



OmbudsmanSA

REPORT TO THE MINISTER FOR LOCAL GOVERNMENT

Regarding implementation of Ombudsman recommendations from:

RIGHT OF REVIEW

**An Audit of Local Government Internal Review of Council Decisions
Procedures**

June 2017

Introduction

This report is a record of all 68 South Australian local government councils' responses to my November 2016 audit report *Right of Review* - an audit of Local Government Internal Review of Council Decision Procedures.

Local government councils in South Australia are required by section 270(1) of the *Local Government Act 1999 (the Act)* to provide a procedure 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 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 procedure is an essential complaint handling tool for local government and for the management of complaints made to my Office.

My audit followed a previous Ombudsman SA investigation of complaint handling in South Australian councils that reported in November 2011. That report identified that there was a low take-up rate by the public of the section 270 option for internal review of council decisions. At that time, eight of the 12 councils audited had procedures in place that did not comply with the Act.

The former Ombudsman made three recommendations in 2011:

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. 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.

In February 2013 the former 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.

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. I found deficiencies remained in council internal review procedures and in the conduct of some council section 270 reviews I examined. I also found inconsistent and ad hoc approaches to the conduct of section 270 reviews in investigations conducted by me in response to complaints from members of the public.

Ombudsman's jurisdiction

Section 13 of the *Ombudsman Act 1972* stipulates that I must not investigate complaints that are open to a right of appeal or review with another body or tribunal. In short, Ombudsman SA is a review body of last resort for complainants. Consequently, most local government complainants are referred back to councils to attempt to resolve their complaint in the first instance.

In the year 2016-2017, my Office received 1,002 complaints about councils. 456, or 45% 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

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.

Audit Terms of Reference

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
- review council methods for citing exclusions to their *Internal Review Of Council Decisions Policy* against the Local Government Association of South Australia (LGASA) 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 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.

9. Twelve councils were selected to participate in the audit. They were:

Adelaide Metropolitan area

Council

- Eastern Adelaide
 - Northern Adelaide
 - Southern Adelaide
 - Western Adelaide
- Norwood Payneham /St Peters
City of Salisbury
City of Mitcham
City of Charles Sturt

Greater Adelaide area

Council

- Adelaide Hills
 - Barossa, Light and Lower North
 - Fleurieu and Kangaroo Island
- Adelaide Hills Council
Town of Gawler
District Council of Yankalilla

Country regions

Council

- Eyre and Western
 - Far North
 - Limestone Coast
 - Murray and Mallee
 - Yorke and Mid North
- District Council of Tumby Bay
Roxby Council
District Council of Robe
DC Loxton Waikerie
Port Pirie Regional Council

The audit report was tabled in the Parliament of South Australia and published in November 2016. It contained seven recommendations for all councils to consider. The recommendations are attached at Appendix 1. I asked for responses by 31 March 2017.

I am pleased to report that all 68 councils responded to me in writing. The following is a summary of the responses received from councils after their consideration of my recommendations. I include relevant quotes from individual council written responses.

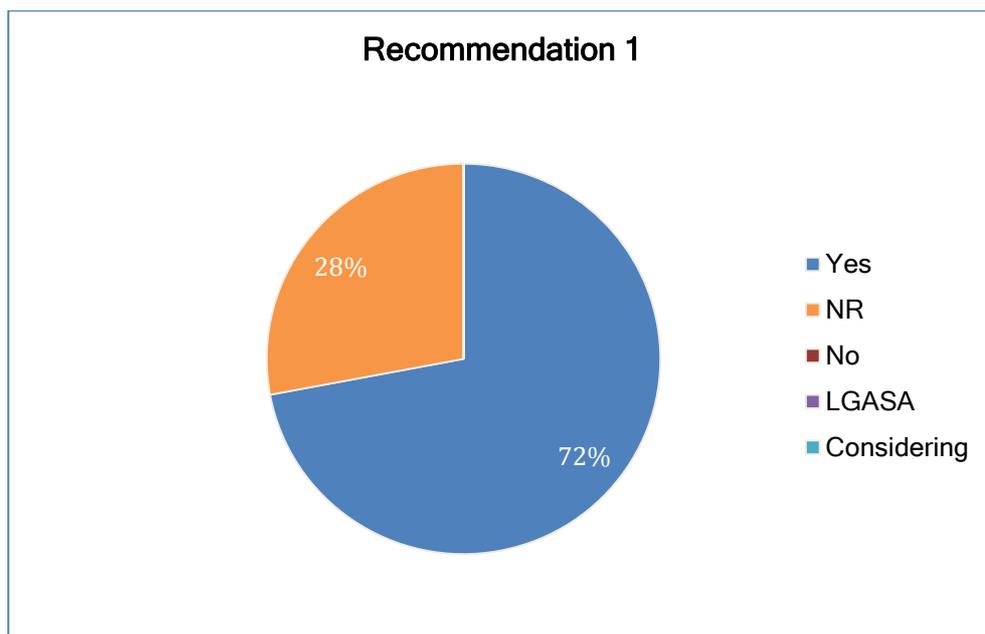
¹ This figure was derived from an Ombudsman SA report generated on 19 June 2017. It therefore does not include the last business days of the 2016-2017 financial year.

Results summary

The audit recommendation implementation findings can be summarised as follows:

Recommendation 1: Availability of internal review policy/procedure to the public

1. My report found that all audited councils recognised 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 appropriate, I consider that councils should make people aware of their right to a formal review of decision.
2. I recommended that all councils highlight a direct link on their website page 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.
3. 49 of 68 councils reported that they had accepted my recommendation and had either already provided a direct link on their website page - or were in the process of doing so. This represents a positive response rate of 72%.²



4. Many councils welcomed the recommendation and used the opportunity to review their current webpage layout and design to ensure easier public access to the review procedure. The City of Burnside commented:

Council has adopted this recommendation and will implement it in the following manner. Council is creating a webpage on its website that is dedicated to 'internal reviews'. It will be written in plain English and cover topics such as:

- What is an internal review?

² NOTE: Throughout this report the pie charts legend uses 'NR' for 'No Response'; 'LGASA' to indicate the matter has been referred to the Local Government Association of South Australia; and 'Considering' to indicate that the council has yet to make a decision.

- What kind of matters can be internally reviewed?
- How do I seek an internal review?
- How long will it take to process my internal review?
- Will I have to pay?
- What happens if I am dissatisfied?
- Who can help me with my internal review?
- Link to Procedure.

Council already has a 'complaint' webpage on the website. A link will be inserted on this existing webpage to the new 'internal reviews' webpage.

Council officers will be encouraged to better promote internal reviews to the public.

5. Nineteen councils did not respond to this recommendation³. However, no council responded in the negative. Some councils found problems with the accessibility and public availability of their complaints and review information. Yorke Peninsula Council commented:

[Complaints] information was included on our website, in a recent upgrade to the website the information was inadvertently removed. However, staff responsible for website content have been alerted to reinstate the information about the procedure for making an application for internal review and it is linked to our formal complaints processes. I am advised that this has been restored.

6. I note that many councils have decided to create an active link between the section 270 procedure and the council's complaints policy and procedure documents. I welcome this initiative to improve public access to the relevant information.

Recommendation 2: Compliance with the Local Government Act

7. My audit found that, despite an earlier Ombudsman SA audit on complaint handling conducted in 2011, half of the 12 audited councils in the recent 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 accepted that this omission needed to be remedied.
8. I recommended 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. Further, that all council CEOs confirm in writing to the Ombudsman their full compliance with section 270 of the Act by 31 March 2017.
9. All 68 councils reported that they had accepted my recommendation and had checked their current review of decision procedure to ensure compliance with the law. I was pleased to receive an assurance from each council that they are now fully compliant with this section of the Act. The City of Prospect commented:

Council reviewed the Internal Review of Council Decisions Policy and Procedure in February 2016, garnering input from the Office of the Ombudsman at this time and believes the Policy to be compliant with section 270 of the *Local Government Act 1999*.

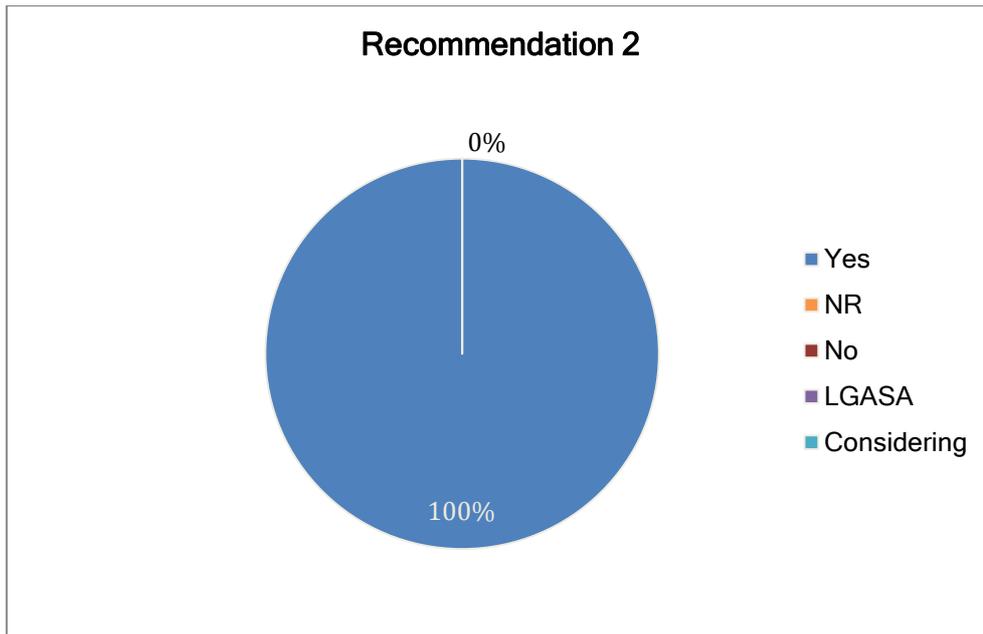
10. Some councils had reviewed their procedures and found errors and omissions which they rectified. The most common omission was the reference to section 270(2)(ca) that relates to review of rates or service charges. There were, however, other areas of omission or non-compliance that were addressed. The City of Holdfast Bay commented:

³ Some councils chose not to respond to all my recommendations.

Council's Customer Feedback and Complaints Policy has been reviewed following your Report and it was noted that it was not compliant in the following areas:

- Time frames within which notifications will be made and procedures on a review will be completed (270(2)(e))
- Reasons for refusal under 270(4)

It was the council's intention to incorporate the [LGASA] model policy into our updated policy. However, as this has not become available, the council has updated its existing policy to address the above non-compliances, and a new Internal Review of Council Decisions Policy is due to be presented to council as part of our wider policy review in May 2017.



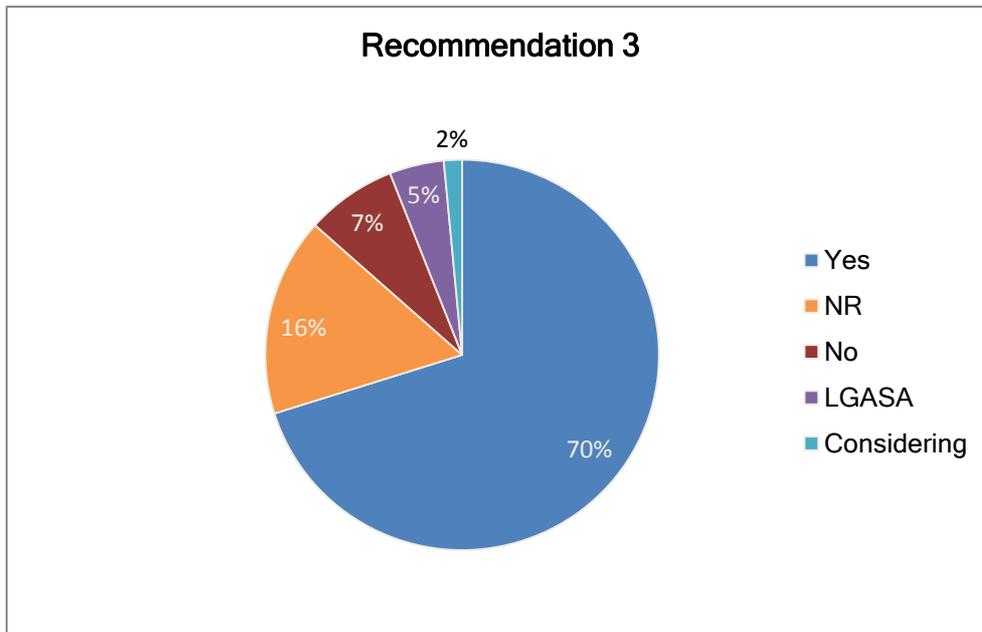
11. On the basis of the audit recommendation implementation returns from councils, I am pleased to report that the errors and omissions found by the former Ombudsman in 2011, and on many individual occasions since, have been remedied. This has been achieved through a process of formal reviews conducted by councils since the release of my audit report in November 2016.

Recommendation 3: Time limits on applications for review

12. My audit found that 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.
13. I recommended 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 discretion by councils to allow a longer time limit to apply in particular cases.

14. 47 of 68 councils reported that they had accepted my recommendation and had either already amended their internal review procedure to incorporate the 6 month limit - or were in the process of doing so. This represents a positive response rate of 70%. The Kangaroo Island Council commented:

The inclusion of a six (6) month time limit for accepting an Internal Review of Council Decisions application, along with a statement regarding discretionary consideration of particular cases, makes sense and shall be attended to in the immediate short term and brought before the Council for their endorsement.



15. Eleven councils did not respond to the recommendation; and just 5 disagreed with the recommendation. A further 4 councils referred the matter to the LGASA to resolve in the context of the revised Model Policy - or were further considering their position.

16. The City of Norwood Payneham & St Peters offered the following reason for not accepting the recommendation:

The recommendation is not supported. The Council's Review of Decisions Policy and Procedure will include a (3) month period from the date of the decision, as the maximum period within which applications for an Internal Review are required to be lodged.

The provision of a six month time limit has the potential to delay the implementation of decisions, particularly if the decision relates to a major project, or indeed if a decision has already been actioned. A three month time limit provides a reasonable timeframe for such requests and it ensures that this process is not used purely to disrupt the implementation of a decision.

Notwithstanding the above, the time period within which to lodge a request for review should not be left to individual Councils to determine. There needs to be consistency across Local Government as to do otherwise will lead to confusion and angst.

17. With respect to the view expressed by the City of Norwood Payneham & St Peters, I point out that whatever the accepted timeline is, there is a potential for internal reviews to delay the implementation of decisions. That is unavoidable in some

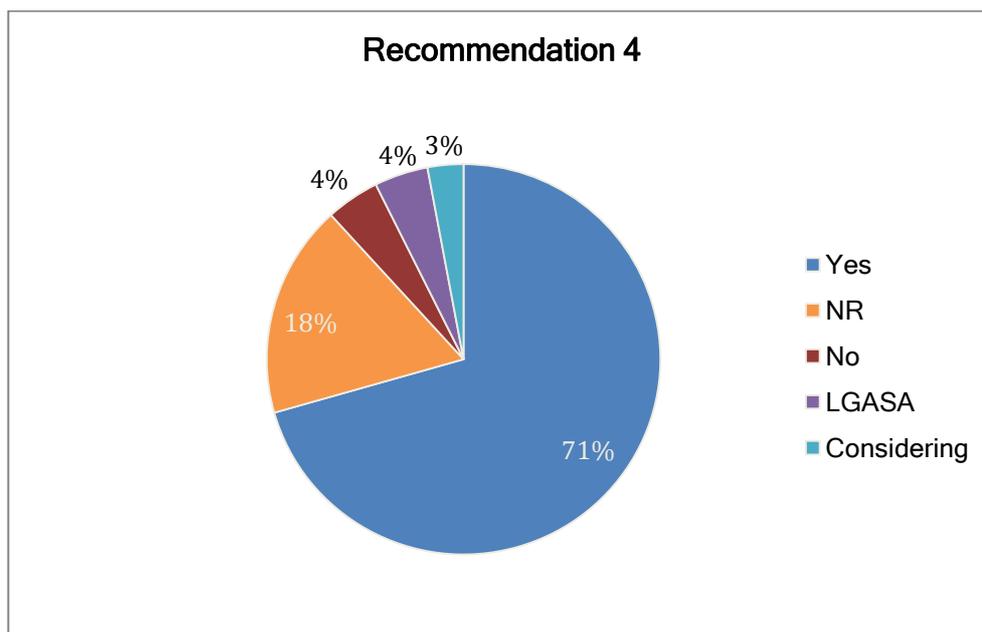
circumstances. However, I strongly agree with the council that the stipulated timeline should be consistent and clearly articulated across all of local government. I note too that some councils submitted that the 6-month timeline should be included in the legislation or the regulations. I consider this is a matter for the Minister and the government to decide.

18. 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 and others have dealt with matters two or three years old. 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. Some councils went further, and suggested the time limit should be included in the legislation. The Light Regional Council commented:

Council considers that the introduction of a time limit surrounding the lodgment of an Internal Review of Council Decision application may be a useful adjustment to the Act provision and therefore would be supportive of an adjustment to the statute, or by regulation or by instruction for policy amendment.

Recommendation 4: Decisions to which the internal review process can apply/cannot apply

19. My audit found that 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.
20. I recommended 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, I recommended 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*.



21. 48 of 68 councils reported that they had accepted my recommendation and had included the words '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' - or similar. This represents a positive response rate of 71%. The City of Tea Tree Gully commented:

This section of the Internal Review of Council Decisions Policy which was endorsed by Council at its meeting on 28 February 2017 was amended to explicitly state that the purpose of this policy is to fill the gaps in the law where a complainant has no rights of review. The policy is now clear that matters that fall outside the statutory appeals procedures in other pieces of legislation will be considered for the conduct of a section 270 review on a case by case basis on the merits of the individual application.

22. Twelve councils did not respond to this recommendation. Another 3 councils rejected my recommendation; a further 3 referred the matter to the LGASA for resolution and 2 councils advised me they were still considering the matter. In rejecting my recommendation the Wakefield Regional Council commented:

Matters noted as being outside the scope of the policy and procedure are matters where right of review is provided within the relevant legislation and best managed under the requirements of that legislation.

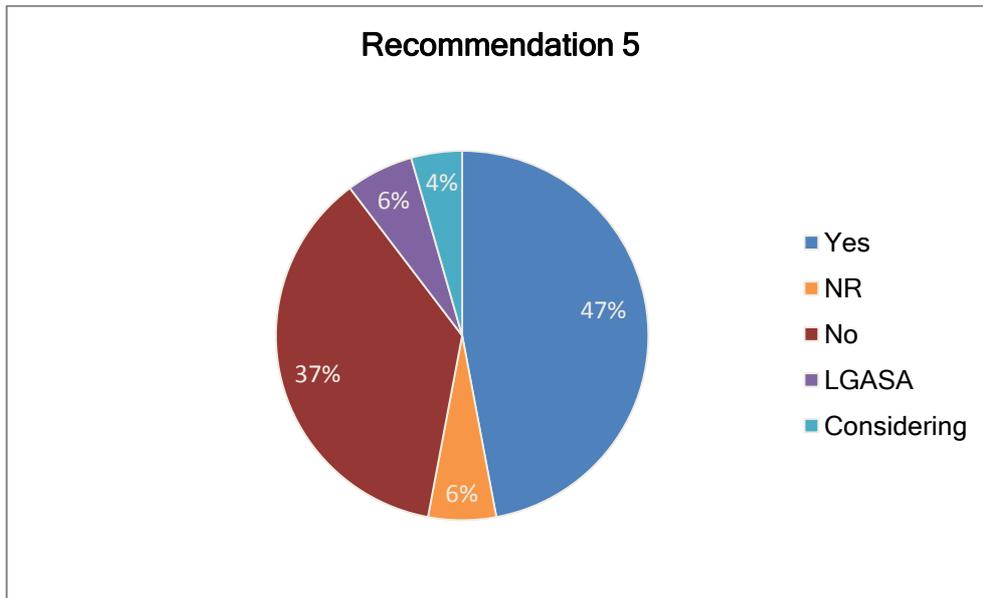
23. Along with Wakefield Regional Council, the other councils responding in the negative to my recommendation all cited a similar reason; namely that they believed that the legislation giving appeal rights (e.g. the Development Act) was intended by the parliament to 'cover the field' in respect to rights to review or challenge decisions. Therefore, if the appeal process does not cover a particular situation (such as a non-complying development), then the parliament *ipso facto* intended that no appeal right should be available.

24. I disagree with that view on the basis that I consider that the intent of section 270(1) in the Local Government Act is to enable citizens to challenge council decisions where there is no other statutory appeal right available. In this sense, section 270 is designed to 'cover the field' across all matters where no other statute applies.

Recommendation 5: Independent conduct of an internal review of decision

25. My audit found that South Australian councils have, generally speaking, 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.
26. I recommended that all councils, through the auspices of regional Local Government Associations, consider and report to me, by 31 March 2017, on the option of developing regional panels of independent reviewers who can assist councils with complex review matters.
27. 32 of 68 councils reported that they had accepted my recommendation and had no objection to the use of independent reviewers through regional panels or, as one council suggested, 'engaging the services of external lawyers from a council endorsed panel'. This represents a positive response rate of 42%. The City of Walkerville commented:

Council supports the option of developing regional panels with independent reviewers to assist Council's with complex review matters, providing it remains at the discretion of each Council to determine whether to utilise the panel or not.



28. 24 councils or 37% disagreed with the recommendation; while 4 councils gave no response, 4 referred the matter to the LGASA and 2 others indicated they were considering the matter.

29. All five regional Local Government Associations (**LGA**) responded to my recommendation with most deciding that regional panels were not necessary. The Limestone Coast Local Government Association commented:

At the LCLGA Board meeting held on 10 February 2017, this issue was discussed at length and accordingly we wish to advise that our member councils are of the opinion that adequate measures are in place to deal with the issue and we feel that there is no need to establish or develop a separate Regional Panel.

30. Responding in the affirmative, the City of Port Lincoln reported a resolution of the Eyre Peninsula Local Government Association (**EPLGA**) at the meeting held on 27 February 2017:

- The EPLGA responds to the Ombudsman's Review of Decisions report as follows:
- a. that the EPLGA will establish a nominated pool or panel of Elected Members and staff members to assist councils in review of decisions when they request such assistance.
 - b. that the LGA of SA be requested to provide training and development of panel members should it be required.
 - c. that prior to engaging a panel member(s) the requesting Council is to negotiate with the panel member(s) any costs such as travel, etc.
 - d. that engagement of the panel member(s) is a decision of the Chief Executive Officer of the requesting Council as and when needed.

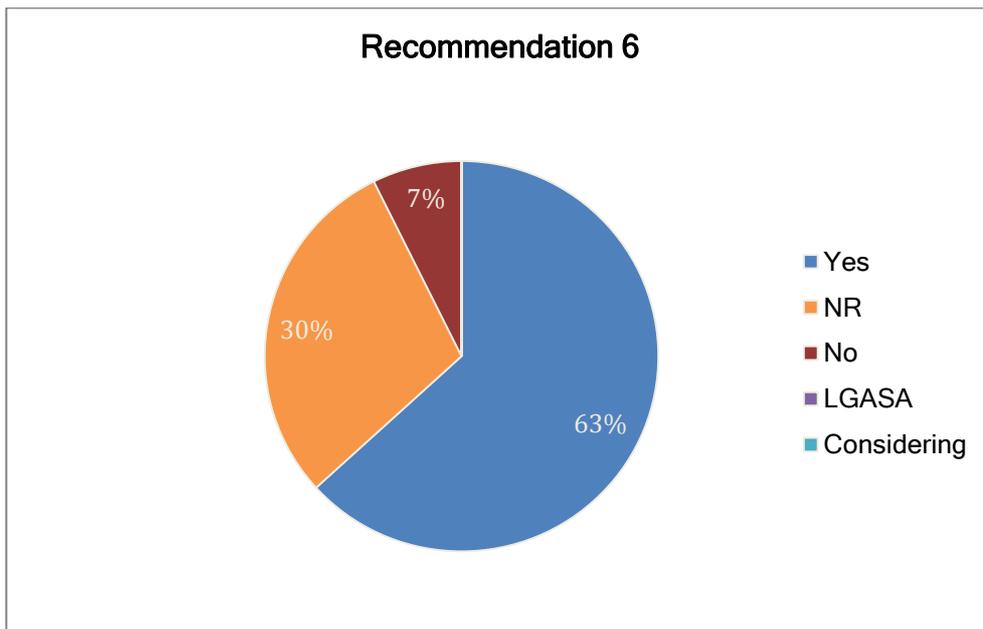
31. As my recommendation called for consideration of 'the option of developing regional panels of independent reviewers', I am satisfied that all councils have indeed so considered the option. Responses to my recommendation more accurately reflect the take up rate of councils and regional LGA's that wish to use regional panels.

32. A note on nomenclature. It would appear that some councils have interpreted the word 'panels' to mean a standing group of expert reviewers - possibly in a paid capacity. This was not the intention of my recommendation. Rather, I intended that 'panels' be considered as nominated individuals (possibly from neighboring councils, as some currently are) who could be called upon to assist in matters where independent reviewers with appropriate expertise are best placed to conduct a section 270 review.

Recommendation 6: Learning outcomes from internal reviews of decision

33. My audit found that 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. I found that councils have shown an ability to analyse review outcomes to inform better administrative practice.
34. I recommended 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.
35. 43 of 68 councils reported that they had accepted my recommendation, with many commenting that the practice of evaluating section 270 reviews was already part of their administrative improvement procedures. This represents a positive response rate of 63%. Alexandrina Council commented:

Each section 270 review most often leads to learnings for that particular service area which are implemented as appropriate. In recognition that a regular, holistic evaluation of the range of section 270 reviews undertaken by Council may lead to more learnings for the broader organisation, I have tasked the Internal Audit Group with undertaking an annual review of section 270's and identify possible learnings for the organisation.



36. 20 councils or 30% did not respond to the recommendation; while five councils disagreed with the proposal. The level of non-response seems to be a result of some councils choosing to respond to only what they saw as key or relevant recommendations from my audit report. This is also reflected in the small numbers of councils that rejected the recommendation; mostly on the grounds that they had recently conducted few or no section 270 reviews. Kingston District Council commented:

Although Council actively promotes the Internal Review Policy and Procedure and other complaint/request mechanisms to the community, very few applications for internal review of Council decisions have been received over the past 5 years. The applications received have been minor in nature and have provided little opportunity for learning outcomes in respect of administrative practices.

37. Some councils considered this aspect of the report and decided that their current practices should be upgraded to include seeking assistance in evaluation of reviews from the GPON. In addition, one council, the City of Port Adelaide Enfield commented:

In order to formalise this review for learning', we commit to our governance team preparing a more in depth report for the Executive team that considers these matters on an annual basis. Where appropriate, as an active member of GPON, we can share any learnings that are of broader application.

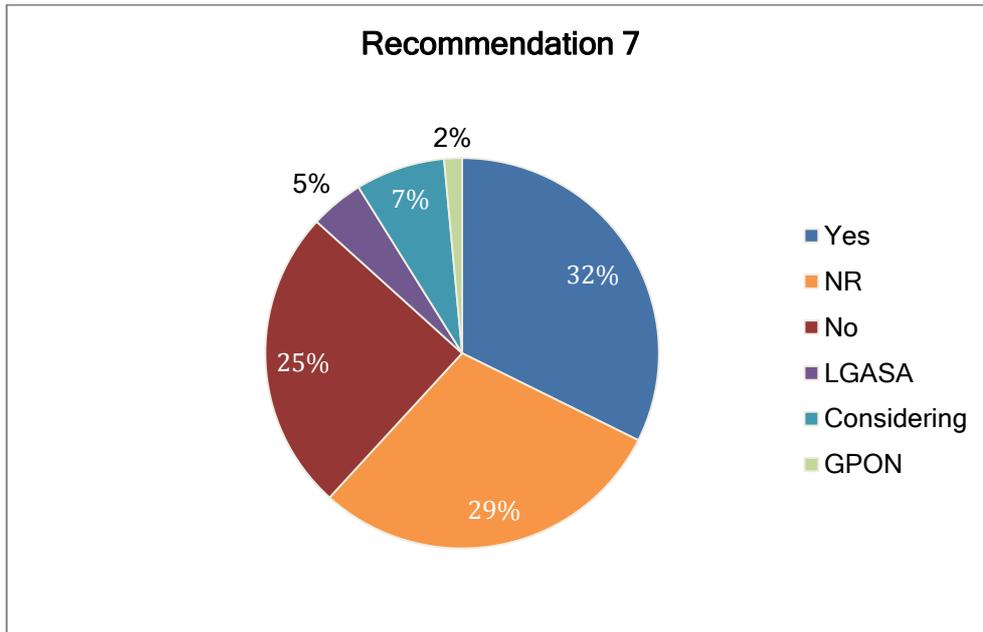
38. As noted in my audit report, the number of section 270 reviews across councils has been increasing steadily over the last seven-year period. In 2009 the number of review applications received across all councils was just 42. In 2015 the sector reported over twice as many - with 89 recorded by the 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.

Recommendation 7: Do councils need more governance support?

39. My audit found strong evidence from councils about the value of the GPON as a forum for issues of common interest in governance policy and practice. A majority of South Australian councils now participate in the Network 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.
40. I recommended 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.
41. 22 of 68 councils reported that they had accepted my recommendation, with many commenting that whilst they considered the recommendation a matter for GPON to decide, they were in favour, or strongly in favour, of an expanded role for the Network. The Town of Gawler commented:

The Town of Gawler's Administration agree with this recommendation. Council's Governance Officers find this Network to be very valuable and would like to see it become a more formalised group. In particular, Council's Governance Officers would like to see legal representation on the Network to assist with legislative

interpretation and compliance issues. Also, reminders about key legislative dates would be very useful - a professional group and website would be ideal.



42. 20 councils did not respond to the recommendation; while 16 disagreed with the proposal; 3 councils referred the matter to the LGASA and 4 were considering their position in the context of GPON's expected response. A number of larger metropolitan councils also advised me that as they had governance teams in place and were connected to GPON, they found existing arrangements served them well.
43. At the invitation of GPON, I attended one of their regular meetings to discuss my recommendation and to express my support for Network activities. I also sought to clarify that my recommendation was about considering an expanded role for the Network - not a proposal to formalise it as such. Concerns had been raised that formalising the group would have resource and reporting implications with no added benefit. Following the meeting, the convenor of GPON advised me of their position as follows:

On behalf of the Governance and Policy Officers Network in SA, I would like to extend to you our thanks for your willingness to attend the GPON meeting last Friday (10/03/2017) and for your presentation and responses to questions put to you by the Members in attendance.

The Network has asked that I advise that, in relation to Recommendation 7 of your report, the Network does not feel that there is a case to be made for an expanded role of the Network at this stage. The prevailing view is that the Members believe the Network works well in its current form, with its current Terms of Reference meeting the needs of the Members. The informality of the Network suits Members and provides a forum for freely sharing information and issues concerning governance. Should there be a need in the future for a special project to be undertaken then the Network is able to approach the LGASA, as it has done in the past and in its current form, to seek Research and Development Funding for the project.

Thank you for the opportunity to consider if there is a case for an expanded role for the Network.

44. Notwithstanding the variety of responses received to the recommendation in the audit report, I consider that councils and the GPON have fully met my recommendation. My aim was for councils and GPON to give thought to the future role of the group. I take account of the high levels of communication the Network has across the local government sector and note the valuable work done in supporting governance standards across councils.
45. On the matter of legal services support to councils (as raised by the Town of Gawler above), I note the views expressed by some other councils broadly in support of enhanced access to legal expertise across the sector. As stated by three of the 12 councils during the audit stage, there is some support for the LGASA to re-establish its 'legal services unit' that had been valued as a source of information and advice on some of the more complex governance and legislative matters. Some councils voiced a concern that their use of private legal services for governance matters created duplication and generated an additional expense for ratepayers.

Other matters of note

Effectiveness of the legislation

46. My audit noted the amendments to the Local Government Act that came into effect on 10 December 2011. These included a new requirement for councils to develop and implement complaint handling and request for services policies. The changes were added to the original section 270 with a commensurate minor amendment to section 270(1) relevant to internal reviews.
47. Some councils submitted that confusion arises with the reference often made by councils to 'section 270', which 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 in a separate location to the 'Internal Review of a Council Decisions Procedure'. There are concerns that the practical effect of having two documents under different headings is to distance the internal review procedure from the council's complaint handling policy.
48. 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.
49. Despite this issue, most councils are satisfied that the legislation is working as intended and does not need major amendment.⁴ I note that most councils agree that people have a right to review of decision without participating in informal resolution processes.
50. No council put forward a submission that the legislative requirement for review of decision should be scrapped or substantially altered. I concluded that the right of the public to challenge a decision of a council is overwhelmingly accepted by the

⁴ Some council representatives commented that section 270 could be better 'signposted' with a division made between the complaints provisions in s.270 and possibly a 's.270A' provision for internal review.

local government sector; and that the requirements of section 270 are generally reasonable and appropriate to ensure accountability and transparency.

51. Notwithstanding the broad acceptance of the section 270 provisions, there were submissions made to me in the recommendations implementation stage that are worthy of further discussion and consideration by councils and government.
52. The Campbelltown City Council made the following comments in its submission responding to my recommendations. Some of these issues were also raised by other councils at the interview stage of my audit.

Council would also like to make the following suggestions for your consideration when next reviewing the complaint handling legislation, that:

- a. Section 270 of the Local Government Act be reviewed to separate 'Request for Service' and 'Complaint' provisions to reduce confusion in the Community about these provisions.
- b. The Development Act/new Planning, Development and Infrastructure Act complaint provisions be reviewed to expand the complaint handling provisions in these Acts.
- c. The time limit of '6 months from the council's most recent decision on a matter' for applications for review be added to the Local Government Act with discretion for Council to make this longer as appropriate on a case by case basis depending on merit.

The case for a universal review standard across local government

53. One of the other issues raised during the course of the audit was the proposal for a consistent or universal standard for internal review of decision procedures across councils.
54. When asked if the LGASA Model Policy and Procedure for internal reviews should be universally adopted as a standard across the local government sector, audited councils generally responded in the affirmative. Some wanted variations included in the document to reflect local factors. However, most considered that members of the public should be able to expect comparable processes of review across all councils.
55. I have carefully considered the issue of a universal standard for section 270 internal review procedures across councils. I have concluded that the adoption of a Model Policy or Guideline is an essential resource to provide consistency, compliance and clear communication of the Parliament's legislative intent. I can see no good reason why there should be significant variation in procedures between councils leading to the risk that the legislation may be misinterpreted.
56. In my discussions with the LGASA, I have found agreement on the principle of a universal standard. However, I have not found agreement on the form such a standard should take. The essential difference, as I understand it, is the view I hold that the Procedure document should be a tool for clear communication with the public. I consider that the focus on council staff understanding of the statute's various provisions should not impede public understanding of the procedure for internal review.

57. In the course of this review, I have examined a substantial number of Internal Review of Decisions Policy and Procedure documents from councils around the state and taken note of their various provisions. I have also carefully considered the revised LGASA Model Procedure document and discussed its provisions with LGASA representatives. From these, I have generated a Guideline Procedure that aims to incorporate succinctly, and in plain English, the legislative requirements and my recommendations for procedural improvement.
58. I have attached my Guideline at Appendix 2 for discussion and further consideration by councils across the local government sector. Notwithstanding the different scale and structure of councils across the state, I consider the case for consistency and clarity of the Internal Review Procedure to be persuasive.

Conclusion

59. In the concluding comments for my audit report *Right of Review*, I noted the evidence that indicates councils are now conducting internal reviews more confidently, openly and with clearer resolutions in mind. I expressed optimism that such an approach would add to the credibility and positive public image of councils.
60. I note with satisfaction that councils have been willing to think through existing practices and make changes where these were deemed necessary or desirable.
61. When my Office responds to members of the public seeking to query decisions of councils, we will continue to support referral of complainants directly back to councils for re-consideration of their matters. In many cases, informal complaint handling processes will resolve the grievance at hand. Where this is not possible, I consider citizens should have the right to avail themselves of a formal review mechanism that has integrity and procedural fairness.
62. Under the Act, councils have a responsibility to report on the numbers, types and outcomes of section 270 reviews of council decisions. Along with the annual 'census' of council section 270 reviews taken by the South Australian Local Government Grants Commission, I consider this to be a useful tool for government to continue to monitor the use and efficacy of the internal review provisions.

Wayne Lines
SA OMBUDSMAN

22 June 2017

AUDIT RECOMMENDATIONS - *RIGHT OF REVIEW*

The following recommendations are made in the body of the *Right of Review* report under the headings that I adopted for the conduct of the audit.

Availability of internal review policy to the public

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

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

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

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

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.

Learning outcomes from internal reviews of decision

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?

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.

Internal Review of a Council Decision: A Guideline Policy and Procedure for Councils

Purpose

The purpose of this policy and procedure document is to provide guidelines for how Council will deal with formal requests for internal reviews of Council decisions (including decisions by its employees and other people acting on behalf of Council).

The [Council name] recognises the importance of transparency in Council decision-making and the need to provide a fair, objective and consistent process for the review of Council decisions.

Legislative framework

There is a legal requirement for Council to develop and maintain policies, practices and procedures for the review of Council decisions and requests for services.

The following legislation applies to this policy:

Local Government Act 1999

Section 270(1) states that a council must establish procedures for the review of decisions of:

- The council;
- Employees of the council;
- Other persons acting on behalf of the council.

Section 270(2) states that the procedures must address at least the following matters:

- The manner in which an application for a review may be made
- Assignment of a suitable person to reconsider a decision under a review
- Matters that must be referred to the council itself for consideration or further consideration
- Notification of the progress and outcome of an application for a review
- Timeframes within which notifications will be made and procedures on a review will be completed
- In the case of applications relating to the impact that any declaration of rates or service charges may have had on ratepayers, to ensure that these applications can be dealt with promptly and, if appropriate, addressed through the provision of relief or concessions under the Act.

Section 270(8) states that a council must, on an annual basis, initiate and consider a report that relates to:

- The number of applications for review made under this section
- The kinds of matters to which the applications relate
- The outcome of applications under this section
- Such other matters as may be prescribed by the regulations.

Definitions

For the purposes of this policy and procedure the following definitions apply.

Act - Local Government Act 1999.

Decision of Council - a formal decision of Council or Council Committee, a decision of an employee of Council made under delegation or decisions of other people acting on behalf of Council.

CEO - refers to the Chief Executive Officer (including their delegate) of the [Council name]

The applicant - a person who lodges a request for the review of a decision.

Merits Review - a 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.

Process Review - a review of the correctness of the procedures followed in making a decision.

Policy

Council (including Committees, employees of Council and people acting on behalf of Council) make decisions every day which impact on members of the community. It is imperative that these decisions are fair, objective and subject to review.

An internal review of a Council decision is available under section 270(1) of the Act. This is a procedure that enables a Council to reconsider the decision making process and all the evidence relied on to make a decision, including new evidence if relevant. The aim of this policy is to ensure a fair, consistent and structured review process for any party dissatisfied with a Council decision. This policy does not and is not intended to exclude other rights and remedies available at law.

An internal review of a Council decision will examine the correctness of the procedures followed in making the decision and may also examine the merits of the decision itself.

Council also has processes in place for dealing with customer complaints and requests for service. As a general rule, Council will encourage use of these processes in the first instance as they offer the potential for more immediate informal resolution. Complaints about the actions of the council, employees of the council, or other persons acting on behalf of the Council will attempt to be resolved under our [General Complaints Policy].

Reasonable requests for the provision of a service by the Council or for the improvement of a service provided by the council are dealt with under the [Requests for Services Policy].

The formal internal review of a Council decision process is generally a last resort in the complaint handling process, but may also be used in situations which are not able to be resolved by other means. While Council encourages the use of other resolution mechanisms, it is an applicant's right to use the formal internal review process in the first instance if that is their preference.

Pursuant to section 270(7) of the Act, a formal request for review does not prevent a complaint being made to the Ombudsman at any time. However, as a general rule, the Ombudsman prefers that matters be addressed by Council in the first instance.

Matters outside the scope of the Policy and Procedures

Some Council decisions fall outside the scope of this policy as an alternative statutory process for a review or appeal may exist in other legislation. Examples of other legislation containing statutory review processes include:

- *Development Act 1993* and appeals to the Environment, Resources and Development Court
- *Freedom of Information Act 1991*
- *Expiation of Offences Act 1996*

Applicants wanting a review of a council decision should check if any other statute applies to their matter before proceeding with an application. However, matters that fall outside the statutory appeals procedures will be considered for the conduct of a section 270 review on a case-by-case basis, depending on the merits of the individual application.

The purpose of this policy and procedure is to fill the gaps in the law where a complainant has no right of review.

Procedure

The following procedure will apply to any request for a review of a decision of Council:

Making an application

The review of a Council decision commences at the point where a formal request for a review of a Council decision is received.

- A formal request for a review of a decision must:
 - Be in writing, ideally using the [Internal Review of Council Decisions Application] available on Council's website
 - Be addressed to the CEO (or in the case where the matter is about a decision made by the CEO, the matter will be referred to a Director)
 - Provide full details of the decision for which the applicant is seeking a review (including how the decision impacts on their rights and/or interests) and set out clearly and succinctly the reasons for applying for the review
 - Be lodged within six (6) months of the original decision being made (with discretion provided to the CEO to allow a longer time limit to apply in particular cases. This will be assessed on a case-by-case basis).

There is no fee payable for a review of a Council decision.

Acknowledging an application

- The CEO will formally acknowledge in writing all requests for a review of a Council decision within five (5) working days of receiving the request and advise the applicant of the expected timeframe within which a determination will be made in respect of their request for review.
- It is essential that no one is excluded from lodging an application for review because of any difficulties they may have in representing themselves. Council staff are expected to offer assistance where appropriate and provide it on request, including assistance in documenting the reasons for applying for the review in writing. Where

necessary, access should be provided to interpreters, aids or advocates to assist applicants.

- The CEO will consider all requests for a review and may refuse to assess such an application pursuant to section 270(4) of the Act if:
 - The request is made by an employee of the Council and relates to an issue concerning the employee's employment
 - It appears that the request is frivolous or vexatious
 - The applicant does not have a sufficient interest in the matter - this will be determined on a case-by-case basis.

Undertaking the review

- Applicants will be treated equally, in accordance with good administrative practice. Council's procedures are designed to ensure that:
 - Every applicant has the opportunity to make an application for review of a decision covered by this procedure
 - An unbiased assessment is undertaken
 - Reviews will be completed as quickly as possible, while ensuring that they are dealt with at a level of authority that reflects their level of complexity
 - Decisions are based on sound evidence
 - Applicants receive information about the outcome of the review
 - Applicants will be afforded procedural fairness.
- The CEO will assess all applicable requests for a review of a Council decision (except those which will be referred directly to the Council) and determine what action, if any, should be taken (including whether an independent investigation is necessary).
- The CEO may elect to appoint another officer (an Internal Review Contact Officer - IRCO) or external advisor for assessment and/or preparation of a report to assist in the review process. The person appointed to assist with the review must be independent of the original decision being reviewed (i.e. have no prior involvement in the matter). An external advisor may be recommended where the decision under review is complex and/or raises legal questions.
- The CEO will refer a review of a Council decision directly to Council where the decision being reviewed was made by the Council or a Committee. A review of decisions made by the CEO will be referred to a Director or Senior Manager.
- The CEO may decide to refer a review of a Council decision directly to Council where:
 - The decision being reviewed relates to civic or ceremonial matters
 - The decision being reviewed is in the opinion of the CEO likely to be of interest to the wider community
 - Any other matters at the discretion of the CEO.
- Where a review of a Council decision is referred to the Council, the CEO will prepare a report to Council which will include all of the relevant information about the decision being reviewed.

- Where a request for review has been referred to Council the applicant will be advised of the date that the report will be presented to Council and will be given the opportunity to provide a written or verbal submission in relation to the report for Council's consideration.
- In most cases, Council will use its best endeavours to ensure that requests for review will be considered and determined within 20 business days. However, in more complex cases, or if the decision is to be reviewed by Council, Committee or an external provider a review may take longer. In the event that a review exceeds 20 days, the applicant will be provided with periodic updates on the progress of the review until the review is finalised.
- Except where a decision has already been implemented and cannot be revoked, a merits review will be conducted. In those instances where a merit review will not be conducted, a process review will be undertaken and the applicant will be advised of this at the time the review is commenced.

Procedural fairness

- Those that may be affected by a decision must be accorded procedural fairness, which includes the principles of natural justice. As part of the review process all parties with an interest in the matter will have the opportunity to make a written submission expressing their point of view and responding to issues raised, including the provision of any relevant information.
- In undertaking a review, the CEO or Council will review the decision in question to ensure that the original decision maker complied with the following procedural requirements and made the best possible decision in the circumstances having regard to the following:
 - The decision maker had the power to make the decision
 - The decision maker considered all matters which were relevant to the making of the decision at the time and did not take into account matters which were not relevant, as well as any additional relevant information or material provided by the applicant.
 - The decision maker did not exercise a discretion or power in bad faith, for an improper purpose, or while subject to duress or the influence of another person
 - The decision maker had no conflict of interest, bias or perceived bias
 - The decision maker ensured that findings of fact were based on evidence
 - The decision was reasonable
 - The decision maker considered any relevant legislation, policies or procedures
- The details of any request for review will be kept confidential in so far as it is necessary and practicable for conducting an effective review process.
- The applicant will be informed in writing of the outcome of the review (even where a determination is made that the original decision under review is upheld).
- Adequate reasons will be recorded for all internal review determinations.

Applications under this policy relating to Rates

This procedure applies to applications that relate to the impact that any declaration of rates or service charges may have had on ratepayers.

Council or the CEO will give priority to such applications and consider the impact of rates and services on ratepayers and the provisions available to ratepayers for rate relief or concessions as set out in the Act (e.g. remission or postponement of payment, issuing of fines and interest, particular land use categorisation).

Council cannot review its decision relating to the setting and declaration of rates.

Remedies

Where the review of a decision upholds the applicant's grievance, an appropriate remedy of response will be determined that is consistent and fair for both the applicant and the Council. The remedy chosen will be proportionate and appropriate to the outcome of the review and may include (but is not limited to) such things as:

- varying the original decision
- returning the situation to its original status (such as not pursuing the construction of something, not implementing the original decision, etc)
- an explanation
- mediation
- an apology or admission of fault
- a change to Council policy procedure or practice
- a correction of Council records.

Where appropriate, the findings of the internal review will be considered in regard to how Council's existing practices can be improved.

Other References

Council documents including:

- General Complaints Policy
- Ombudsman Enquiry and Investigation Management Policy
- Requests for Services Policy
- Fees and Charges Register
- Internal Review of Council Decisions Application (Form)
- Local Government Association of SA - Internal Review of a Council Decision: Model Procedure