initiative of the Electoral Commissioner or returning officer or in response to a complaint or information received from any other person (including a candidate). The Electoral Commissioner or Returning Officer can be requested via a complaint but cannot be compelled to investigate.

Section 4.96 also requires that the Electoral Commissioner or the Returning Officer provide a report on an investigation into electoral misconduct to the Minister for Local Government. The offences provided for in the Act related to electoral misconduct include bribery, printing unauthorised electoral material, canvassing in polling places or committing offences related to postal votes.

The power to investigate electoral misconduct in the Act are clear and in the case of the Shire of Serpentine Jarrahdale North Ward election, the Magistrate noted in their decision in the matter that the Western Australian Electoral Commission had conducted an investigation of potential electoral offences.

Section 4.97 of the Act provides that a prosecution related to a breach of electoral offences can be commenced by the Returning Officer or any other person referred to in section 9.24(1) of the Act. Section 9.24 of the Act includes any employee of a local government acting in the course of their duties.

Officers suggest that this broad power to commence prosecutions without the associated broad investigative power provided for in section 4.96 is not aligned, and that consideration could be given to aligning the power to investigate and prosecute offences under this Part.

*Point 2 and 3 - Investigations into the validity of elections*

The Act sets out an approach to the conduct of local governments elections and provides a pathway through the Courts for any person to present an argument that an election result should be disputed.

The approach set out in the Act is the same to that used in every other local government in Australia, State Government and Federal Government.

The approach enables any person who has reason to believe that an election result should be contested to bring about a legal challenge.

Any person, including the Western Australian Electoral Commission or the local government itself (as was the case in the 2021 Ordinary Local Government Election in the North Ward) can present a challenge to the Court.

The onus is on the individual seeking to make the challenge to provide evidence of irregularity. As noted in Court decisions, including the decision that related to North Ward election in the Shire, the bar for declaring an election invalid is high and relates to the 'threshold of materiality'. Essentially for an election to be declared invalid the defect or likely defect must materially impact the result.

The Act currently does not provide a specific power for the Western Australian Electoral Commission or the Returning Officer to conduct an investigation into the validity of the election, but it does not preclude it either.



An example of this is occurring in South Australia where the results of the most recent election of the Lord Mayor of the City of Adelaide appear likely to be challenged. In this case following complaints from candidates, the South Australian Electoral Commission has scrutinised ballots further and an unsuccessful candidate is likely to present a challenge to the Court within 28 days after the conclusion of the election. In South Australia, like Western Australia, there is no explicit power for the Electoral Commission to conduct an investigation or one that compels an organisation to conduct an investigation – the onus is on the person seeking to invalidate the election result.

Officers consider that with the many different reasons that an election result may be sought to be overturned, it can be very difficult to require any independent authority to conduct a meaningful and thorough investigation in a timely manner and make recommendations thereof to assess whether that ‘threshold of materiality’ required by a Court has been met.

Officers suggest that the reforms proposed in the notice of motion could result in increased costs for all the State’s 137 local governments conducting elections, as the proposed powers would compel an authority to conduct an investigation and elections are conducted on a cost recovery basis.

Requiring an authority to investigate would inherently result in additional costs from those investigations, which would be passed on to local governments. This could include investigations that were spurious or not substantiated because there would be a requirement to investigate claims of election validity rather than electoral misconduct.

Similarly, the implications of such reforms on the many predominately smaller local governments where the Chief Executive Officer as an employee of the local government is charged with the responsibility of being the Returning Officer and investigating electoral conduct would be required.

However, none of this diminishes the responsibility of the Returning Officer conducting the election to ensure integrity of the election and apply appropriate levels of scrutiny. In the case of elections at Serpentine Jarrahdale this is the Western Australian Electoral Commission who reports to the Western Australian Parliament and whose Officers are public servants bound by applicable legislation. This includes scrutiny of ballot papers.

Ultimately, a reading of the Magistrate’s decision in the matter can conclude that it was the combination of evidence presented from Western Australian Electoral Commission, the Shire of Serpentine Jarrahdale and then Mr Mack (now Cr Mack) that resulted in the election result in the North Ward being overturned, including scrutiny of returned ballots and slips by the Electoral Commission. This scrutiny of ballot papers, which constituted an investigation, informed the Shire of Serpentine Jarrahdale’s decision to take the extraordinary and unprecedented action of lodging an invalidity complaint to challenge the result of its own election.

Given the extraordinary events of the 2021 ordinary local government election in the North Ward, it is reasonable to ask what lessons can be learned for future elections both in Serpentine Jarrahdale and elsewhere. Officers suggest that these lessons may extend beyond the remit of the reforms proposed by the notice of motion and that a broader consideration by the State Government may yield insights to improve the conduct of future elections.

### *Conclusion*

Overall, Officers propose an alternative Officer recommendation that requests that the Shire President write to the Minister seeking that the Minister consider the events and experience of the Shire of Serpentine Jarrahdale 2021 Ordinary Local Government Election in the North Ward and subsequent successful invalidity complaint and incorporate any lessons to inform the



Minister's review of the *Local Government Act 1995*. This is proposed to be achieved through a working group that the Minister would establish with representatives of the Department of Local Government, Western Australian Electoral Commission, Western Australian Local Government Association and Shire.

This approach will enable policy makers in the State Government to consider any and all lessons from this complex and unusual event and propose reforms as required to legislation through a thorough regulatory impact assessment process.

**Voting Requirements:** Simple Majority

#### **Councillor Recommendation**

**That Council REQUESTS that the Shire President write to the Minister for Local Government requesting that the Minister review the legislation related to:**

- 1. Electoral offences in local government elections to ensure that the authority to undertake investigations of electoral offences and commence prosecutions related to electoral offences are clearly assigned and appropriate.**
- 2. Complaints which call into question the validity of an election and the process in which those complaints are investigated ensuring an appropriate authority completes an investigation prior to the cut off for a complaint to be made to the Court of Disputed Returns.**
- 3. The report which is to be provided under the current legislation to the Minister by the Western Australian Electoral Commission after an election to be done in greater depth to include complaints and the results of the subsequent investigations.**

#### **Alternate Officer Recommendation**

**That Council REQUESTS that the Shire President write to the Minister for Local Government requesting that the Minister consider the events and experience of the Shire of Serpentine Jarrahdale 2021 Ordinary Local Government Election in the North Ward and subsequent successful invalidity complaint and incorporate any lessons to inform the Minister's review of the *Local Government Act 1995* via a working group with members from the Department of Local Government, Western Australian Electoral Commission, Western Australian Local Government Association and Shire of Serpentine Jarrahdale.**