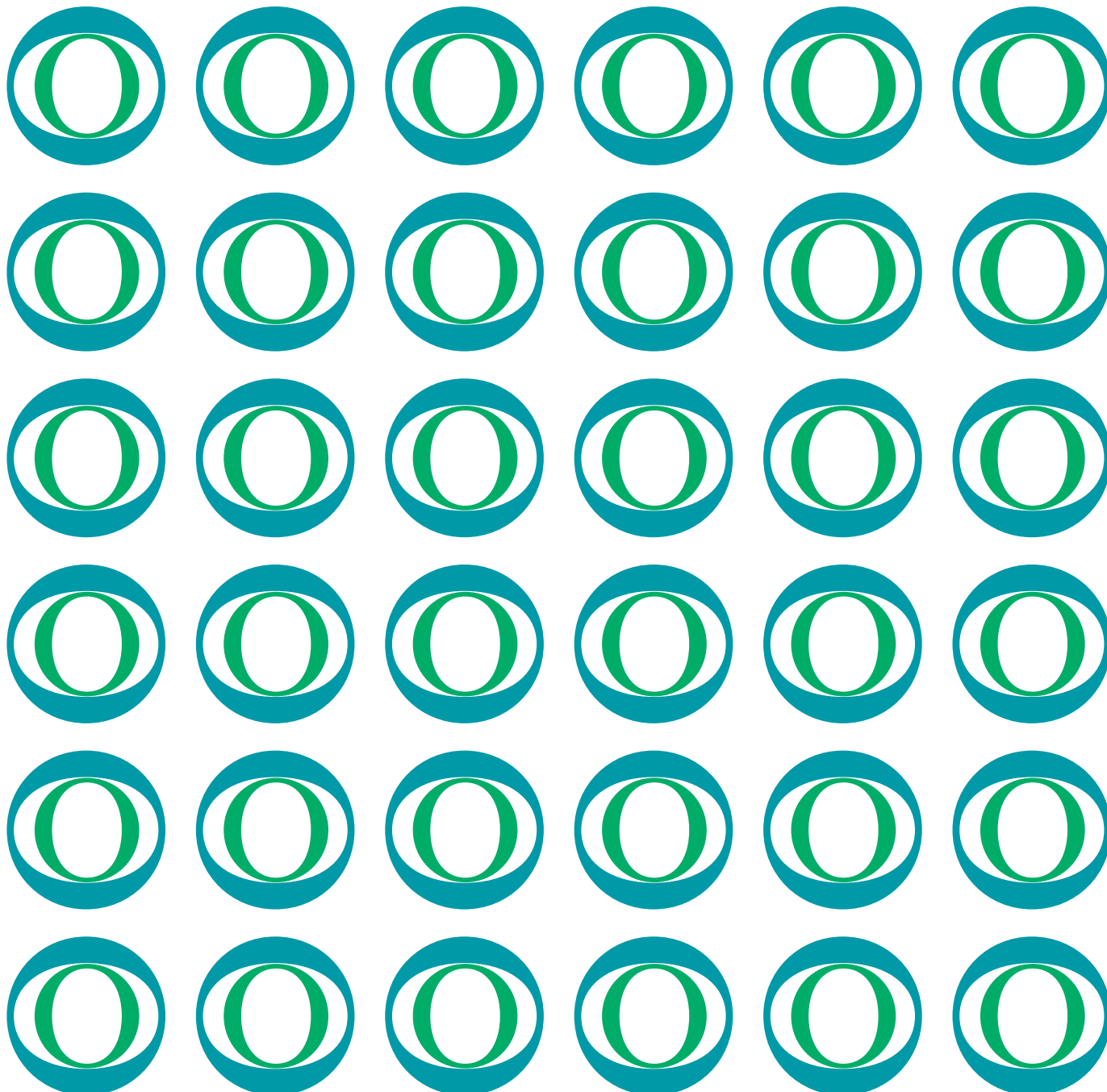


Ombudsman SA

RIGHT OF REVIEW

An audit of Local Government Internal Review of
Council Decisions Procedures

November 2016



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FOREWORD

This report documents my findings and recommendations relevant to the operation of the internal review of decisions provisions in the *Local Government Act 1999*.

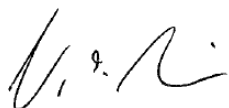
Local government councils in South Australia are required by the Act to provide a process for the internal review of council decisions. The obligation is part of the broader set of requirements to have in place policies, practices and procedures for responding to complaints about the actions of the council, employees of the council, or other persons acting on behalf of the council.

The section 270 internal review of decision process is an important mechanism for the resolution of disputes and complaints about decisions made by councils. As such, the review process is an essential complaint handling tool for local government and for the management of complaints made to my Office.

A previous Ombudsman SA audit on complaint handling in SA councils identified that there was a low take-up rate by the public of the section 270 internal review of council decisions option. On the evidence from this audit, that take-up rate is now increasing significantly.

This report examines some of the key issues for councils in delivering a fair internal review of decision process. It also explores how councils can use internal reviews to drive their administrative improvement and service excellence.

I take this opportunity to thank the twelve councils who cooperated with my Office in the conduct of this audit. Together with all other councils, and with local government sector organisations, I believe there is an opportunity to build more trust in the accountability of local government through a more confident use of the review of council decisions mechanism.



Wayne Lines
SA OMBUDSMAN

EXECUTIVE SUMMARY

In April 2015, my Office conducted a desktop evaluation to assess the current state of policies/procedures of councils regarding the internal review of council decisions. All 68 councils were assessed and the following emerged:

- 8 councils did not have an internal review policy/procedure available on their website
- 21 councils had not yet reviewed their policy by the due date
- 13 councils did not provide a date for the next review
- 15 councils had not included rate declaration issues or service charges as required by section 270(2)(ca) of the Local Government Act.

The evaluation also involved an examination of the section 270 internal review policy/procedure documents of a selected group of 12 councils, as found on their websites. The evaluation sought to identify whether council policies were compliant with section 270 of the Act and whether recommendations by the Ombudsman in his 2011 audit report have been implemented.

The desktop evaluation found that the internal review policies/procedures of five out of the 12 councils were not fully compliant with section 270 of the Act. In particular, the five councils' policies/procedures failed to refer to section 270(2)(ca), that requires provision to be made for applications relating to the impact of a declaration of rates or service charges. There also appeared to be a wide variation in council methods for citing exclusions, despite the Local Government Association of South Australia (LGASA) promoting an Internal Review of a Council Decision Model Policy and Procedure in 2012.

SUMMARY OF RECOMMENDATIONS

The following findings and recommendations are made in the body of the report under the headings that I adopted for the conduct of the audit. They are directed at achieving change in the use of the section 270 procedures across councils, and aim to:

- address administrative deficiencies
- guide councils to implement changes that can improve their administrative processes
- improve the delivery of services
- improve the standard of public administration in South Australian councils.

Availability of internal review policy to the public

Conclusion

Audited councils all recognise the importance of making their internal review of decisions procedure available to the public. However, most councils do not actively promote the procedure, preferring to steer complainants towards informal or negotiated procedures to resolve grievances. Whilst this is legitimate, I consider that councils should make people aware of their right to a formal review of decision.

Recommendation 1

That all councils highlight a direct link on their website homepage to a plain English description of the procedure available for making an application for internal review of council decision. The procedure could usefully be linked to the council's complaint handling policy information that also outlines steps that can be taken for informal resolution of complaints.

Compliance with the Local Government Act

Conclusion

Despite an earlier Ombudsman SA audit on complaint handling conducted in 2011, half of the 12 audited councils in this survey were still not compliant with the law as it applies to grievances that relate to the impact that any declaration of rates or service charges may have had on ratepayers. All audit councils accept that this omission needs to be remedied.

Recommendation 2

That all councils ensure that their internal review of decisions procedure is fully compliant with the requirements of section 270 of the *Local Government Act 1999*. Further, that all council CEOs confirm in writing to the Ombudsman their full compliance with section 270 of the Act by 31 March 2017.

Time limits on applications for review

Conclusion

Council section 270 procedures allow for varying or no time limits for acceptance of applications for internal review of decisions. The Act is silent on the issue and there is no fetter on applying a time limit. There is an argument for consistency in approach across all councils. Most councils consider that a period of six months or more is appropriate. Councils are mindful that section 270 reviews may be resource intensive and are reluctant to consider older matters when no application was received at or near the time of decision.

Recommendation 3

That all councils include a reference to a six month time limit for accepting internal review of council decision applications in a revised version of their internal review of decisions procedure. Consideration should also be given to the exercise of a discretion by councils to allow a longer time limit to apply in particular cases.

Decisions to which the internal review process can apply/cannot apply

Conclusion

There is a wide range of policy positions determined by councils in South Australia on appeal and review arrangements in the areas of planning, development and expiation of offences. Some councils wrongly decline to consider a section 270 application for review in these categories on the basis that the area is covered, or should be covered, by the provisions of legislation outside the Local Government Act, e.g. the Development Act.

Recommendation 4

That all councils revise the part of their internal review of decision procedure that deals with 'Matters outside the scope of the policy and procedures' to explicitly state that matters that fall outside statutory appeals procedures will be considered for the conduct of a section 270 review on the merits of the individual application. Further, that councils discuss with the LGASA the desirability of including this commitment in the LGASA *Internal Review of a Council Decision Model Policy and Procedure*.

Independent conduct of an internal review of decision

Conclusion

Many South Australian councils have developed internal review practices that seek to manage situations where an original decision-maker (often the CEO) may have a conflict of interest. Whilst internal senior delegation of responsibility is a preferred option, many councils are willing to involve independent reviewers where possible and when available.

Recommendation 5

That all councils, through the auspices of regional Local Government Associations, consider and report to the Ombudsman by 31 March 2017 on the option of developing regional panels of independent reviewers who can assist councils with complex review matters.

Matter types and learning outcomes from internal reviews of decision

Conclusion

The statistics from the Local Government Grants Commission show that section 270 applications received by councils have doubled in the past seven years. Whilst the numbers are still low, and concentrated largely in metropolitan councils, there is some evidence that councils are willing to use the internal review mechanism more now than in the past. Councils have shown an ability to analyse review outcomes to inform better administrative practice.

Recommendation 6

That all councils periodically evaluate their section 270 review investigations and document learning outcomes relevant to their administrative practices and functional responsibilities. That, as appropriate, these learning outcomes are shared with the Local Government Governance and Policy Officers Network (**GPON**) and relevant local government interests.

Do councils need more governance support?

Conclusion

The evidence from councils about the value of the GPON as a forum for issues of common interest in governance policy and practice is strong. A majority of South Australian councils now participate and there is a clear body of support for GPON to extend its influence and relevance across the local government sector in its area of expertise.

Recommendation 7

That the existing membership and leadership of GPON consider if there is a case to be made to all councils for an expanded role for the Network - whether this be expanded membership development of a website and/or project and research relevant to governance standards in councils - or other governance priority identified by the Network

PART 1

THE AUDIT PROCESS

1.1 Audit context and Ombudsman's jurisdiction

1. The November 2011 Ombudsman SA audit of complaint handling in South Australian councils *Valuing Complaints* identified that there was a low take-up rate by the public of the section 270 option for internal review of council decisions. The audit found that eight of the 12 councils audited had procedures in place that did not comply with the *Local Government Act 1999* (the Act).
2. The Ombudsman made three recommendations at that time:
 1. That all councils ensure that their internal review of decision procedure is fully compliant with the requirements of section 270 of the Local Government Act
 2. Further, that all councils consider a standard form of wording for exclusions and a statement about the exercise of discretion in accepting matters for review
 3. As an adjunct to development of complaints policy, councils should consider the merits of establishing a network or panel of independent reviewers from which to draw support for internal review processes.
3. In February 2013 the Ombudsman wrote to all councils requesting feedback on the implementation of the complaint handling audit recommendations. The responses from councils identified that only 41 of 68 councils had implemented the recommendation that all section 270 policy/procedures comply in full with the requirements established by law.
4. In April 2015, my Office conducted a desktop evaluation to assess the current state of policies/procedures of councils regarding the internal review of Council decisions. All 68 councils were assessed and the following emerged:
 - 8 councils did not have an internal review policy/procedure available on their Website
 - 21 councils had not yet reviewed their policy by the due date
 - 13 councils did not provide a date for the next review
 - 5 councils had not included rate declaration issues or service charges as required by section 270(2)(ca) of the Local Government Act.
5. The evaluation also involved an examination of the section 270 internal review policy/procedure documents of a selected group of 12 councils, as found on their websites. The evaluation sought to identify whether council policies were compliant with section 270 of the Act and whether recommendations by the Ombudsman in his 2011 audit report have been implemented.
6. The desktop evaluation found that the internal review policies/procedures of five out of the 12 councils were not fully compliant with section 270 of the LG Act. In particular, the five councils' policies/procedures failed to refer to section 270(2)(ca), which requires provision to be made for applications relating to the impact of a declaration of rates or service charges. There also appeared to be a wide variation in council methods for citing exclusions, despite the LGASA adopting and promoting a Model Policy and Procedure in 2012. There were also five councils (a different mix) that did not provide details of the applications for internal review in their Annual Report as required. As with the larger group, some of the councils also had policies that were well beyond the review dates stipulated on the policy.

7. Section 13 of the *Ombudsman Act 1972* stipulates that I must not investigate complaints that are open to a right of appeal with another body or tribunal. In short, Ombudsman SA is a review body of last resort for complainants. Consequently, most local government complaints are referred back to councils themselves to attempt to resolve in the first instance.
8. In the year 2015-2016, my Office received 1,011 complaints about councils. 420, or 42% of them, were referred back to the council in question for action. I estimate that approximately half of these complaints were potentially section 270 review of decision matters.¹
9. For the reasons above, I considered it was in the public interest to conduct an audit of councils' practices and procedures concerning internal review of council actions. Section 14A of the Ombudsman Act provides as follows:
 - (1) If the Ombudsman considers it to be in the public interest to do so, the Ombudsman may conduct a review of the administrative practices and procedures of an agency to which this Act applies.
 - (2) The provisions of this Act apply in relation to a review under subsection (1) as if it were an investigation of an administrative act under this Act, subject to such modifications as may be necessary, or as may be prescribed.

1.2 The Audit Group

10. The selection of councils for audit was made with regard to each of the 12 state government regions and what was considered to be a good spread of population densities, geographic locations and council size.
11. In 2006, the South Australian government decided to introduce 12 administrative regions for uniform use in planning and reporting across all state government departments and agencies.
12. There are four regions in the Adelaide metropolitan area; three regions in the greater Adelaide area; and five country regions.
13. The Australian Classification of Local Governments (**ACLG**) was introduced in 1994 as a method of classifying local governing bodies in receipt of general financial assistance grants from the Commonwealth. The system uses a variety of urban, urban fringe, provincial city and rural codes to classify councils. In South Australia the Local Government Grants Commission uses the system to allocate grants across four council groupings based on region and size.
14. Through a process of cross referencing councils with ACLG groupings and state government regions the following selections were made for the audit:

Adelaide Metropolitan area

- Eastern Adelaide
- Northern Adelaide
- Southern Adelaide
- Western Adelaide

Council

Norwood Payneham /St Peters
City of Salisbury
City of Mitcham
City of Charles Sturt

¹ This estimate, which equals approximately 210 complaints, makes an interesting comparison with the 89 section 270 matters actually handled by councils in 2015. See data recorded on page 18 of this report.

Greater Adelaide area

- Adelaide Hills
- Barossa, Light and Lower North
- Fleurieu and Kangaroo Island

Council

Adelaide Hills Council
Town of Gawler
District Council of Yankalilla

Country regions

- Eyre and Western
- Far North
- Limestone Coast
- Murray and Mallee
- Yorke and Mid North

Council

District Council of Tumby Bay
Roxby Council
District Council of Robe
DC Loxton Waikerie
Port Pirie Regional Council

1.3 Audit Terms of Reference

15. I determined that the audit would:

- examine and assess council compliance with the section 270(1) to (9) requirements for internal review contained in the *Local Government Act 1999*
- review council methods for citing exclusions to their *Internal Review Of Council Decisions Policy* against the Local Government Association Model Policy and Procedure adopted in 2012
- identify the incidence of section 270 internal reviews conducted by SA councils and to identify any impediments or difficulties faced by councils in implementing reviews
- examine and assess the incidence of councils' engagement of an independent person or panel to conduct an internal review of decision
- examine any other matters relevant to the use of section 270 internal review procedures
- make findings and recommendations relevant to administrative improvement in councils' use of the section 270 internal review provisions.

1.4 Audit Methodology

16. The audit process was designed to proceed in several stages. Key tasks included:

- June 2015 - letter to all 68 councils announcing a Stage 1 audit, enclosing a two question Survey on compliance with section 270 of the Act. All responses to be collated and compared to 2013 Ombudsman SA survey results
- Selection of 12 audit councils - based on SA government administrative regions and a geographic and size spread of councils
- Stage 2: August 2015 - letter advising 12 councils of inclusion in audit and sending a ten part Questionnaire for completion by early September 2015
- December 2015 and January 2016 - Ombudsman follow-up interviews with 12 councils
- May 2016 - July 2016 provisional audit report preparation
- July 2016 - provisional audit report sent to 12 audit councils for comment
- October 2016 - preparation of final audit report for publication.

1.5 Responses to the provisional report

17. In July 2016, I wrote to all 12 councils involved in the audit and asked them to provide me with their comments on the content, findings and draft recommendations made in the provisional report.²
18. I note here that there is no requirement for me to consult with agencies subject to audit under section 14A of the Ombudsman Act. Rather, I decided that the information I received from the 12 councils during the questionnaire and interview stages was best augmented by seeking feedback from them after I had had the opportunity to consider their individual submissions and make tentative findings and recommendations.
19. I received written submissions or comment from all 12 audit councils in August 2016.
20. A number of councils suggested that the LGASA should be involved in the process of responding to the audit provisional report.
21. I explained to those councils that the provisional report was a document sent to the audit councils only, that the process at that stage was confidential and that the LGASA was not a party to the audit as it was not an organisation within my jurisdiction. Having said that, I explained that I would welcome LGASA comment when the audit report was released and acknowledged that the LGASA has a critical role to play in supporting best practice in complaint handling in local government.³
22. Seven of the 12 councils agreed fully or partly with all Recommendations made in the provisional report.
23. The response to Recommendations 1 and 2 was generally supportive.
24. While most councils agreed on the premise behind Recommendation 3, there were varying views about what an appropriate time limit on applications for review should be. Four councils, (Adelaide Hills Council, Town of Gawler, DC Robe and Port Pirie RC) wholly agreed with the six month time limit based on the 'last point of contact' proposed by Recommendation 3. Only two councils, (City of Norwood Payneham & St Peters and DC Tumby Bay) advocated for a shorter time limit of three months, which had been the most popular choice at the questionnaire stage. Three councils, (City of Norwood Payneham and St Peters, City of Salisbury and City of Charles Sturt) thought that the time limit should be based on when the decision was made/recorded, as opposed to the last point of contact. Some councils expressed the view that the last point of contact could be confusing and lead to unreasonable extension of time limits. They thought a record of the decision was more definitive.
25. There were few objections and many comments in favour of the main proposition in Recommendation 4, i.e. that matters which fall outside statutory appeals procedures should be considered for the conduct of a section 270 review. Salisbury Council expressed the view of many on this issue:

In relation to matters that fall outside statutory appeal procedures...there may be occasions where a matter should be afforded consideration of a review. In those

² I have used the term 'Recommendation' hereafter in this section as shorthand for the Draft Recommendations under discussion in my provisional report.

³ I note also the very useful work done by the LGASA to develop and continually update its *Internal Review of a Council Decision: Model Policy and Procedure* for the guidance and use by SA councils.

circumstances the merits of the matter should be afforded consideration on a case by case basis. Given this, it would be appropriate for information to that effect to be included within the Review of Decisions Procedure.

The City of Norwood Payneham & St Peters agreed, adding the caveat that:

..there needs to be clarity and consistency around such a provision and this therefore could be considered as part of the Local Government Association of South Australia's Model Policy - Internal Review of Decision.

The second part of Recommendation 4 appeared to be the most contentious amongst the audit councils. There were strong objections to the internal review procedure allowing for a discretion for review 'even where a statutory appeal is available for the decision'. Most councils shared the opinion that complainants should not be allowed to pursue internal review of a decision where there is an existing statutory appeal process. On this issue, the Adelaide Hills Council represented the point succinctly:

..we do believe in the right to request a review of a council decision, however, as this process is resource intensive and requires appropriate expertise, it is considered inefficient and a waste of limited resources to provide the ability for a review of council decisions under two separate statutory appeal processes, especially where there may be a chance that the review is duplicated by different agencies at the same time.

My provisional report notes at paragraph 84 that internal review should not be used where there are statutory appeal rights available, e.g. in development approval matters. Recommendation 4 proposes that council procedures allow a *discretion* for review (and therefore does not mandate review) - and fill the gaps in the law where a complainant has no right of review (such as in the example given by Roxby Council, where an internal review was undertaken in relation to a development application because the applicant had no appeal rights). Two councils, (DC Robe and Port Pirie Regional Council) suggested that the Development Act should be amended to cover review of all planning matters. While perhaps not to that extent, some clarification of the legislation may be considered to avoid the grey area that gives rise to the confusion regarding when internal review should be available. Regardless, I have taken note of the concerns raised about duplication and a potential to confuse the public and deleted the reference to discretionary review in the final recommendation.

26. While most audit councils were open to the idea of an independent review panel, as proposed by Recommendation 5, they considered that engagement of the panel should remain at their discretion. Without the full support of councils, particularly given that most indicated a preference to resolve complaints before they reached the formal review stage, the costs of the formation of an independent review panel may end up outweighing its value. Some councils were also concerned with the potential cost of the process. Two councils, (City of Charles Sturt and Adelaide Hills Council) proposed that an independent panel of reviewers (as a discretionary option) would be best organised through the auspices of the LGASA, rather than through regional Local Government Associations. I have no disagreement with this approach if it is preferred by councils.
27. Councils were generally supportive of the proposal in Recommendation 6 that they evaluate internal reviews and document their learning outcomes. Some suggested that they already do this internally. Five councils (Norwood Payneham & St Peters, Salisbury, Charles Sturt, Adelaide Hills and Gawler), noted that they share review information with the Local Government Governance and Policy Officer's Network

(GPON), 'with a view to streamlining processes and ensuring consistency across the local government sector'. Many commented that such sharing should be at the discretion of each council. Councils were more concerned with that part of the recommendation that suggested they share review outcomes with external parties such as the LGASA. Two councils, (City of Norwood Payneham & St Peters and City of Salisbury) further considered that this was not part of the role of the LGASA, although one council (City of Charles Sturt) considered that sharing through the LGASA to be more effective. I have taken note of these concerns and amended the final recommendation to acknowledge that sharing of review learning outcomes with external bodies should be discretionary. I have, however, retained the reference to GPON as this forum is recognised as a council auspiced entity across the local government sector.⁴

28. Three councils (City of Charles Sturt, Adelaide Hills Council and DC Tumby Bay) believed that the LGASA should be involved in facilitating Recommendation 7. It proposed investigation of a single complaints policy format incorporating the procedure for internal review of council decision. Adelaide Hills Council cites the LGASA's Model Policy process as a prospective way forward. Two councils (City of Norwood, Payneham & St Peters and City of Salisbury), considered complaint handling and internal review to be linked, but separate processes. Some suggested that it would be beneficial for there to be consistency between councils about how complainants are treated, but overall there is not strong support for a single policy framework. The City of Salisbury argued that the complaints processes should remain separate to maintain impartiality. At Salisbury complaints and internal reviews are handled by different departments - so they are conducted by different people. After reflection on the issues and various points of view, I have decided to omit draft Recommendation 7 from my final report. As suggested by a number of councils, this matter may best be pursued by councils in dialogue with the LGASA.
29. Given the references made to GPON in the examination of the issues around the development of a single model complaints policy for local government, I had cause to revisit my findings and commentary on the Network at section 5.1.3. I asked the question there: 'do councils need more governance support?' Some councils have put it to me that there is a need, in an increasingly regulated local government environment, for greater sharing of governance expertise amongst councils. Not all councils believe this is necessary. However, on balance, I decided to recommend that the GPON members and the current leadership group initiate a discussion with councils to explore this topic and to make decisions for themselves as appropriate. As such, I have added concluding remarks and a new Recommendation 7 on the topic.
30. In their responses, two councils raised the issue that arose in the provisional report of merits review versus process review. DC Tumby Bay was particularly interested in the arguments made by two councils about disallowing applications for merits review and considered that the idea of process review had a lot of value. DC Robe was also concerned with the use of merits review, which it considered did not foster consistency when it felt that the consistent application of process was paramount. This is a particularly important issue, and my report accordingly finds that the legislation provides for *both* merits and process review.
31. I have considered the submissions from all councils and taken account of them as I consider appropriate in preparing this final report. I note in particular that I have amended recommendations 3, 4, 6 and 7 from my provisional report.

⁴ See section 5.1.3 'Do councils need more governance support?' for a more detailed discussion of the role of GPON.

PART 2

THE LEGISLATIVE FRAMEWORK

2.1 A right of appeal?

32. In 2016 the South Australian *Local Government Act 1934* was repealed with the passage of amendments to the successor *Local Government Act 1999*.
33. The 1934 Local Government Act contained no right of review for a decision made by the elected local government council or the administration that served it.
34. In our legal system, an appeal is the process in which cases are reviewed, where parties request a formal change to an official decision.⁵ In the courts, appeals are intended to provide a mechanism for error correction and also a process for clarifying and interpreting the law. Although appellate courts have existed for hundreds of years, common law countries did not incorporate an affirmative right to appeal into their jurisprudence until the 19th century.
35. Local government in South Australia (and elsewhere) came to consider the right to an appeal much later. The issue was canvassed at length in the Local Government Revision Committee report to the Minister of Local Government, the Hon. Geoff Virgo, in July 1970.⁶ Documenting a litany of local ratepayer complaints to the Committee about council decisions that could not be challenged, the report took account of the findings of the 1962 Whyatt Report, produced by the British Section of the International Commission of Jurists. On the 'right of appeal' in local government, Whyatt said:

The remedy available to a citizen aggrieved by an act of maladministration is the same as that available to a citizen aggrieved by a discretionary decision; it is to complain to the elected representatives of the council and try to persuade them to redress his grievance. This method of seeking redress presents serious difficulties since complaints of maladministration in local government are, in effect, complaints against a Committee of the elected representatives, rather than officials, because of the close, direct control which elected representatives exercise over the administrative processes of local government. The elected representatives are therefore, judges in their own cause and the only external checks are public criticism and the ballot-box at the next election.⁷

36. The Revision Committee report asserted that introducing a right of appeal (review) in the proposed new Local Government Act would cause council decisions to be made more carefully because councils would be aware that their determinations were now open to challenge. It was considered that this would lead to better decision making in councils. This, in turn, would 'substantially obviate the need to appeal'. The report went on to conclude that:

If local government is to survive as an effective force it must gain a very much better public image. The Committee believes that it would be greatly helped in that regard by a right of appeal. The experience with Courts of Appeal in the ordinary legal system, and the experience with ombudsmen overseas, show that the percentage of cases in which the decision needs to be reversed is much smaller than the number of cases in which the decision is upheld; but the fact that the decision can be tested is important: the ratepayer feels that he is getting a fair go - he is given an opportunity of testing his council's decision, and of testing it fairly.⁸

⁵ For the purposes of this background discussion I have located the right of review in the framework of English and Australian common law. Whilst the term 'appeal' was used in the 1970 Local Government Revision Committee report, it is more commonly associated with the function of the courts. The term 'review', with essentially the same meaning, is the subject of this audit report, and is consistent with the much more recent statutory obligation of local government.

⁶ *Report by the Local Government Act Revision Committee on Powers, Responsibilities and Organisation of Local Government in South Australia* - Parliament of South Australia, July 1970.

⁷ *ibid.* p.666. From: *The Citizen and the Administration* (the Whyatt Report) p.88.

⁸ *ibid.* p.667.

2.2 What the Parliament said

37. The 1970 Revision Committee report was a thorough and progressive study that confronted most of the administrative and representative anomalies in the legislative framework of the 1934 Act. However, it took the State Parliament another 19 years to introduce local government legislation that conformed to the principles of modern public administration. The right to review council decisions was one such reform.
38. Introducing the second reading of the Local Government Bill on 17 February 1999, the Hon Mark Brindal, Minister for Local Government, canvassed the essential elements of each chapter of the proposed legislation. He noted, at Chapter 13, that the Bill sought to establish new methods for the review of the conduct of elected members, and also brought together provisions that regulated review of actions, decisions and operations of councils. These included a new requirement for councils to put in place internal grievance procedures. He said:

There is no intention that the latter provision should impede in any way the right of citizens to approach other sources of remedy for illegal actions on the part of councils, whether the Ombudsman under the Ombudsman Act, or the courts under their various jurisdictions, or the Minister responsible to Parliament for the administration of the Local Government Act. Nonetheless it is the intention of this legislation that councils should make every effort to deal with problems locally, including those arising from their own decisions and operations.⁹

2.3 The Statute

39. Various amendments in 2011 and 2016, Section 270 of the *Local Government Act 1999* (SA) provides a process for the internal review of Council decisions. Today it reads as follows:

Section 270—Procedures for review of decisions and requests for services

- (a1) A council must develop and maintain policies, practices and procedures for dealing with—
 - (a) any reasonable request for the provision of a service by the council or for the improvement of a service provided by the council; and
 - (b) complaints about the actions of the council, employees of the council, or other persons acting on behalf of the council.
- (a2) The policies, practices and procedures required under subsection (a1) must be directed towards—
 - (a) dealing with the relevant requests or complaints in a timely, effective and fair way; and
 - (b) using information gained from the council's community to improve its services and operations.
- (1) Without limiting subsections (a1) and (a2), a council must establish procedures for the review of decisions of—
 - (a) the council;
 - (b) employees of the council;
 - (c) other persons acting on behalf of the council.
- (2) The procedures must address the following matters (and may address other matters):
 - (a) the manner in which an application for review may be made;
 - (b) the assignment of a suitable person to reconsider a decision under review;

⁹ *Hansard*. House of Assembly. South Australian Parliament. 17 February 1999, p.807.

- (c) the matters that must be referred to the council itself for consideration or further consideration;
 - (ca) in the case of applications that relate to the impact that any declaration of rates or service charges may have had on ratepayers—the provision to be made to ensure that these applications can be dealt with promptly and, if appropriate, addressed through the provision of relief or concessions under this Act;
 - (d) the notification of the progress and outcome of an application for review;
 - (e) the time frames within which notifications will be made and procedures on a review will be completed.
- (3) A council is not entitled to charge a fee on an application for review.
- (4) A council, or a person assigned to consider the application, may refuse to consider an application for review if—
 - (a) the application is made by an employee of the council and relates to an issue concerning his or her employment; or
 - (b) it appears that the application is frivolous or vexatious; or
 - (c) the applicant does not have a sufficient interest in the matter.
- (4a) The policies, practices and procedures established under this section must be consistent with any requirement prescribed by the regulations.
- (5) A council must ensure that copies of a document concerning the policies, practices and procedures that apply under this section are available for inspection (without charge) and purchase (on payment of a fee fixed by the council) by the public at the principal office of the council.
- (6) A council may amend the policies, practices or procedures established by the council under this section from time to time.
- (7) Nothing in this section prevents a person from making a complaint to the Ombudsman at any time under the *Ombudsman Act 1972*.
- (8) A council must, on an annual basis, initiate and consider a report that relates to—
 - (a) the number of applications for review made under this section; and
 - (b) the kinds of matters to which the applications relate; and
 - (c) the outcome of applications under this section; and
 - (d) such other matters as may be prescribed by the regulations.
- (9) The right of a council to recover rates is not suspended by an application for the provision of some form of relief or concession with respect to the payment of those rates (but a council may then, if appropriate in view of the outcome of the application, refund the whole or a part of any amount that has been paid).

PART 3

STAGE ONE AUDIT - SURVEY RESULTS

3.1 Stage One - The Audit Survey of all councils

40. In June 2015 I wrote to all 68 councils enclosing the Stage 1 Audit Survey. The letter requested responses to two questions about compliance with the requirements of section 270(1) to (9) of the Act. It also notified councils that I would subsequently conduct a Stage 2 audit with a group of 12 councils as part of an in-depth examination of the practices around internal review of council decisions.

41. The questions were:

1. Has your council a current internal review of council decisions policy/procedure which complies fully with the requirements of section 270 (1) to (9) of the *Local Government Act 1999*, including section 270(2)(ca)? Yes or No?
2. When is the council's internal review of council decisions policy/procedure next due for review? Next review date.....

42. All 68 councils responded to the survey. 59 of 68 answered in the affirmative, saying their policy/procedure documents were fully compliant with the Act. Two others stated that they were compliant, but on examination, were found to be non-compliant. A total of nine councils, or 13 per cent of the total, fell into this category.

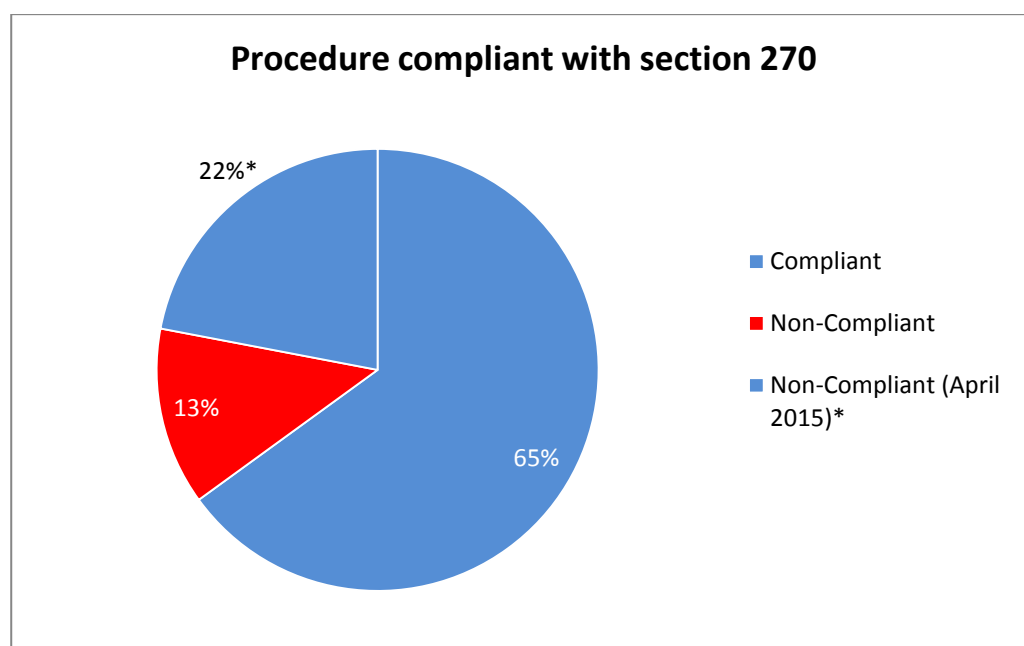


Diagram 1

43. Diagram 1 shows the level of council compliance with section 270(1) to (9) of the Act. The diagram also shows that the number of non-compliant councils has fallen from 15 in April 2015 (22%) to nine in July 2015 (13%). Whilst nine councils is still a serious number, I acknowledge the efforts many councils have recently made to review and update their policy/procedure for internal review of council decision.

44. With regard to question two about the next date of review, many councils responded 'under review currently' - or similar. This was because many councils had exceeded their own nominated date of review - in some cases by years. It appears, again, that my question acted as a prompt for some councils to undertake a review and update their policy/procedure. I welcome this development.

45. Whilst most of the nine councils in the non-compliant category were in breach because they failed to address Section 270(2)(ca), relevant to rates and service charges, there were other examples of omissions and errors in policy which led to non-compliance. Some of these were:
- stating which matters may be referred to the council for consideration rather than stating which matters must be referred to the council as required by section 270(c)
 - no policy information about when and how complainants will be notified about the progress of their application as required by section 270(d)
 - no policy information about the timeframes within which notifications will be made and procedures on a review will be completed as required by section 270(e)
 - advice in a council policy to the effect that the CEO may 'refer the customer to the State Ombudsman'. To the extent that this is suggesting that the council may refuse to deal with an application under section 270 of the Act, and may instead refer the matter to the Ombudsman, then that is inconsistent with the Act.
46. During the course of this audit my Office has referred many councils to the LGASA *Internal Review of a Council Decision: Model Policy and Procedure* document. I note that this document was updated in October 2015. It is available to all councils at <https://www.lga.sa.gov.au/webdata/resources/files>.

3.2 Seven year profile - total numbers of section 270 reviews

47. In order to gather evidence about the extent of use of the internal review of council decision procedures, my Office approached the South Australian Local Government Grants Commission for data on the numbers of section 270 complaints received and resolved by all 68 councils for the seven-year period 2009-2015.¹⁰

Year	Total Complaints Received	Total Complaints Resolved
2009	42	31
2010	60	53
2011	65	61
2012	46	39
2013	62	62
2014	79	71
2015	89	84

Table 1

48. Table 1 and Chart 1 (overleaf) show the numbers gradually doubling from 42 in 2009 to 89 in 2015. Whilst this is still an average of just 1.3 applications per council (up from 0.6 per council in 2009), it is a significant increase over that period of time, and some indication that the procedures are becoming better known in the community.¹¹

¹⁰ The Grants Commission, or SALGGC, analyses a General Information Return from all councils annually that contains a series of questions on council financial and other performance. These are specifically related to the distribution of untied Commonwealth Financial Assistance Grants to local governing authorities in South Australia. One question relates to the number and outcome of section 270 requests for review of decision received by councils.

¹¹ The 'total complaints resolved' column refers to those matters completed at the close of each reporting period. Therefore, some matters have been commenced but not finalised in each of the report years, hence the discrepancy in numbers.

49. A notable statistic emerged from the data. It showed that a total of 29 councils had not had a section 270 application for five or more years of the seven year period.

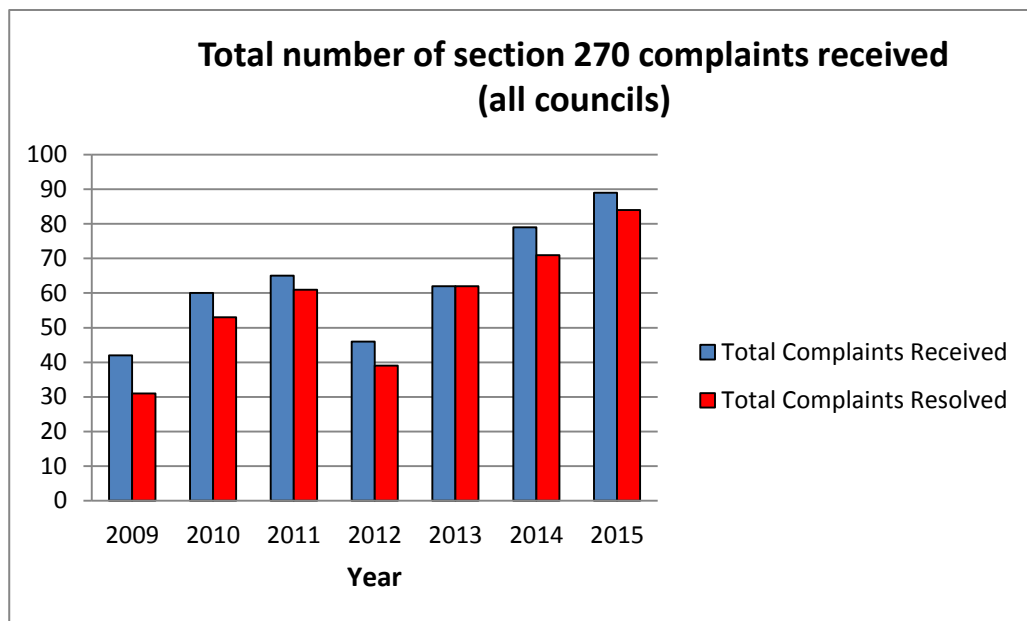


Chart 1

PART 4

STAGE TWO AUDIT - RESPONSES FROM COUNCILS

4.1 Council Audit Questionnaire

50. Stage 2 of the audit process commenced with the distribution of a questionnaire to the 12 audit councils. The questionnaire sought answers to ten questions designed to examine a broad range of issues in the internal review process. The following is a summary of the information and analysis of council responses to the seven key questions arising from that research.

4.1.1 Availability of internal review policy/procedure to the public

1. Considering the availability of the council's section 270 internal review policy/procedure to members of the public, do you consider that: *(Please tick as many boxes as are relevant)*

- ☐ The policy/procedure is in a prominent place on the council website
- ☐ The policy/procedure could be more prominently displayed *(please explain)*
- ☐ The policy/procedure is not available on the council website *(please explain)*
- ☐ The council does not promote the internal review policy/procedure as we prefer to resolve matters before a formal review is necessary *(please explain)*

51. The question is directed at the approach taken by councils to ensuring wide accessibility of the review of council decision policy and procedure to the community.
52. The principle involved is that people should be made aware of their right to request review of a council decision and the process that will be followed.
53. Figure 1 shows that eight of the 12 audit councils indicated that their 'Internal Review of a Council Decision' policy was located in a prominent place on the council website and was therefore easily accessible to the public. Four councils conceded that they could do more to make the policy easy to access. One council does not promote the policy because of a preference for informal resolution.

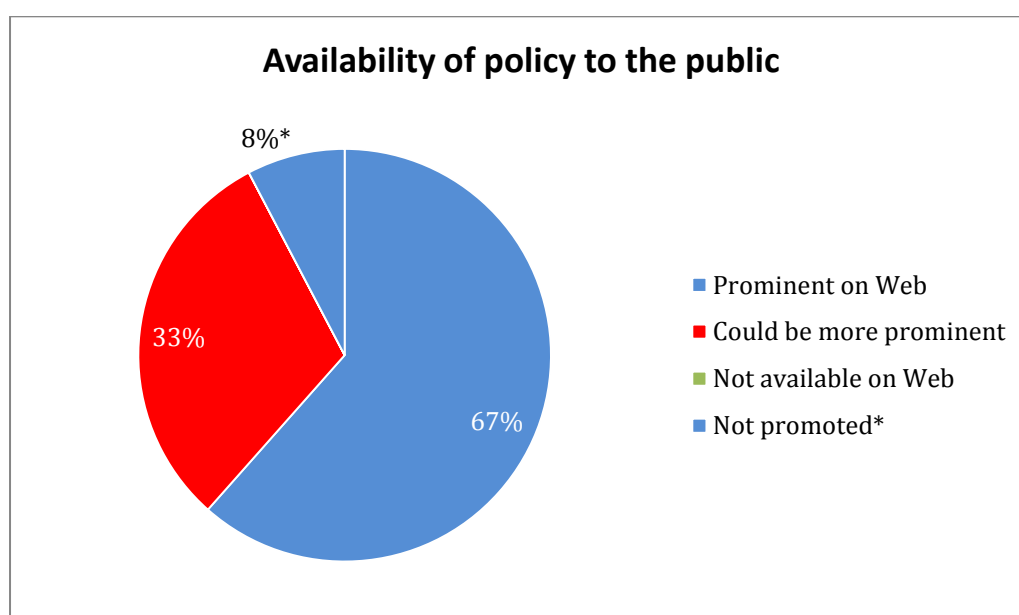


Figure 1

54. Commenting on improved public access, the City of Salisbury noted:

Currently the City of Salisbury's Internal Review of Council Decisions Procedure is accessed on the council's website by searching for 'Internal Review'. Following the review of the Procedures, currently underway, the Procedures will be included on the Policies page to facilitate easier access. The reviewed Policy will also be linked to Council's Customer Compliments, Comments and Complaints Policy.

55. An obvious impediment to access is the name of the document. 'Internal Review of a Council Decision' is not the first search phrase that might occur to a person looking to make a complaint or, more specifically, to challenge a council decision. As noted by the City of Salisbury, some councils are now looking to link their Internal Review policy to the more obvious section that gives information on complaints procedures. Whilst this is useful, it is clear that there is work that councils can do to make their policies and procedures more widely available.
56. A related and equally important issue is the promotion of the policy. Most councils involved in this audit readily admitted that they did not actively promote the internal review policy because they did not want to have to use it. The City of Norwood Payneham & St Peters was an exception. They stated their position as follows:

Whilst we do promote the policy, we always aim to resolve issues without the use of the policy.

57. Many, perhaps more than half, of all 68 councils' internal review policies include wording similar or identical to the following:

The council will attempt to resolve all complaints about council decisions without the need for formal requests for review of those decisions to be lodged.

58. Most council Chief Executive Officers (**CEOs**) took this position. Many expressed the view to me that, because an internal review of decision was a formal statutory investigative process, it was necessarily time consuming and costly to the council. A minority also felt that the current internal review provisions in the Act allow residents to seek the review of a council decision without the need to establish any *prima facie* flaw in the decision making process. One CEO described this as 'a waste of public money'.
59. I acknowledge the concerns raised by council CEOs, particularly in regard to the resource implications of some internal review processes. I address this issue elsewhere in this report. I also address the related issue of people's right to use the formal internal review process instead of opting for a negotiated or conciliated settlement to their grievance.
60. I accept that councils will most often use every endeavour to avoid the formal review process. That is legitimate if the council is seeking to resolve the matter through informal means - and this approach is acceptable to the complainant. Aside from conducting a formal investigation, there are other options, such as the alternative dispute resolution (ADR) process discussed below.
61. Regardless of the other methods of resolution available, I consider that people should always be made aware that they have a right to the formal internal review process. In my view, councils have a responsibility to promote all mechanisms available under the Act to resolve grievances received from members of the public.

Conclusion

Audited councils all recognise the importance of making their internal review of decisions procedure available to the public. However, most councils do not actively promote the procedure, preferring to steer complainants towards informal or negotiated procedures to resolve grievances. Whilst this is legitimate, I consider that councils should make people aware of their right to a formal review of decision.

Recommendation 1

That all councils highlight a direct link on their website homepage to a plain English description of the procedure available for making an application for internal review of council decision. The procedure could usefully be linked to the council's complaint handling policy information that also outlines steps that can be taken for informal resolution of complaints.

4.1.2 Applications for review which relate to rates or service charges

2. Does your council's current internal review of council decisions policy/procedure include a provision to ensure that applications that relate to rates or service charges can be dealt with promptly? [Section 270(2)(ca)]

- ☐ YES
☐ NO (*please explain*)
☐ No, but currently under review (*please explain how/when*)

62. The question seeks to identify Internal Review of Council Decisions policy compliance with the Local Government Act. In this case, the question addressed section 270(2)(ca) which requires provision to be made in the review procedure for applications relating to the impact of a declaration of rates or service charges.
63. The principle involved is that councils have an obligation to ensure their policies and procedures comply fully with the law.
64. As Figure 2 shows, six of the 12 audit councils indicated that their 'Internal Review of a Council Decision' procedure was not compliant because there was no appropriate reference to applications for review that relate to rates and service charges. At the time of the audit survey, four of the six non-compliant councils stated that they were in the process of reviewing their internal review policy and would rectify the omission.
65. Of greater concern was one council which also omitted information on the manner in which a review may be made [s.270(2)(a)]; made no provision for notification of the progress and outcome of a review application [s.270(2)(d)]; and gave no indication of timeframes within which notifications will be made and procedures on a review will be completed [s.270(2)(e)].
66. I note the former Ombudsman's previous audit findings in his November 2011 report, *Valuing Complaints*, and the clear recommendation he made to ensure full compliance with the requirements of section 270 of the Act. As such, I am concerned to report that six of the 12 audit councils were not fully compliant with the Act at the time of this audit survey. I am further concerned to note that one council from the audit group is in breach on at least four requirements of the statute.

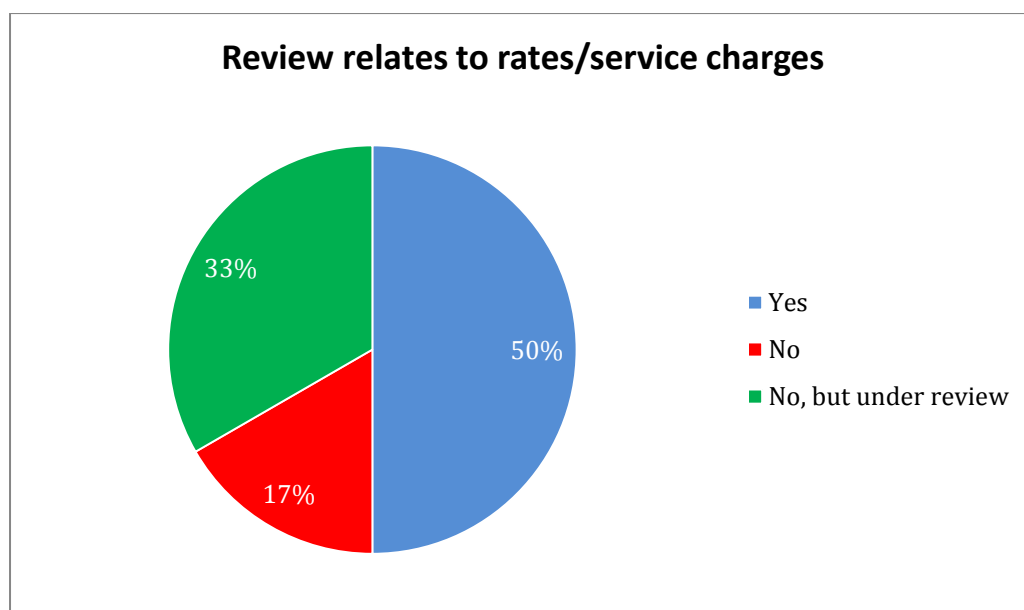


Figure 2

67. One council in the audit group, the City of Charles Sturt, stated that decisions related to rates were considered only under the council's Rate Rebate Policy. Indeed, the council's Internal Review of Council Decisions policy specifically states that 'council will not review decisions of council in respect to the setting of council rates'. I am also aware of other councils, outside the audit group of 12 that have taken this approach to review of rates decisions.
68. In his explanation to me, the CEO of Charles Sturt correctly pointed out that valuation decisions are not within the council's purview and are the responsibility of the Valuer General. He also said that decisions of the council in respect to the setting of council rates (emphasis mine) were not within the remit of the section 270 internal review policy because this is inconsistent with section 151 of the Act. He noted that the community has the ability to have input into the rate setting policy of the council through the Annual Business Plan Consultation process. He submitted that:
- Council would be concerned if applications could be made to review the rates set as this may take some time (in fact the complaint may not be lodged until after the rates are struck, the budget determined and the rates notices sent). As with decisions of council that are clearly set out in the City of Charles Sturt Business Plan and budget council continually allowing these decisions to be reviewed would mean council would not be able to operate.
69. However, whilst it is correct that section 270 does not allow for challenges to the setting of council rates (as per section 151(9) of the Act)¹², it does mandate at 270(2)(ca) a procedure for grievances:
- ...that relate to the impact that any declaration of rates or service charges may have had on ratepayers—the provision to be made to ensure that these applications can be dealt with promptly and, if appropriate, addressed through the provision of relief or concessions under this Act;
70. It may be that there is confusion in some councils between the issue of setting of council rates and grievances that relate to the impact of rates levied on ratepayers.

¹² An exception to this may be if a council does not correctly follow the statutory procedures for setting rates and in so doing exposes its declaration of rates to a challenge that the decision is *ultra vires*.

These may include issues such as remissions, rate rebates, rate capping and division of land. However, the statute is clear. There must be provision made for grievances about rates and service charges in the council's section 270 internal review procedure. It is not appropriate for these matters to be referenced only in the council's Rate Rebate Policy or similar.

71. Several other councils made mention of their policies related to Debtor Management or to Rates Notices that contain information about 'Objections to Valuations' and 'Objections to Land Use'. One states that complaints regarding rates and service charges usually involve incorrect description of the property or valuation details 'which are managed via administrative procedures'.
72. By contrast, the Adelaide Hills Council accepted and processed an application for review of decision under section 270 in response to a complaint about separate rates for one property and the declaration of the commercial rate. The council reviewed the decision to create separate assessments by the Rates Department, and also the council resolution for the creation of the commercial rate. The outcome was that the original decisions were upheld, citing detailed reasons to the complainant about why the decisions were made and the legislative basis for them.

Conclusion

Despite an earlier Ombudsman SA audit on complaint handling conducted in 2011, half of the 12 audited councils in this survey were still not compliant with the law as it applies to grievances that relate to the impact that any declaration of rates or service charges may have had on ratepayers. All audit councils accept that this omission needs to be remedied.

Recommendation 2

That all councils ensure that their internal review of decisions procedure is fully compliant with the requirements of section 270 of the *Local Government Act 1999*. Further, that all council CEOs confirm in writing to the Ombudsman their full compliance with section 270 of the Act by 31 March 2017.

4.1.3 Time limitations on applications for an internal review of decision

3. The Act does not provide for any time limitation on applications for internal review. However, some councils require applications to be lodged within a certain time period. What do you think should be a reasonable benchmark across the local government sector?

- ☐ Three months
- ☐ Six months
- ☐ Twelve months
- ☐ Two years
- ☐ No time limitation

73. The question is directed at identifying an appropriate and reasonable timeline after the council decision is made for terminating access to the review process.
74. The principle involved is that people should have adequate time to be made aware of a council decision that affects their interests and to initiate a formal request for review of that decision if other means of resolution fail.

75. Six of the 12 audit councils indicated that three months was an adequate amount of time before access to the section 270 review process was cut off. One of those councils later revised their position to advocate six months as a more appropriate time limitation on applications. Four councils preferred six months and two other councils preferred one year and two years respectively.

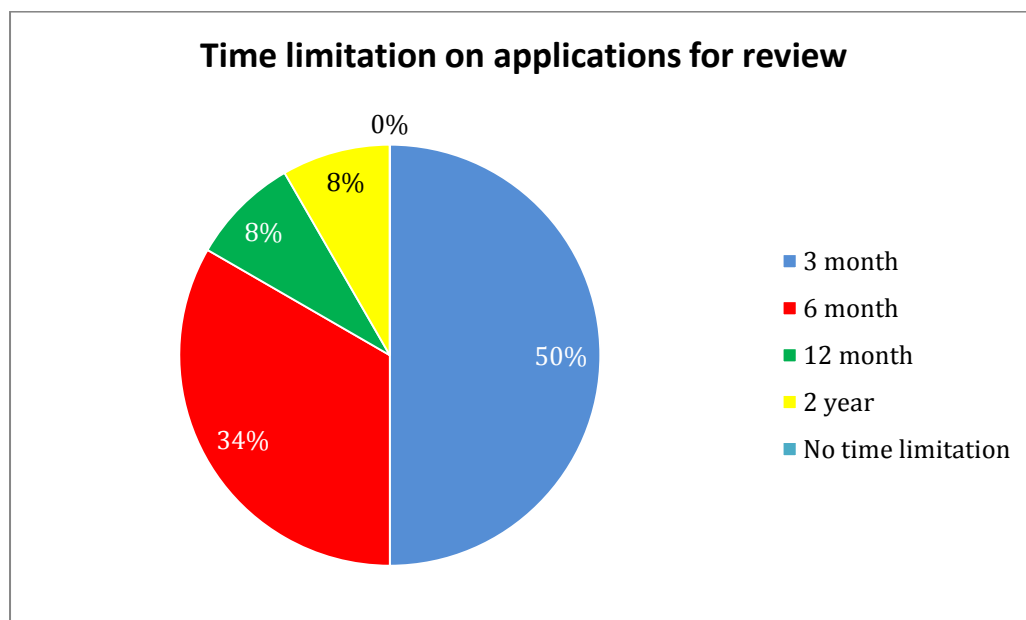


Figure 3

76. There were a range of views expressed on the time limitation issue that perhaps reflect the different approaches to the value and effectiveness of the review mechanism itself. Two councils advocated for the three month time limit to be incorporated into the Local Government Act, arguing that consistency across local government was important and legislation was needed to 'ensure compliance'. The City of Mitcham submitted that:
- A statutory time limit of 3 months is supported to ensure that matters can be challenged quickly and to avoid the s270 process becoming a mechanism that can be misused to excessively delay the implementation of a council or administrative decision.
- Council does, however, believe there should be an 'exceptional circumstances' exemption to any statutory timeframe and would find it useful for guidance on exceptional circumstances to be provided in the legislation.
77. Other perspectives on the issue concentrated on the realities of decision-making and questions of fairness. One council submitted that the 'last point of contact' should be the point when the time limit commences rather than the date of the actual decision. This is because 'the applicant may initially try to have the matter addressed outside of the section 270 process and shouldn't be prejudiced by these actions'.
78. The City of Salisbury revised its policy position upwards from three to six months after an internal review of their public document. Its second submission says:
- [Our] updated 270 Review policy provides for a period of 6 months as an appropriate limitation on applications for internal review. This is in recognition of the time taken to implement decisions, and also the likelihood that members of our

community are not necessarily well versed in terms of processes available to them to question a decision that affects them.

By allowing 6 months, there should be sufficient time for individuals to make contact with the council to express concerns about an issue, and then be provided with information about options available to them. Our focus remains on resolving issues of concern with members of our community and providing them with fair and equitable access.

79. My own legislation has a 12 month time limit within which complaints may be made to my Office. The period commences 'from the day on which the complainant first had notice of the matters alleged...' Importantly, I have a discretionary power available to assess a matter and accept the complaint outside that time limit if, 'in the all the circumstances of the case, it is proper to entertain the complaint'.¹³ I am aware of at least one council that has received requests for section 270 reviews for matters that go back more than five years. These are invariably resource intensive, and I see little advantage in any requirement allowing such old matters to be reviewed in a local government context.
80. On the other hand, I see merit in the arguments for consistency across the sector. There is also a case for discretion to be exercised by individual councils in accepting matters for review that are outside the standard time limit. I do not, however, consider that it is necessary to legislate or regulate the time within which applications for review may be made.
81. Rather, I propose that all councils include a six month time limit for accepting applications in the next update of their Internal Review of a Council Decision: Policy and Procedure. The wording of the time limit clause should also include a reference to an appropriate discretion to be exercised by the council or it's CEO in cases where the time limit may have been exceeded. On reflection, and in view of submissions made in response to my provisional report, I do not consider it necessary to recommend that the last point of contact be taken as the point of determination for review. This is appropriately covered by the time limit discretion.

Conclusion

Council section 270 procedures allow for varying or no time limits for acceptance of applications for internal review of decisions. The Act is silent on the issue and there is no fetter on applying a time limit. There is an argument for consistency in approach across all councils. Most councils consider that a period of six months or more is appropriate. Councils are mindful that section 270 reviews may be resource intensive and are reluctant to consider older matters when no application was received at or near the time of decision.

Recommendation 3

That all councils include a reference to a six month time limit for accepting internal review of council decision applications in a revised version of their internal review of decisions procedure. Consideration should also be given to the exercise of a discretion by councils to allow a longer time limit to apply in particular cases.

¹³ *Ombudsman Act 1972*, Section 16 - Time within which complaints may be made.

4.1.4 Decisions to which the internal review process can apply/cannot apply

4. Subject to a bona fide application, would your council conduct a section 270 internal review of decision for any of the following: (Please tick as many boxes as are relevant)

- ☐ A complaint where there is no appeal right (e.g. non-complying development)
- ☐ Where the complaint relates to how the council has handled alleged breaches of the Development Act (e.g. decisions about whether to take enforcement action)
- ☐ Where the complaint relates to how the development was categorised (and there is no review right available under section 86(1)(f))
- ☐ Where the matter relates to conduct of a delegate but doesn't fall within the Minister's Code in the Development Act
- ☐ A complaint relating to an expiable offence
- ☐ None of the above

82. The question is directed at identifying council policies and practices when considering applications for internal review of decision where another appeal mechanism may not be available.
83. The principle involved is that people should be able to access an appropriate avenue for review if their grievance is the result of a council decision. As such, a *bona fide* application for review should not be frustrated by apparent gaps in legislative review provisions.
84. Two of the 12 audit councils indicated that they would conduct a section 270 internal review of decision on all the five example decisions proposed. A third council accepted all the Development Act related decisions for review, but rejected the expiation offence example. Another three councils indicated that they would not conduct a review on any of the examples proposed. Six councils accepted some of the examples given as grounds for conducting a section 270 review of decision.

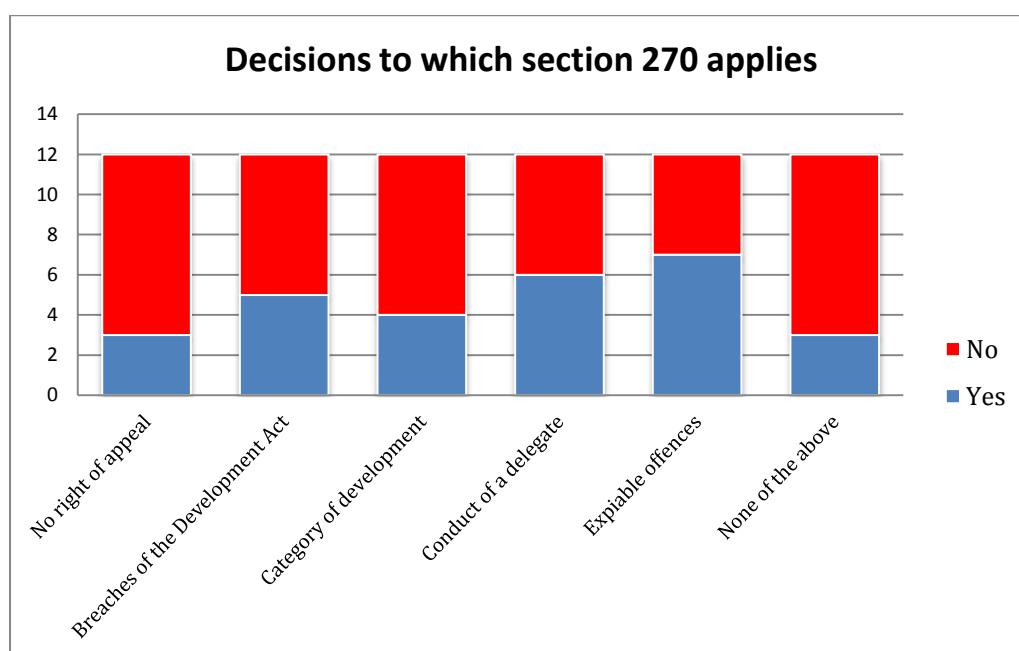


Figure 4

85. Whilst applications for a review of decision about development related issues represent less than 20% of the sample cases identified by the 12 councils, the range of views expressed on the scope of the policy were wide and varied.¹⁴ Roxby Council explained its approach to development matters as follows:

As the Development Act contains detailed, specific appeal and review mechanisms, it is considered appropriate, as a 'general principle' that applicants make use of the statutory scheme specifically set up to deal with complaints regarding decisions surrounding development applications.

However, that is not to say that the council refuses to conduct section 270 reviews of matters determined pursuant to the Development Act itself. As recently as August 2015, the council undertook a section 270 review at the request of an applicant who had submitted a development application for a non-complying proposal that had been refused development plan consent. The applicant had no appeal rights.

86. The central issue inherent in the question is whether a council can limit the types of matters/decisions that could be subject to the section 270 internal review processes. Section 270(4) of the Act proscribes the limitations on the types of decisions that may be subject to review. It states:

A council, or a person assigned to consider the application, may refuse to consider an application for review if—

- (a) the application is made by an employee of the council and relates to an issue concerning his or her employment; or
- (b) it appears that the application is frivolous or vexatious; or
- (c) the applicant does not have a sufficient interest in the matter.

87. On my reading of the provision, the Act does not enable councils to limit the types of matters it is prepared to accept for review of decision under section 270 unless it falls into category (a), (b) or (c), above.

88. However, the real difficulty in interpretation of the statute is highlighted by the exclusions that some councils have identified and promoted. These specify 'Matters outside the scope of the policy and procedures'. Some councils, among them the City of Mitcham, state that a 'section 270 review is not applicable with regard to development matters under the Development Act 1993'. The council made a submission to me as follows:

In broad terms, State legislation and regulations, (including the Development Act) provide a range of appeal processes. It is felt that where these appeal processes are provided for in the legislation and/or regulation, the parliament has had the opportunity to determine what appeal rights should be provided. We therefore feel that a complainant should not be able to [access] a general provision within the Local Government Act (s270) to have unlimited appeal rights on matters that relate to other legislation...

There is also a jurisdictional issue in our view - i.e. matters being assessed under the Development Act should only be reviewed under provisions within that Act, not carry over into reviews available under provisions within the Local Government Act. By allowing section 270 reviews of matters, the powers of the Development Act are undermined.

¹⁴ For the financial year 2013-2014 the 12 councils identified four development related matters from a total of 21 internal review applications across their jurisdictions in that year.

89. Although I understand that there is confusion in local government about how some statutory appeals processes apply to decisions of the council, there is no basis in law for asserting that review rights must be embodied only within an Act that generally applies to that area of governance. As the Minister told the Parliament when the new Local Government Bill was introduced in 1999: 'there is no intention that the provision should impede in any way the right of citizens to approach other sources of remedy for illegal actions on the part of councils...'
90. In my view, a reasonable interpretation of this is that section 270 was designed to provide an avenue of review for grievances that do not fit into any other legislative or regulatory framework relevant to the operation of local government.
91. The LGASA Model Policy¹⁵ correctly cites other provisions in the Local Government Act (such as objections to land valuations) where prescribed appeal arrangements exist and should be used. Similarly other legislation, including the *Development Act 1993* and the *Environment Protection Act 1993*, include their own proscribed appeal procedures that should be used. Despite that, it is not uncommon to find council internal review procedures citing a list of prohibited matters that the council will not consider reviewing under the section 270 provisions. Usually these identify particular legislation or an area that council considers is covered elsewhere, such as Code of Conduct matters.
92. As noted, some councils consider that development or planning matters, for example, should only be reviewable under that legislative umbrella. No right of review should be available under section 270 of the Local Government Act. However, the main problem my audit identified is the interpretation that many councils give to the prescribed appeal procedures under the Development Act.
93. A common view seems to be that if the grievance is a development or planning matter, an appeal under that Act is the only source of redress for the complainant. This is the interpretation of council internal review policies that is sometimes given to inquiring members of the public. My Office has frequently had cause to review this advice. In some cases we have referred the matter back to the council for reconsideration as a section 270 matter; and the review has been conducted.
94. As the varying responses from the 12 audit councils show, there is a wide spectrum of approaches to the question of exclusions. Using the development example, some councils have accepted, or will accept, a request to review a development application for a non-complying proposal that had been refused development plan consent. In the case cited above by Roxby Council, the applicant had no appeal rights.
95. On the other hand, there are councils that consider any development related matter is outside the parameters of the section 270 provisions. Given the 'grey' area that this issue highlights, it is not surprising that a number of councils were cautious in answering the question. The Port Pirie Regional council put its position this way:
- While council would review each applicant on its merit, the Development Act is generally quite clear on appeal rights available to all parties.
96. In my view, there is a need for consistency across local government in South Australia on matters which fall outside the scope of the review process. It is unsatisfactory and inconsistent with the intent of the legislation for there to be situations where a review is allowed in one council area, but the same, or a similar review, disallowed in a neighbouring jurisdiction. Such inconsistencies are rightly

¹⁵ *Internal Review of a Council Decision: Model Policy and Procedure* - LGASA, October 2015.

seen as unjust and may well erode confidence in the integrity and professionalism of local government.

97. On the question of review applications relating to expiation of offences, there was more consistent support - by seven of the 12 audit councils. For those not inclined to accept an application for review in this category, a common explanation was that there is 'no legislative intent' for an appeal to be available. Roxby Council took a more inclusive view:

With respect to expiable offences however, the decision to issue an infringement such as a parking fine is usually taken at officer level without the considered period of external review. Whilst these issues are usually black and white there may be a case of extenuating circumstances that would warrant a review and potential withdrawal of the infringement. For instance, a Doctor's car parking in a no parking zone whilst attending an emergency might warrant an infringement but a review on practical grounds.

98. Roxby Council was entirely correct in its example of 'extenuating circumstances' that would likely warrant the offence being deemed 'trifling' and potentially subject to review under section 270 of the Act. The relevant legislation in this case is the *Expiation of Offences Act 1996*, specifically sections 4(2), 6(1)(ha) and 8A(1). Section 8A(1) provides that a person who has been given an expiation notice may apply for a review of the notice on the ground that the offence is trifling.¹⁶ There may be other circumstances that warrant consideration for internal review. An example might be where the council is challenged about confusing speed sign changes and agrees that there may be a case to consider waiving fine notices.
99. In summary, I consider that all councils should be open to accepting an application for internal review of decision in matters where there is evidence that no right of appeal exists under any other Act. That said, an internal review under section 270 should not be used where there are statutory appeal rights available, e.g. in a development approval matter, because only a court can overturn a decision on the granting or refusal of a development application. In so saying, I note the new provisions for rights of review and appeal at section 202 of the *Planning, Development and Infrastructure Act 2016*. When the Regulations are finalised, the new Act will eventually replace and initiate the repeal of the *Development Act 1993*.
100. I have taken note of the concerns raised by councils about the potential for process duplication and for the public to be confused if the internal review procedure were to allow for a discretion when a statutory appeal is also available for the decision. Instead, I have accepted the suggestion that councils consider approaching the LGASA to include the commitment to a fully inclusive review remit in the LGASA *Internal Review of a Council Decision Model Policy and Procedure*.

Conclusion

There is a wide range of policy positions determined by councils in South Australia on appeal and review arrangements in the areas of planning, development and expiation of offences. Some councils wrongly decline to consider a section 270 application for review in these categories on the basis that the area is covered, or should be covered, by the provisions of legislation outside the Local Government Act, e.g. the Development Act.

¹⁶ The Supreme Court of South Australia considered 'trifling' in the case of *Roberts v Police* [2013] SASc 190. A relevant finding at [17] was that 'a deliberate breach will rarely be described as trifling save in cases where humanitarian considerations or considerations of urgency arise'.

Recommendation 4

That all councils revise the part of their internal review of decision procedure that deals with 'Matters outside the scope of the policy and procedures' to explicitly state that matters that fall outside statutory appeals procedures will be considered for the conduct of a section 270 review on the merits of the individual application. Further, that councils discuss with the LGASA the desirability of including this commitment in the LGASA *Internal Review of a Council Decision Model Policy and Procedure*.

4.1.5 Independent conduct of an internal review of decision

5. The issue of separating the original decision-maker from the internal review decision-making process has been raised with the Ombudsman. In general terms, who is best placed to conduct an internal review of decision for the council? (Please tick as many boxes as are relevant)

- ☐ The CEO
- ☐ The original decision-maker
- ☐ A senior officer of the council not part of the original decision
- ☐ Lawyers engaged by the council
- ☐ The Local Government Governance Panel
- ☐ A neighbouring council CEO or senior manager
- ☐ An independent person with a knowledge of local government governance issues but not currently serving

101. The question is directed at identifying council policies and practices when deciding how to conduct an internal review of decision in circumstances where conflicts of interest arise with the original decision-maker.
102. The principle involved is that no-one involved in making the original decision should conduct the internal review; and that a senior person not associated with the original decision should conduct the internal review to ensure that grievances are assessed and adjudicated transparently and impartially.

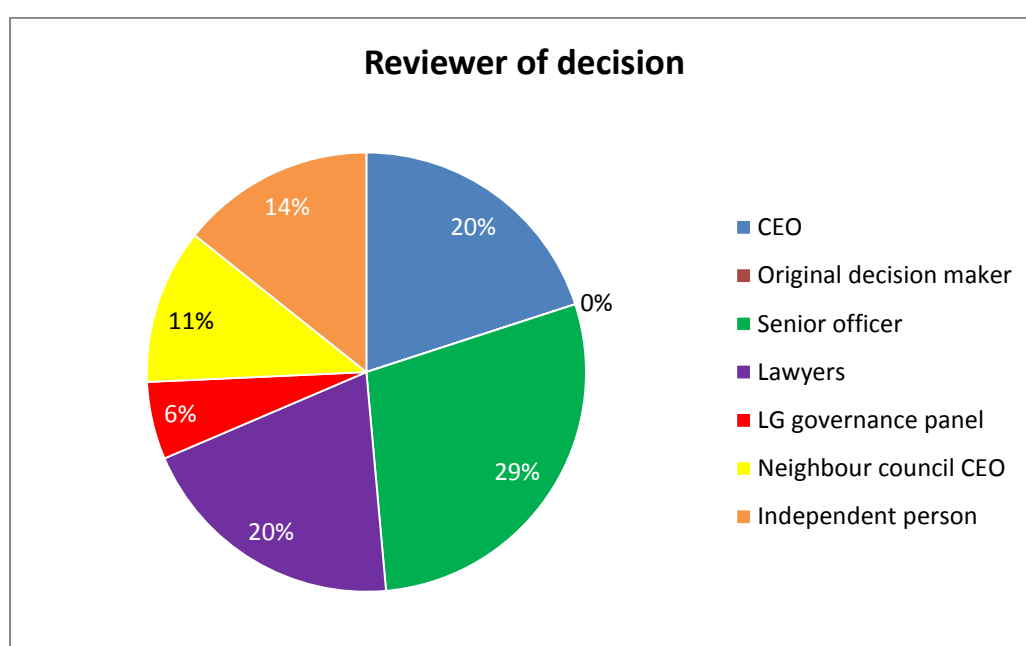


Figure 5

103. The LGASA provides guidance on this issue in the form of advice on assignment of applications for review in its Model Policy document. Many councils have chosen to incorporate this passage in their Internal Review Procedure. It says, at clause 6.1:

Wherever possible and appropriate, council will seek to involve an external person or panel to assist with the review, including the enlistment of employees of other councils.

[Optional: council has established a panel of external experts and experienced reviewers from which it is able to draw for this purpose.]

104. Notwithstanding the range of choices made in the survey, not all councils were in agreement with the principle that the original decision-maker should be separated from the internal review process. One Chief Executive stated openly that he would be prepared to review his own decision. He told me that he would 'look at it myself and see if I'd change my mind'. He went on to suggest that seeking independent assistance in a review of decision from a neighbouring council would not be accepted in his community because, 'people wouldn't trust another council...it would be seen as boys looking after boys'. Three councils in the audit group also conceded that they had used the original decision-maker to conduct section 270 internal reviews.

105. The interviews I conducted with councils did, however, reveal a broad consensus on the question of decision-maker conflict of interest. Most CEO's readily agreed that an internal review of decision should be conducted at arm's length from the original decision-maker - regardless of the fact that that person was often the CEO. As the figures show, the largest number opted simply for a senior manager in the administration to conduct the review. In many instances the key consideration appears to be a selection based on management experience and the most effective way to bring the review matter to a close. The Town of Gawler identified its approach as follows:

The Governance team have not had a lot of experience in investigating section 270 reviews and have used Executive management and lawyers to assist. Neighbouring councils have offered their experience if required but this offer has not been taken up to date.

An independent panel would be a useful avenue if a complaint is about an executive officer or no experienced council officer is available to investigate a complaint. We are aware of the LG Governance Panel but have not had to contact them to date.

106. Some councils thought that matters which relate to a decision of the CEO are best handled by an independent reviewing officer. In most cases, this has meant engaging lawyers to conduct the review, although there were a number of instances cited where councils have engaged neighbouring council senior officers or retired public servants to conduct the review. Despite general agreement that external reviewers are a desirable option, there were some strong views expressed against any regulatory requirement to use external reviewers or a panel of experts.
107. Some smaller councils, including the District Council of Yankalilla, expressed the opinion that an independent panel of experts was worth considering:

It would be a good resource, enabling referrals to an external body. It would allow for independent review of the complaint. [It] would free up resources within our small council.

It is not essential for panel members to have a local government background. Any person with suitable investigation experience/mix of suitable skills could do it. Sometimes it would be useful to use non-local government reviewers because it can be hard to find people in smaller communities to conduct reviews who are not involved with the council members or the CEO in some way.

The District Council of Robe had a broadly similar view and a suggestion about resource sharing:

An independent panel would be worthwhile except the costs incurred would be substantial. A neighbouring council would do the investigation for 1/10th the cost. Maybe a regional panel could be established as part of the LGA regions. This would reduce costs.

108. Implicit in the discussion about the independence of reviewers is the associated issue of the relevant expertise to conduct the review. As stated above, some councils have suggested drawing on the expertise of people outside of local government, particularly people with investigation and alternative dispute resolution (ADR) skills.¹⁷
109. With an externally facilitated ADR process, for example, it is sometimes possible to resolve protracted and difficult disputes through the auspices of an independent third party, usually a professional mediator. It is also worth noting, as many councils have demonstrated to me, that they already use mediation and conciliation techniques to resolve disputes at the secondary level of complaint handling.
110. Whilst there are excellent resources available to councils to develop in-house investigation skills, there would appear to be a case for more training and development across the sector in this area.¹⁸ Some councils will continue to prefer the services of lawyers to conduct formal investigations. However, as the LGASA has demonstrated with the Local Government Governance Panel, there is also an option of a sector driven process or body to provide external review services and support.

Conclusion

Many South Australian councils have developed internal review practices that seek to manage situations where an original decision-maker (often the CEO) may have a conflict of interest. Whilst internal senior delegation of responsibility is a preferred option, many councils are willing to involve independent reviewers where possible and when available.

Recommendation 5

That all councils, through the auspices of regional Local Government Associations, consider and report to the Ombudsman by 31 March 2017 on the option of developing regional panels of independent reviewers who can assist councils with complex review matters.

¹⁷ ADR is also known as 'external dispute resolution'.

¹⁸ See The Australian/New Zealand Standard *Guidelines for complaint management in organisations* and the *Better Practice Guide to Complaint Handling* endorsed by Australian Parliamentary Ombudsman.

4.1.6 Matter types and learning outcomes from internal review of decision

6. In your return to the Local Government Grants Commission for 2013-14 council reported numbers of complaints received under the 'Internal Review of Council Decision Procedures'. If you received complaints, please attach a brief summary of all complaints under the following headings:

- Nature of complaint
- Identity of Reviewer
- Review process
- Giving reasons for the decision
- Resolution
- ☐ No s.270 internal review complaints received

111. The question aims to identify the frequency of section 270 internal review applications to audited councils and the types of matters people sought to have resolved through this mechanism.
112. The principle involved is that people have a right to request a formal internal review of council decision and the legislation intends a wide variety of matters will be eligible for review.
113. Figure 6 shows one of the 12 audit councils reported a single section 270 application in the year 2013-2014; four councils reported two applications each and three councils reported four applications each.¹⁹
114. As detailed in Table 1, the number of reviews across the local government sector has been increasing steadily over the last seven-year period. In 2009 the number of review applications received across all councils was just 42. In 2015 the sector reported over twice as many - with 89 recorded by the Local Government Grants Commission. It is interesting to note that there also seems to be a contrast between several larger metropolitan councils, where section 270 review application numbers are highest - and a cluster of smaller regional councils where application numbers are low, or non-existent.
115. It is reasonable to observe that the increased numbers of review applications are a reflection of a variety of factors. These include better promotion of the review policy/procedure by some councils; more internal review referrals from my Office; and a greater willingness and confidence by councils to use the review mechanism where informal resolution has failed. The nature of the council's business and community engagement profile are also likely to be factors.

¹⁹ As reported by councils, not all section 270 applications proceeded to a formal review. Some matters were resolved by negotiation, others were rejected on various grounds, including referral to another appeal process. Interestingly, at least one of the section 270 matters reported was the result of an instruction from the council CEO that a section 270 review of decision was to be conducted after receiving a verbal complaint from a resident.

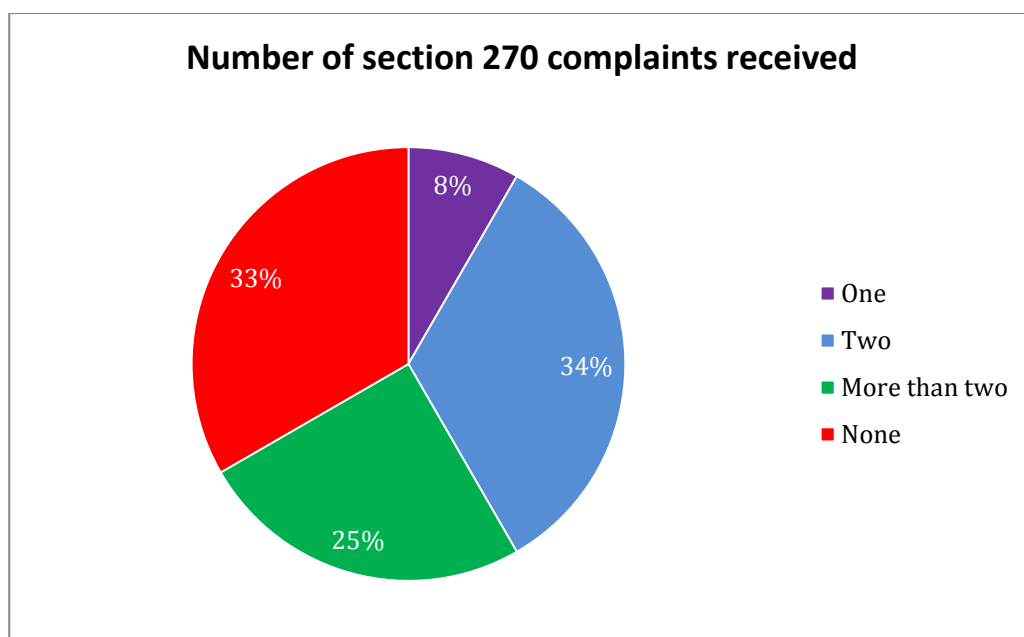


Figure 6

116. The 12 audit councils reported the following types of review matters to me in case studies submitted in response to question 6:

- decision regarding development-related matters by Planning staff
- decision to decline request for rate capping
- decision to decline application for removal of a street tree²⁰
- decision to locate a Telstra tower
- decision not to remove vagrants from a council reserve
- decision to remove a regulated tree from a council park
- decision not to undertake a Traffic Impact Statement
- decision to enforce a by-law
- decision to levy a separate rate for a commercial property
- decisions and council action re investigation of a dog complaint
- decision to remove signage from a public place
- decision not to publicly advertise a council position
- decision re sale of council assets
- decision to dispose of steel sections
- decision not to waive a marquee hire fee
- decision not to offer a promotion package for a community event
- decision re Code of Conduct review.

117. Question 7 in the survey questionnaire asked councils for an indication of the remedies they had applied after a section 270 internal review had been completed. In many instances, councils reported that the outcome was to provide an explanation to the complainant because, after review, the original decision had been upheld. Two councils offered complainants an apology for mistakes made by council staff; there were numerous reports of internal reviews leading to a review of particular council policies and/or procedures and training for staff. There was also a report that a debt had been waived and, another, that a staff member had been disciplined for an error.

²⁰ This matter was reported as an example of a section 270 application received but rejected on the grounds that there had never been a request to the council to remove the tree and therefore there was no council decision against which to lodge a complaint. Further discussion and negotiation with the complainant resulted in the tree subsequently being removed to the satisfaction of the complainant.

118. Audit councils were also asked about administrative improvement and learning outcomes from internal reviews. The CEO of the District Council of Loxton-Waikerie reflected on the outcomes of two reviews that were conducted by senior managers of the council:

In [the first] instance the primary lesson learnt was the Section 41 committee members were not as aware of the nature and limitations of the role of the committee as they could have been, i.e. the committee had committed to waive a fee that they did not have the delegated authority to do so.

Council developed training for all section 41 committee chair persons and members in an attempt to ensure that all were much better informed of the role of a section 41 committee, i.e. in making a recommendation to council.

In the second example the waiver of the fee was also determined not to be warranted and the offer of free tickets [in exchange] was not deemed appropriate.

In both instances I am confident that an independent review would have reached the same conclusion, given the nature of the decisions that were taken, and the scope of the investigations.

In each circumstance, internal review has been viewed as a valuable opportunity to review and improve policy, procedure and practice.

119. Commenting on the outcomes of two reviews undertaken - one about a council officer decision in relation to the enforcement of a by-law; the other a complaint about separate rates for one property and the declaration of the commercial rate, the CEO of Adelaide Hills Council noted:

The process generally worked well. Given scant resources meeting specified timeframes was very difficult, especially where the investigation was complex - the timeframe was too optimistic. Undertaking both the contact officer role and the investigator role was difficult. Consideration could be given to ensuring the two roles are separated.

Of the two reviews not completed by the end of the 2014-2015 financial year one is now resolved. The review had been completed but the matter had been left open until a policy was reviewed. However, in retrospect, it would have been more appropriate to close the review once the determination was finalised, with a recommendation that the specified policy be reviewed.

120. The CEO of the Town of Gawler commented:

We are happy with the reviews conducted in regards to removal of signage and the recruitment process. Both instances were investigated by the Governance Department and found that officers had acted in line with the policies and procedures of the Town of Gawler. Lawyers also gave an opinion during these investigations.

121. The CEO of the City of Charles Sturt told me at interview:

In terms of lessons learnt, it is important to have a reviewer who fully understands the issues and to maintain communication between parties and stakeholders. It is also important to follow up [internally] after the determination.

Conclusion

The statistics from the Local Government Grants Commission show that section 270 applications received by councils have doubled in the past seven years. Whilst the numbers are still low, and concentrated largely in metropolitan councils, there is some evidence that councils are willing to use the internal review mechanism more now than in the past. Councils have shown an ability to analyse review outcomes to inform better administrative practice.

Recommendation 6

That all councils periodically evaluate their section 270 review investigations and document learning outcomes relevant to their administrative practices and functional responsibilities. That, as appropriate, these learning outcomes are shared with the Local Government Governance and Policy Officers Network (GPON) and relevant local government interests.

4.1.7 The effectiveness of the legislation requiring internal review of council decisions

7. Section 270 of the Act was recently amended to incorporate new requirements, including a policy covering complaints about the services and actions of the council. Do you consider the current section 270 legislation is working effectively?

- ☐ YES
☐ NO, it needs amendment (*please explain*)
☐ The current section 270 should be scrapped and replaced with (*please explain*)

122. The question is directed at identifying council views on the suite of legislative requirements in the current Local Government Act that provide for complaint handling and internal review of council decisions.
123. The principle involved is that the legislation must be followed by councils, but acknowledges that complaint handling expectations from the community are changing and that the legislation should be amended in practical ways.

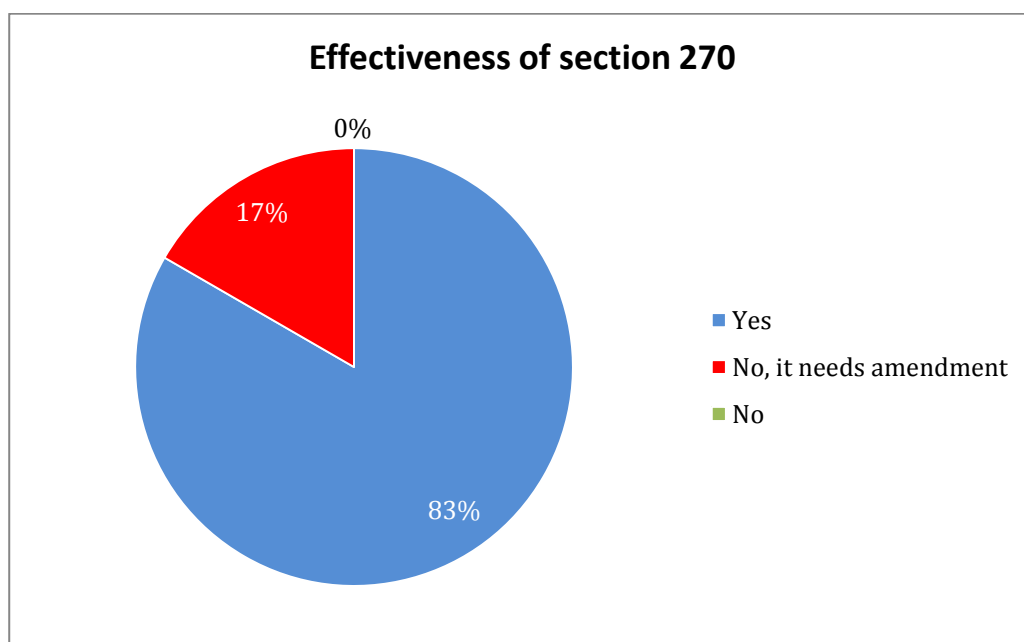


Figure 7

124. Figure 7 shows that 10 of the 12 audit councils are satisfied that the legislation is working as intended and does not need amendment. Two councils submitted that the legislation needed amendment on the grounds that it allows review of merit as well as process, and they consider it should not. I examine these views at greater length in the next section.

125. No council put forward a submission that the legislative requirement for review of decision should be scrapped. In other words, it is reasonable to conclude that the right of the public to challenge a decision of a council is overwhelmingly accepted by the local government sector. The Adelaide Hills Council commented that:

The requirements of s270 are reasonable and appropriate to ensure accountability and transparency.

126. Amendments to the Local Government Act that came into effect on 10 December 2011, included a new requirement for councils to develop and implement complaint handling and request for services policies. These requirements were simply added to the original section 270 with a commensurate minor amendment to section 270(1). They read as follows:

- (a1) A council must develop and maintain policies, practices and procedures for dealing with—
 - (a) any reasonable request for the provision of a service by the council or for the improvement of a service provided by the council; and
 - (b) complaints about the actions of the council, employees of the council, or other persons acting on behalf of the council.
- (a2) The policies, practices and procedures required under subsection (a1) must be directed towards—
 - (a) dealing with the relevant requests or complaints in a timely, effective and fair way; and
 - (b) using information gained from the council's community to improve its services and operations.
- (1) Without limiting subsections (a1) and (a2), a council must establish procedures for the review of decisions of—
 - (a) the council;
 - (b) employees of the council;
 - (c) other persons acting on behalf of the council.

127. It is apparent from the audit evidence that the effect of the amendments has been to cause some confusion in councils and, it is reasonable to assume, in the community as well. The problem, it seems, is that most councils have complied with the legislation by introducing a complaint handling policy and procedure to comply with (a1) and (a2) in addition, and separate to, the existing internal review procedure already required by section 270(1).

128. The confusion arises with the reference often made by councils to 'section 270', which of course now also provides for generic complaint handling processes and procedures. Those procedures usually include an internal review of decision element as the 'third step' in the complaint handling process. The result is that almost all councils now list their complaint handling policy and procedure on their website [usually alphabetically under '[c]' - and, in a separate location under '[i]', most list the 'Internal Review of a Council Decisions Procedure'. The practical effect of having two documents under different headings is to distance the internal review procedure from the council's complaint handling policy.

129. A few councils have decided to overcome the separation by simply including the internal review of council decision procedure in the complaint handling documents. That seems reasonable, given that the statute titles section 270 as: 'Procedures for review of decisions and requests for services'. Nevertheless, most councils have not done this, and keep the two processes as separate policy and procedure documents.
130. It may be that most councils prefer to keep the instruments separate, because they do not want complainants to escalate their grievance to an internal review. As stated above, all councils place strong emphasis on early resolution and a preference to resolve matters 'promptly at the initial point of contact and at the appropriate officer level'.
131. Interestingly, all but two of the 12 audit councils agreed that people have a right to request a formal internal review of decision if they are not satisfied by an informal officer-level review or a negotiated settlement. The CEO of the Town of Gawler put it succinctly:

If the person wishes to go directly to an internal review, that option is available to them.

Conclusion

The evidence from the audited councils shows that there is a potential for the public to be confused by the separation of complaint handling and internal review policy and procedure documents. A large majority of councils believe the legislation is working as it stands and most agree that people have a right to review of decision without participating in informal resolution processes.

PART 5

GOVERNANCE STANDARDS AND ADMINISTRATIVE LAW

5.1.1 A universal review procedure across local government?

132. One of the issues raised during the course of the audit was the question of a consistent or universal standard for internal review of decision procedures across councils.
133. Asked if the LGASA Model Policy and Procedure for internal reviews should be universally adopted as a standard across the local government sector, councils generally responded in the affirmative. Five councils gave an unqualified yes, another five said yes, but with variations included in the document to reflect local factors. The District Council of Loxton Waikerie was unequivocal in support of a universal standard:

Members of the public should be able to expect comparable process of review [across all councils].

134. Another council CEO agreed that the LGASA Model Policy was a useful source document to the extent that it covered all matters involved with section 270 reviews. However, he informed me that his council did not prefer it because 'the model policy is hard to read and follow as there is no logical sequence with policy and procedure being scattered throughout the document'.
135. The City of Charles Sturt was one of the two councils that responded in the negative on the question of a universal standard across local government. Whilst being clear that they did not favour a universal standard, the CEO did voice his agreement with the concept of consistency:

Given all councils have very different scale and structures a universal standard may not be appropriate. Councils as individual entities should be able to have the ability to develop and implement relevant policies and procedures. However, having model policies is a good way of supporting consistency.

136. Some councils indicated that a revised model policy could usefully clarify the application of the 'sufficient interest' test in the legislation. Section 270(4)(c) reads:

(4) A council, or a person assigned to consider the application, may refuse to consider an application for review if-

(c) the applicant does not have sufficient interest in the matter

137. Many councils commented that refusal of an application for internal review was not done without full consideration of the issues raised. In general terms, they deemed applicants to have 'sufficient interest' in a matter if they are personally affected by the decision in question. Whilst one commented that 4(c) was a useful 'filter' test for applicants, the council also emphasised that each matter should be, and would be, considered on its merits.
138. My Office has done some research on the issue of the application of the sufficient interest test at law. In summary, the question of 'standing' in administrative review is closely linked with the doctrine of procedural fairness and a complainant's right to be heard (the hearing rule). There is some relevant case law that consistently supports the principle that an applicant must establish that they have an interest in the subject matter, over and

above that of the general public. It is acknowledged that this is not an unduly high test, and that decisions relating to standing must be determined on the facts and circumstances of individual cases.²¹

139. The Ombudsman Act has a similar provision at section 15(3)(a) which provides that, subject to some exceptions, a complaint must not be entertained by the Ombudsman unless made by a person or body of persons directly affected by the administrative act to which the complaint relates. This standing test is consistent with, or perhaps a higher test threshold than the provisions contained in section 270(4)(c). It may be that some guidance on an appropriate application of the sufficient interest test would be a useful addition to the LGASA Model Policy.
140. Consistent with the recommendation that I have made above in section 4.1.4, I consider that it would also be appropriate for councils to discuss with the LGASA the desirability of revising its Model Policy at 2.2: 'Matters outside the scope of the policy and procedures'. Such a discussion would aim to encourage consistency across the sector. Current wording is unclear about what happens to applications that fall outside prescribed appeal procedures. The revision could clearly state that grievance matters that fall outside statutory appeals procedures will be considered for the conduct of a section 270 review of decision on the merits of the individual application.

5.1.2 A process review of decision only?

141. As reported at 4.1.7, two councils made detailed submissions proposing amendments to the Local Government Act to disallow applications that seek to challenge the merits of a council decision. Both councils consider that only reviews of the process of decision-making should be allowed under section 270.
142. The Commonwealth Administrative Review Council has articulated the most commonly accepted discussion of the characteristics of a merits review - and contrasted it with the more limited focus of a process (or judicial) review. It says:

Merits review is the process by which a person or body, other than the primary decision maker, reconsiders the facts, law and policy aspects of the original decision and determines the 'correct or preferable decision'. In a merits review, the whole decision is made again on the facts. This is different to judicial review, where only the legality of the decision making process is considered. Judicial review usually consists only of a review of the procedures followed in making the decision.

The objective of merits review is to ensure administrative decisions are correct or preferable - that is, they are made according to law, or if there is a range of decisions that are correct in law, the best on the relevant facts. It is directed to ensuring fair treatment of all persons affected by a decision, and improving the quality and consistency of primary decision making.²²

143. In his 2011 audit of complaint handling in local government, my predecessor came across at least one example of a council that explicitly disallowed a

²¹ For example, the commentary of White J in *Clothier and Simper v City of Mitcham* (1981) 45 LGRA 179 at 186.

²² Administrative Review Council, *What decisions should be subject to merits review?* (1999). Cited in the *Australian Administrative Law Policy Guide* © Commonwealth of Australia 2011, p.12. *Note:* The Australian Government announced on 11 May 2015 that it had decided to discontinue the Administrative Review Council as a separate advisory body, and to consolidate its functions into the Attorney General's Department.

merit review in its section 270 procedure document. He suggested that the council modify its procedures document, commenting:

This is a wrong interpretation of the statute. I can find no impediment to reviewing the merits of a decision in the legislation. Further, as a matter of good governance, complainants are entitled to a review of all aspects of a decision, including merit, under section 270 of the Local Government Act.²³

144. The issue of whether section 270 provides for both process and merits review arose in an investigation conducted recently by my Office, which concerned a council's decision to remove a tree.²⁴ The complainants in that matter sought internal review of the decision under section 270. The council's review noted:

This report will not deal with [this part of] the Applicant's complaints, as it is not the role of procedures under Section 270 of the Act to discuss or determine on the merits of opposing arguments. Rather, the purpose is to ensure decisions were made reasonably, fairly, and followed appropriate processes. As such, this review will only deal with procedural matters relating to the decision itself.

The council later advised me that:

The council did consider the merits of the decision in relation to the decision making processes and whether the views of different parties had been appropriately considered.

145. This submission indicated the apparent confusion surrounding the distinction between a review of the decision-making process (a process review) and a merits review. Review of the decision-making process and whether the views of different parties were appropriately considered is a separate matter to the conduct of a merits review, which requires the fresh consideration of all relevant information, including the original circumstances and arguments. The council advised that it did not do this, and in my view, section 270 necessitates such a consideration. I therefore found that the council had erred by its failure to consider the merits of the decision in the section 270 review.

146. On this basis, I recommended that the council:

review its Complaint Operating Guideline (including section 270 internal review of council decisions or grievances) to clearly outline how the council undertake its section 270 review process and to make it clear that such a process should include an assessment of the merits of the decision ...

147. The Council has subsequently indicated to me its commitment to fully implementing this recommendation, as well as commencing a full merits review of the decision.

148. I note that one audit council made a submission to me on this issue, recognising that the Local Government Act does not restrict internal reviews to process only, and therefore that merits review was part of the existing statute.

²³ *Valuing Complaints* - An audit of complaint handling in South Australian councils - Ombudsman SA, November 2011, p.65.

²⁴ The council subject to the investigation was not one of the 12 councils involved in this audit.

149. Instead, they argued that in some cases, the right to challenge a decision of the elected council body (as distinct from the council administration) has led to delays in implementation of project decisions at significant cost to ratepayers and/or third parties. On this basis, the City of Mitcham thought the legislation needed to be amended because:

We are concerned that complainants are using the s270 process as an opportunity to try to get a decision they don't like overturned (irrespective of whether they believe the process was right or wrong) or are using the s270 provisions to simply delay or frustrate the implementation of a valid Council/Administrative decision...

Council supports the right of customers/residents to lodge a complaint or to request a review of a decision if they feel that the process was unfair or flawed. However, this review process should not be used to frustrate the business of Council or the implementation of lawful decisions. Local Government is the only level of government subject to such review rights and as such should not be subjected to excessive additional costs or delays due to these provisions.

150. In fairness to the two councils supporting a legislative amendment to disallow merit reviews, I acknowledge here that some others, notably the City of Norwood Payneham & Saint Peters, also raised concerns with me about the potential for lawful council decisions to be frustrated by internal review applications.²⁵
151. However, it is not accurate to assert that only local government is subject to the exercise of internal review rights by citizens. Many agencies at state and federal level have formal systems of internal review, and it may be provided for in legislation. Some decisions are also subject to external review by a tribunal or a regulator, reviewing decisions under a decision-making power, or through the auspices of an independent officer from another agency. Nevertheless, I acknowledge that there is no comparable right to review decisions made by the Cabinet of a State or the Federal government.
152. The City of Charles Sturt commented on this issue. They decided that the review of a council decision should be retained, but that the statute should be clarified to explicitly state whether the internal review should be merit based or process based. They said:
- Section 270's primary purpose should be to provide an Internal Review Process for decisions. It would be good to have clarity as to if the scope should be a review of the decision making process or the decision itself (or both). That is, does it confer an 'appeal right' of the decision or should it look only at the decision making process for future learning? If it is to confer an appeal right, at what point can a decision be acted upon? Should action be halted once a Review of Decision application is made and what would prevent this being misused to delay by an aggrieved party?
153. The short answer to the very reasonable questions posed by the council is that the law confers a right to both merit and process review of decision. The statute is clear, if not explicit. I agree that there should be definition about time limitations for an internal review of decision application. In my view, it is

²⁵ See the *Eastern Courier Messenger*, March 16, 2016 p.15: '\$5m Oval upgrade delayed'. The story tells of a resident's complaint leading to an internal review which took three months to complete. The council was quoted as saying the review was 'partly responsible' for a delay in work commencing on an upgrade of Norwood Oval.

not reasonable that people can ask councils to review decisions that were made years ago. Councils have a responsibility to contain costs, including for legal services provided. They cannot be expected to revisit decisions where decisions are already long ago implemented. There should also be a reasonable emphasis on informal and alternative dispute resolution options to resolve matters before a formal review is conducted.

154. Having said that, the legislation provides for members of the public to have access to the formal review of decision mechanism. Notwithstanding some concerns about individual cases taking too long, and delays in implementing some decisions, I have no body of evidence before me that indicates the internal review process is too onerous for councils to manage. I have concluded that councils need to accept the parameters of the law and manage their internal review processes accordingly.²⁶

5.1.3 Do councils need more governance support?

155. One of the terms of reference for this audit covers identifying opportunities for administrative improvement in councils' use of the section 270 internal review procedures. At the interview stage of the audit, I asked all councils a question about their internal governance support arrangements and the importance of these dedicated resources to the handling, resolution and learning from complaints - including internal reviews. I also inquired about the councils membership, or otherwise, of the Local Government Governance and Policy Officers Network (GPON).
156. Nine of the 12 councils involved in the audit had a dedicated governance officer or team as part of their senior administrative structure. The role of the 'governance team' is, generally speaking, to provide policy development and review, training for staff and council members, legislative advice and complaint handling services to the council and its senior managers.
157. Some councils have composite teams or units with titles such as Governance, Governance and Risk and the Governance and Business Support Team. Some are small, with only a single Governance Officer. Larger councils may have teams with six to eight staff with a range of significant governance and business support roles allocated to them. There is broad agreement across the sector that governance support is an increasingly important area of council operations and needs to be appropriately resourced.
158. In their discussion of approaches to internal reviews and governance issues, the Loxton-Waikerie, Port-Pirie and Yankalilla councils described inter-council cooperation models and partnerships that I found to be both practical and creative.
159. Yankalilla has developed a governance advisory relationship with the much larger and better resourced Onkaparinga council. Port Pirie has supported the neighbouring Flinders Rangers Council by conducting an internal review for them; while Loxton-Waikerie has entered into a formal governance

²⁶ I acknowledge here the comment made by the CEO of the City of Mitcham who observed that changing a council decision requires a majority of council [elected] members to vote for the decision to be overturned. He said that 'there is already provision for this to occur via a rescission motion; s270 is not required in my view. If there is no Elected Member willing to move a rescission the review will not succeed. If the decision was made by Administration I would support a review of the decision under s270 to occur'.

support relationship with the City of Unley that will involve training and secondments across both councils.

160. Many of the 12 audit councils also mentioned their use of private legal services for governance advice; although some expressed reservations about expenditure of ratepayer's money on lawyers. Three councils communicated a desire to see the LGASA re-establish its now defunct 'legal services unit' which had been valued as source of information and advice on some of the more complex governance matters. The CEO of City of Mitcham said:

Mitcham was an inaugural partner and strongly supported the establishment of a legal services team within the LGA to provide expert advice based on common interpretation of the LG Act. We continue to promote the need to reinstate the service and additional services such as mediation could be included in the model.

161. Councils were also asked about their membership in, and the value of, the GPON. Councils came together to establish the Network some years ago, aiming to:

meet regularly to address issues of common interest in the areas of governance and policies for the benefit of each participating council, individuals and the advancement of governance best practice principles throughout local government in South Australia.

The Network will be available for the Local Government Association to consult on relevant governance and policy matters.²⁷

162. Ten of the 12 audit councils are members of GPON. All of these expressed support for the Network as an information sharing and problem solving forum. Some, not all, argued for an expanded role for the Network as a more formal entity along the lines of the South Australian Local Government Finance Managers Group (FMG)²⁸

163. Several suggestions were made by council CEO's to give GPON 'more clout'. A skills audit for Network members; developing and publishing a library of Frequently Asked Questions; developing a website and taking the Network to regional LGAs - were all proposed as enhancements. Without specifically advocating for the FMG model, the City of Salisbury nevertheless had a clear view about the development of the Network:

The GPON is primarily an informal group that shares information in relation to governance/policy matters. There would be some value in a more structured approach from the GPON, subject to appropriate resourcing, that would enable them to respond to sector wide initiatives in a more formal manner. It could be a useful forum to test policy issues, directions etc. to gain input from a range of councils and could also provide structured feedback to the LGA in relation to council matters. There is a point of difference between the operational experience of Governance officers that contribute to the network and the LGA perspective, which is more of a policy/political focus and there could be merit in the LGA working more closely with the GPON.

²⁷ *Terms of Reference* - South Australian Local Government Governance and Policy Officers Network, May 2014. See Appendix C attached to this report.

²⁸ Part of the FMG's role is carrying out projects and research into a range of financial management topics. The Group has its own website and publishes reports, manual and guidelines for use by practitioners in SA councils.

164. I consider that the many governance issues raised by councils throughout this audit are evidence that councils are keen to find ways to strengthen and develop their in-house governance expertise. I note also the creative ways in which councils are looking to support each other on matters such as section 270 review procedures and interpretation of the Local Government Act and Regulations.
165. In my view, there is an argument for GPON to take a stronger governance leadership role across the sector. There may be value in establishing a GPON website presence to promote best practice and aim for consistency and excellence in governance standards. There may also be an opportunity for the Network to work with the LGASA on model policy development, and to take and disseminate advice on legal matters relevant to local government.

Conclusion

The evidence from councils about the value of the GPON as a forum for issues of common interest in governance policy and practice is strong. A majority of South Australian councils now participate and there is a clear body of support for GPON to extend its influence and relevance across the local government sector in its area of expertise.

Recommendation 7

That the existing membership and leadership of GPON consider if there is a case to be made to all councils for an expanded role for the Network - whether this be expanded membership, development of a website and/or project and research relevant to governance standards in councils - or other governance priority identified by the Network.

PART 6

CONCLUSIONS

6.1 Conclusions

166. It is perhaps ironic that the *Local Government (Accountability and Governance) Amendment Act 2015* finally enabled the abolition of the 1934 Local Government Act. With it went the last remnants of the nineteenth century system of governance where the elected bodies of local government were 'judges in their own cause' and no right to review of decisions existed for citizens.
167. I highlight the observations of the 1970 Local Government Act Revision Committee, whereby a right of review was proposed to extend the democratic rights of citizens and ratepayers to enable council decisions to be challenged. In so doing, the principles that underpin section 270 of the Act were also articulated as a stimulus to enable better decision making in councils.
168. This audit has provided some evidence that this is the case. Although the use of section 270 reviews is still uneven and inconsistent, there is some confirmation from councils that the reviews are being conducted more confidently, openly and with clearer resolutions in mind. If this is, in fact, the case, the right to review is a 'pressure release' mechanism that adds to the credibility and positive public image of councils. This is particularly important in an era where good governance is expected and valued.
169. I consider that the affirmation by councils of the need for an internal review mechanism is confirmation that councils are willing to strengthen and develop their decision making accountability measures. Many councils are also looking to promote these mechanisms to the public. I note also the creative ways in which some councils are looking to support and collaborate with each other on governance matters.
170. If my recommendations are adopted by councils, there is every chance that the recent trend toward the public showing greater confidence in the section 270 review process will continue. If that is the case, I hold a reasonable expectation that internal 'testing' of decision making will demonstrate both fairness to the public and excellence in governance standards.



AUDIT OF LOCAL GOVERNMENT ACT SECTION 270 INTERNAL REVIEW OF COUNCIL DECISIONS PROCEDURES - JUNE 2015

COUNCIL AUDIT SURVEY

As part of a more detailed audit of a select number of councils, the Ombudsman is seeking feedback from all South Australian councils on compliance with the section 270 Internal Review of Council Decisions provisions of the *Local Government Act 1999*.

Data from this proforma will be included in the final audit analysis. The information from each council will be collated for a report to be made to the Parliament in 2016.

A completed copy of this two question survey is requested by **Friday, 31 July 2015** to Ombudsman SA - PO Box 3651 Rundle Mall SA 5000.

(Please tick the relevant multiple choice box and make any comment below)

Section 270 Internal review of council decisions

1. Has your council a current internal review of council decisions policy/procedure which complies fully with the requirements of section 270 (1) to (9) of the *Local Government Act 1999*, including section 270(2)(ca) ?

- ☐ YES
☐ NO *(please explain)*

Comment:

--

2. When is the council's internal review of council decisions policy/procedure next due for review?

Next review date.....

Council name.....

CEO *(for sign-off)*

Name.....

Signature.....

Date.....



AUDIT OF LOCAL GOVERNMENT ACT SECTION 270 INTERNAL REVIEW OF COUNCIL DECISIONS PROCEDURES - 2015

COUNCIL AUDIT QUESTIONNAIRE

As part of its administrative improvement role, Ombudsman SA is undertaking an operational audit of a sample group of 12 councils. The aim is to highlight the operation of section 270 of the *Local Government Act 1999* (**the Act**). Specifically, the focus of the audit is an examination of council compliance with, and the implementation of, the section 270(1) to (9) requirements for internal review of council decisions.

The audit does not include an examination of general complaint handling policies and procedures which are mandated under section 270(a1) and (a2) of the Act.

This document is in addition to the Council Audit Survey sent to all SA councils in June 2015. It commences Stage 2 of the audit process.

Data from this questionnaire will be included with other council responses. The information from each council will be analysed for a report to be made to the Parliament in 2016.

A completed copy of this questionnaire is requested by **Friday 11 September 2015** to Ombudsman SA - PO Box 3651 Rundle Mall SA 5000.

If it is deemed desirable/necessary, the Ombudsman will make an appointment to meet with council representatives to discuss issues arising from council responses.

Council details

Council name.....

CEO (*for sign-off*)

Name.....

Signature.....

Date.....

(Please tick the relevant multiple choice boxes and attach additional pages where more space is required for comments)

Availability of internal review policy/procedure to the public

3. Considering the availability of the council's section 270 internal review policy/procedure to members of the public, do you consider that: *(Please tick as many boxes as are relevant)*

- ☐ The policy/procedure is in a prominent place on the council website
- ☐ The policy/procedure could be more prominently displayed *(please explain)*
- ☐ The policy/procedure is not available on the council website *(please explain)*
- ☐ The council does not promote the internal review policy/procedure as we prefer to resolve matters before a formal review is necessary *(please explain)*

Comment:

Applications for review which relate to rates or service charges

4. Does your council's current internal review of council decisions policy/procedure include a provision to ensure that applications that relate to rates or service charges can be dealt with promptly? [Section 270(2)(ca)]

- ☐ YES
- ☐ NO *(please explain)*
- ☐ No, but currently under review *(please explain how/when)*

Comment:

Time limitations on applications for an internal review of decision

5. The Act does not provide for any time limitation on applications for internal review. However, some councils require applications to be lodged within a certain time period. What do you think should be a reasonable benchmark across the local government sector?

- ☐ Three months
- ☐ Six months
- ☐ Twelve months
- ☐ Two years
- ☐ No time limitation

Comment:

Decisions to which the internal review process can apply/cannot apply

6. Subject to a bona fide application, would your council conduct a section 270 internal review of decision for any of the following: *(Please tick as many boxes as are relevant)*

- ☐ A complaint where there is no appeal right (eg non-complying development)
- ☐ Where the complaint relates to how the council has handled alleged breaches of the Development Act (eg decisions about whether to take enforcement action)
- ☐ Where the complaint relates to how the development was categorised (and there is no review right available under section 86(1)(f))
- ☐ Where the matter relates to conduct of a delegate but doesn't fall within the Minister's Code in the Development Act
- ☐ A complaint relating to an expiable offence
- ☐ None of the above

Comment:

Conduct of a section 270 internal review of decision

7. The issue of separating the original decision-maker from the internal review decision-making process has been raised with the Ombudsman. In general terms, who is best placed to conduct an internal review of decision for the council? *(Please tick as many boxes as are relevant)*

- ☐ The CEO
- ☐ The original decision-maker
- ☐ A senior officer of the council not part of the original decision
- ☐ Lawyers engaged by the council
- ☐ The Local Government Governance Panel
- ☐ A neighbouring council CEO or senior manager
- ☐ An independent person with a knowledge of local government governance issues but not currently serving

Comment:

Your experience with section 270 internal review of decisions

8. In your return to the Local Government Grants Commission for 2013-14 council reported numbers of complaints received under the 'Internal Review of Council Decision Procedures'. If you received complaints, please attach a brief summary of all complaints under the following headings:

- Nature of complaint
- Identity of Reviewer
- Review process

- Giving reasons for the decision
 - Resolution
- ☐ No s.270 internal review complaints received

Remedies

9. If your council has conducted one or more internal review of decision in the **past two years**, which of the following remedies has been applied? *(Please indicate how many times in the comment box)*

- ☐ Provide an explanation
- ☐ Change the decision
- ☐ Mediation
- ☐ Admission of fault
- ☐ Correction of records
- ☐ Remission of a penalty
- ☐ Apologise
- ☐ Pay or provide financial or remedial compensation
- ☐ Waive a debt
- ☐ Change a relevant council policy or procedure
- ☐ Discipline staff for an error
- ☐ Other *(please explain)*

Comment:

Annual reporting requirements

10. Section 270(8) requires a report to be produced annually which relates to the number of internal review applications, the kinds of matters considered and the outcome of applications dealt with. Has your council produced a report and published it in the 2013-14 Annual Report? *(If yes, please attach the AR extract)*

- ☐ YES
- ☐ NO

Comment:

Policy/procedure standards and consistency across the local government sector

11. The Local Government Association of South Australia (LGA) has a current *Internal Review of a Council Decision Model Policy and Procedure* in circulation. Do you consider that the LGA Model Policy and Procedure should be universally adopted as a standard across the local government sector in order to provide consistency to all members of the public?

- ☐ YES
- ☐ NO

- ☐ Yes, in large part, but allowing for some local factors (*please explain*)

Comment:

The legislation and the regulations

12. Section 270 of the Act was recently amended to incorporate new requirements, including a policy covering complaints about the services and actions of the council. Do you consider the current section 270 legislation is working effectively?

- ☐ YES
☐ NO, it needs amendment (*please explain*)
☐ The current section 270 should be scrapped and replaced with (*please explain*)

Comment:

Your contact with Ombudsman SA on section 270 matters

13. Ombudsman SA frequently refers complaints from members of the public back to the relevant council for a 'section 270 internal review'. Can you please comment on this practice from your perspective and provide any relevant case study information about how you deal with such referrals.

Comment:

14. Please attach any other comments you wish to make on the operation of section 270(1)-(9) of the Act.

Thank you for completing this survey.

TERMS OF REFERENCE

South Australian Local Government Governance and Policy Officers Network

Last amended May 2014

Purpose

The purpose of the South Australian Local Government Governance and Policy Officers' Network (Network) is to meet regularly to address issues of common interest in the areas of governance and policies for the benefit of each participating Council, individuals and the advancement of governance best practice principles throughout Local Government in South Australia.

The Network will be available for the Local Government Association to consult on relevant governance and policy matters.

Membership

The Network will consist of staff representatives from South Australian Councils who have a role or work in the areas of governance and legislative policy development and review.

Representatives from the Local Government Association and the State Government Department relevant to Local Government may attend Network meetings as invited guests.

Key staff, consultants or representation from stakeholder groups may attend meetings from time to time to provide information and recommendations. Attendance will be by invitation from the Network only.

Protocols and Operating Principles

Decisions made by consensus will be preferred and it is not intended that votes be taken on matters.

Confidential items will not be minuted and discussion should remain confidential where agreed.

Participating Councils will be invited to provide the resources to support the Network including briefing papers, which may be prepared for each agenda item. Where possible all documentation will be prepared and distributed via electronic methods thus avoiding costs of printing and postage.

The Agenda will be distributed to the Network three days prior to meeting dates, and meeting notes distributed as soon as possible after meetings.

The Network will meet quarterly at a time as agreed by the Network. The venue will rotate around various councils mainly within the metropolitan area of Adelaide.

No membership fees will be applicable for membership to the Network.

Role of Chairperson

The Chairperson shall be a person appointed from the membership for the purpose of chairing meetings. This position will be reviewed in the first meeting of each calendar year.

The Chairperson is responsible for authorising any correspondence from the Network.

Role of Secretary/Deputy Chair

The Secretary/Deputy Chair shall be a person appointed from the membership for the purpose of coordinating meetings, maintaining the membership database, recording notes of key matters arising from each meeting and coordinating and distributing questions raised between meetings. This position will be reviewed in the first meeting of each calendar year.



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