Government of **Western Australia**
Department of **Local Government**

Our Ref: 427-98#08 D1101835

Hon Michael Mischin MLC
Chair
Standing Committee on Legislation
Parliament House
WEST PERTH WA 6005

Dear Mr Mischin

**INQUIRY INTO LOCAL GOVERNMENT AMENDMENT (REGIONAL SUBSIDIARIES) BILL 2010**

Thank you for your letter dated 7 July 2011 in which you invited this Department to provide a written submission to the above Inquiry.

It is noted that you similarly invited Hon John Castrilli MLA, Minister for Local Government, to lodge a submission.

The Department's submission, seven copies of which are attached as requested, provides comment on the following three of the six dot points listed in your letter:

- the Department's view as to the specific regulations that will be required in the event that the Bill is enacted;
- advice as to any differences between the local government and legislative environments in Western Australia and South Australia that may impact on the practical effect of the Bill as distinct from the equivalent South Australian legislation; and
- the significance of the differences in text between section 43 and Schedule 2 of the *Local Government Act 1999* (South Australia) and the Bill.

The attached document is intended to complement Minister Castrilli's submission, sent separately, which addressed the remaining three dot points listed in your correspondence. The Minister's submission also examined how the actions/liabilities of a regional subsidiary might impact on the community/ratepayers and how the latter can hold them accountable. It also provided a copy of a relevant March 2011 discussion paper prepared by this Department, entitled, *Regional Local Government Entities – Models for Regional Collaboration in Remote Areas*.

Once again, your invitation to lodge a submission on this matter was appreciated.

Yours sincerely

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20 July 2011

att

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**Submission to Standing Committee on Legislation – Inquiry into Local Government (Regional Subsidiaries) Bill 2010**

- *the Department's view as to the specific regulations that will be required in the event the Bill is enacted.*

  *for example, whether the regional subsidiaries should have a corporate status;*

To enable them to carry out their proposed purposes, such as providing services and activities or performing a function of their constituent councils on a regional basis, Regional subsidiaries need to have corporate status.

- *the specific matters that a charter should be required to address;*

The charter of a regional subsidiary should address:

- all of the matters listed in Clause 19 of Schedule 2 of the South Australian *Local Government Act 1999* (the Schedule);
- whether membership of the board of management of the regional subsidiary will include persons who are not elected members of one of those councils;
- whether or not financial interest returns would be required of board members;
- how a quorum of the board of management will be determined;
- if the regional subsidiary is declared by its charter to be involved in a significant business activity, the charter must specify the extent to which the principles of competitive neutrality are to be applied to that activity and to the extent that may be relevant, the reasons for a non-application of those principles.
- requirements regarding the preparation, adoption, review and amendment of the business plan for the subsidiary, including the need for community consultation. (It is noted that in South Australia the requirement for consultation in that regard is with constituent councils only – Clause 24 of the Schedule refers).

- *how the governance and financial provisions should differ for a regional subsidiary than the obligations imposed on a regional local government and the rationale for any difference.*

<u>Governance provisions</u>
An element of flexibility regarding membership of the governing body is a key characteristic of the proposed regional subsidiary model.

Under the terms of the *Local Government Act 1995*, the governing body (the Council) of a regional local government consists of elected members from participant councils only. There are no external members, although a regional council can contract external expertise.

In the case of a regional subsidiary, membership of the governing body (the board of management) would be spelt out in each individual charter and should be able to consist of, or include, persons who are not elected members of a constituent council.

Regarding governance, it is noted that the Schedule contains specific provisions about board members' duties of honesty (Part 3, clause 34) and duty of care (clause 23). Similar provisions should be considered should the model be introduced in this State, because any external board members might not otherwise be subject to the integrity provisions that relate to councillors under the *Local Government Act 1995*.

Another key characteristic of the proposed regional subsidiary model is that it be subject to the joint direction and control of the constituent councils, unlike a regional local government, where accountability rests with the Regional Council itself, unless otherwise stated in its Establishment Agreement.

If the subsidiary is to be subject to the joint direction and control of its constituent councils in this way, a number of governance and reporting issues would have to be covered by regulation, including matters to do with:

- the provision of information and records by the subsidiary to constituent councils on request, and how associated principles of confidentiality and disclosure would be dealt with;

- requirements for annual reporting by the subsidiary to its constituent councils; and

- how actual or potential conflicts of interest on the part of board members who are also elected members of constituent councils would be addressed.

Financial Provisions

Regional local governments established under the *Local Government Act 1995* have local government status under that legislation. Although their level of compliance is somewhat reduced, they are generally subject to all the constraints, responsibilities and requirements that apply to a local government under the Act, including financial provisions.

Regional subsidiaries are not local governments, and regulations could provide for them to have greater flexibility, particularly in relation to borrowings and investments, which could be addressed in the individual charter.

Nonetheless, appropriate safeguards would be needed. The submission from Hon John Castrilli MLA, Minister for Local Government, includes a discussion in that regard.

Additionally, it is noted that in South Australia, section 48 of the *Local Government Act 1999*, which sets out prudential provisions that are to be adhered to by councils, also applies to subsidiaries.

Similarly, the majority of regulations within that State's recently amended *Local Government (Financial Management) Regulations 2011* refer both to councils and to the operation of subsidiaries in relation to accounting and auditing. Further, regulations 8 (*Provision of subsidiary budgets to councils*) and 21 (*Reporting*) of those regulations specifically relate only to the operations of subsidiaries.

Should the subsidiary model be adopted in this State, the *Local Government (Financial Management) Regulations 1996* and the *Local Government (Audit) Regulations 1996* would need to be amended to ensure similar safeguards are provided.

Finally, once again, as mentioned in Minister Castrilli's submission, regulations or guidance notes would be necessary to make it clear that Ministerial approval would not be granted where constituent councils are not able to demonstrate sufficient capacity, governance and management of attendant risks.

**Submission to Standing Committee on Legislation – Inquiry into Local Government (Regional Subsidiaries) Bill 2010**

- *advice as to any differences between the local government and legislative environments in Western Australia and South Australia that may impact on the practical effect of the Bill as distinct from the equivalent South Australian legislation;*

Relevant differences between the local government and legislative environments between the two States include:

- There are fewer local governments in South Australia than in Western Australia, and they are relatively more homogenous than those in this State.

There are two reasons for this.

First, the remote and sparsely populated areas in South Australia are not incorporated into local governments at all, whilst similar areas in this State are subject to local government.

Secondly, even in the more settled areas of South Australia, the overall number of local governments has been significantly reduced as a result of structural reform in recent decades. By September 1998, the voluntary structural reform initiative in that State had delivered a reduction in the number of proclaimed councils from 118 to 68.

The South Australian Local Government Boundary Reform Board noted at that time that the structural reform initiative had facilitated the creation of councils generally larger in size and scope, which enabled them to:

- more adequately and effectively fulfil their statutory obligations;
- increase their capacity to contribute to local and regional economic and community development; and
- expand community and service delivery provision.

In contrast, structural reform has proceeded at a slower pace in Western Australia, with a total number of 138 local governments still in place across the State.

The large number of local governments in this State, and their diversity in terms of size and financial and planning capacity, has implications for the practical effect of the Bill. This is why both the Department and the Minister have suggested that, in Western Australia, Ministerial approval would not be granted for a subsidiary unless constituent councils have demonstrated sufficient capacity, governance, and management of attendant risks.

It is understood that arrangements for regional subsidiaries in their current form in South Australia evolved in tandem with the progression of local government structural reform in that State.

- The South Australian legislation does not provide for the establishment of statutory regional local governments, as is the case in Western Australia.

We have been informed that waste management is the most common function for which regional subsidiaries have been established in South Australia. In Western Australia, the existing statutory regional local government model has been widely used for this purpose.

- The operational structure of the peak local government bodies in the two States appear to be different.

The Office for State/Local Government Relations in the Department of Planning and Local Government in South Australia has advised that a significant number of the regional subsidiaries in South Australia are regional local government associations.

We understand that these were formed to deal with local government matters of regional interest, and are primarily engaged in regional strategic planning and coordination, and advocacy and representation on behalf of the councils of a region. These associations may also run small programs or facilitate some resource-sharing but, in general, they do not raise funds from ratepayers or provide direct services to ratepayers; employ no staff; have no fixed assets, and no long-term liabilities. Their operations are funded by annual subscriptions from constituent councils and grants.

In Western Australia, many of these purposes are fulfilled by Western Australian Local Government Association Zone groupings. It would appear that the Zone structures of the relevant local government associations in the two States operate somewhat differently and, accordingly, the need for a regional subsidiary model may be more imperative in South Australia than in Western Australia.

**Submission to Standing Committee on Legislation – Inquiry into Local Government (Regional Subsidiaries) Bill 2010**

- *comment on the significance of the differences in text between section 43 and Schedule 2 of the Local Government Act 1999 (South Australia) and the Bill.*

*Differences between Schedule 2 of the South Australian Act, and the Bill*

As highlighted in the submission by Hon John Castrilli MLA, Minister for Local Government, the Bill leaves all essential matters regarding subsidiaries to be dealt with by regulation. The South Australian legislation, on the other hand, covers such matters in Schedule 2, that is, within the body of the Act itself. This mirrors the approach taken in the Western Australian legislation in relation to statutory regional local governments, where essential aspects of the model are covered in the Act, rather than in regulations.

In any case, once again, as discussed in Minister Castrilli's submission, even if all essential matters are to be dealt with by regulation, it would be advisable to expand the wording of section 3.69(2) of the Bill to flag some additional key points that need to be covered in regulations. These include:

- requirements for review of individual charters;
- provisions relating to membership of boards of management;
- provisions to do with liability incurred or assumed by the subsidiary, and protection from liability for board members;
- provisions about interest in companies on the part of a subsidiary (see section 3.60 of the *Local Government Act 1995*);
- provisions about a subsidiary's power of delegation; and

- matters to do with potential conflicts of interest by board members who are also councillors, (two clauses of the South Australian legislation specifically address this), and disclosures by board members of subsidiaries.

*Differences between section 43 of the South Australian Act, and the Bill*

In describing the purpose/s for which a regional subsidiary may be established, section 43(1)(a) and (b) of the South Australian Act differentiate between a local government's 'services or activities' on the one hand, and its 'functions' on the other; whilst the Bill (section 3.69) talks about 'functions' only. This difference in wording is not significant, because the meaning of the term, 'function', in the Western Australian legislation encompasses everything intended by the terms used in section 43(1)(a) and (b).

Section 43(2) precludes a regional subsidiary in South Australia from performing both a regulatory activity and a significant and related service activity, whilst the Bill, in contrast, does not address this. In South Australia, the separation of regulatory and service activities is compatible with the overall provisions of the *Local Government Act 1999* regarding the operations of local governments generally. However, such a distinction is not necessary in this jurisdiction, as the *Local Government Act 1995* is framed differently in that regard. Nonetheless, should constituent councils wish to address this issue in relation to subsidiaries, they can do so in the relevant individual charter.