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Caretaker Guidelines

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lga South Australia

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This Guideline has been prepared by the Local Government Association of SA (LGA) with input from Norman Waterhouse Lawyers for the guidance of and use by member Councils.

1 Introduction

Section 91A of the *Local Government (Elections) Act 1999* (the Elections Act) requires councils to prepare and adopt a caretaker policy to govern the conduct of the council and its staff during the election period for a general election.

Section 91A(2) of the Elections Act stipulates that the caretaker policy must at a minimum:

(a) prohibit the making of a designated decision; and

(b) prohibit the use of council resources for the advantage of a particular candidate or group of candidates,

during an election period.

Local Government Association of SA (LGA) has prepared a model caretaker policy on the basis of meeting the minimum legislative obligations under section 91A of the Elections Act. Councils may wish to incorporate additional requirements within any caretaker policy adopted.

Section 91B of the Elections Act requires a council to hold a public meeting of candidates, except where the Council's caretaker policy provides that a public meeting of candidates will not be held. The model caretaker policy includes provisions for use by a council which elects not to hold a public meeting involving candidates for a general election under section 91B of the Elections Act.

These Caretaker Guidelines (the Guidelines) provide an overview of the scope and meaning of the legislative requirements under sections 91A and 91B of the Elections Act and should be read in conjunction with the model caretaker policy. Terms which are defined in the model caretaker policy have the same meanings in the Guidelines.

2 Overview

Section 91A(2) of the Elections Act sets minimum standards for council caretaker policies.

Caretaker policies must at a minimum:

- prohibit the making of a designated decision during the election period; and
- prohibit the use of council resources for the advantage of a particular candidate or group of candidates during the election period.

In considering how the policy applies to the prohibition on making designated decisions, regard must be had to three separate elements. In particular the following must be present:

1) a decision of council;

2) made during an election period;

3) which is a designated decision.

The caretaker policy must also prohibit the use of council resources for the advantage of a particular candidate or group of candidates during the election period.

Section 91B(1) of the Elections Act requires a council, during the period commencing after the close of nominations and before polling day for a general election, hold at least 1 meeting involving any candidates who wish to participate and members of the public relating to issues in the community relevant to the election and to inform members of the public of the policies and views of candidates unless the Council determines such a meeting will not be held.

2.1 Decision of the council

Section 91A of the Elections Act applies to a decision of the council. This will include decisions made directly by the council at a meeting or indirectly through a council committee or other delegate or sub-delegate.

2.2 Election period

During an election period councils are prohibited from making designated decisions. The use of council resources for the advantage of a particular candidate or group of candidates is also prohibited. Council may apply in writing to the Minister for an exemption from the application of this section to a designated decision.

An election period:[1]

(a) commences on either:

(i) the day on which nominations for a general election close; or

(ii) if a council's caretaker policy specific an earlier date, that date; and

(b) expires at the conclusion of the general election.

Section 91A of the Elections Act does not apply to a decision that is announced during the election period but was made prior to the election period.

2.3 Public meeting not to be held

Notwithstanding the provisions of section 91B(1) of the Elections Act, a council may determine not to hold a public meeting of candidates. If a council makes such a decision it must include a provision within its caretaker policy to this effect. The council must also include a statement certified by the principal member setting out the council's reasons for not holding the public meeting of candidates.

[1] Section 91A(8) *Local Government (Elections) Act 1999*

3 Designated decisions

Only specific types of decisions will be designated decisions under section 91A of the Elections Act. The designated decisions are outlined below.

The Elections Act stipulates that any designated decision made by a council during an election period without a ministerial exemption is invalid.

Any person who suffers loss or damage as a result of acting in good faith on a designated decision made in contravention of section 91A of the Elections Act is entitled to compensation from the council for that loss or damage.

3.1 Decisions relating to the employment of the Chief Executive Officer

Any decision relating to the employment, remuneration or termination[2] of the Chief Executive Officer, other than a decision to:

(a) appoint an acting Chief Executive Officer; or

(b) suspend a Chief Executive Officer for serious and wilful misconduct,[3]

will be a designated decision.

3.2 Specific contracting decisions

Certain council decisions regarding specific types of contracts made during an election period will be designated decisions.

Generally, a decision to enter into a contract, arrangement or understanding (other than a 'prescribed contract') the total value of which exceeds whichever is the greater of $100,000 or 1% of the council's revenue from rates in the preceding financial year[4] will be a designated decision. However, there are exclusions from this general position provided in section 91A of the Elections Act and the *Local Government (Elections) Regulations 2010* (the Elections Regulations).

3.2.1 Prescribed contracts

Prescribed contracts are expressly excluded from the types of contracts which are able to be the subject of a designated decision. A 'prescribed contract' is defined in section 91A of the Elections Act to mean a contract entered into by a council for the purpose of undertaking road construction, road maintenance or drainage works.

[2] Section 91A(8) *Local Government (Elections) Act 1999*
[3] Regulation 17(1)(b) *Local Government (Elections) Regulations 2025*
[4] Section 91A(8) *Local Government (Elections) Act 1999*

3.2.2 Exemptions

Other types of contracts are excluded from being the subject of a designated decision by the Elections Regulations. These types of decision are decisions:

(a) relating to the carrying out of works in response to an emergency or disaster within the meaning of the *Emergency Management Act 2004* or under section 298 of the *Local Government Act 1999* (the Local Government Act);

(b) for an expenditure or other decision required to be taken under an agreement by which funding is provided to the council by the Commonwealth or State Government or otherwise for the council to be eligible for funding from the Commonwealth or State Government;

(c) relating to the employment of a particular council employee (other than the Chief Executive Officer);

(d) made in the conduct of negotiations relating to the employment of council employees generally, or a class of council employees, if provision has been made for funds relating to such negotiations in the budget of the council for the relevant financial year and the negotiations commenced prior to the election period; or

(e) relating to a Community Wastewater Management Systems scheme that has, prior to the election period, been approved by the council.

As set out above, the legislation does not prohibit a council from making a type of decision listed in the Elections Regulations. Councils should be mindful however of community perceptions and are encouraged to exercise care before proceeding with such a decision during a Caretaker Period.

4 Prohibition on the use of council resources to give selective advantage

4.1 Scope of the prohibition

A councils caretaker policy must prohibit the use of council resources for the advantage of a particular candidate or group of candidates during an election period. A caretaker policy may however allow the equal use of resources by all candidates for election.

The prohibition does not prevent all candidates, including council members utilising council resources that are available to all members of the public.

Examples of this include a candidate using a council library public computer to design election campaign material and produce copies for distribution on a council photocopier (that is available to

the general public). Candidates should not be given access to council facilities that are not available other candidates.

There are constraints on the personal use of council resources under the Local Government Act and the Code of Conduct for Council Members. These provisions are discussed in section 4.5 of these guidelines.

4.2 What are 'council resources'?

'Council resources' is a broad concept which is undefined in the Elections Act. A general definition of the term 'resources' provided in the *Macquarie Dictionary* is '*the collective wealth and assets of a country, organisation, individual*'. Applying this definition, any asset or information owned or controlled by a council is a 'council resource'.

Council resources may include:

- materials published by council;
- facilities and goods owned by the council;
- attendance and participation at functions and events;
- access to council information; and
- media services.

Council staff and contractors engaged by a council are also council resources.

4.3 Meaning of 'advantage'

The concept of 'advantage' is broad and is defined in the Macquarie Dictionary as *'any state, circumstance, opportunity, or means especially favourable to success, interest, or any desired end'*. In the context of section 91A of the Elections Act, the relevant advantage is in respect of being elected or re-elected.

An advantage will be conferred where council resources can be used, or the permissible uses of the resource favours, one (or some) candidates over others. An advantage arises when a candidate utilises resources, information or support that is not available to a candidate in an election who is not an existing council member.

The Ombudsman has given 'advantage' a broad interpretation. The Ombudsman's view is that any activity that gives a perception of favouring one candidate over another is an advantage.

In previous decisions of the Ombudsman:

(a) A decision to engage an independent contractor to conduct a section 270 review of a procurement decision did not involve the use of council resources for the advantage of a

particular candidate, even though one possible outcome of the review would have assisted or harmed the electoral chances of particular candidates.

(b) A decision to include a mayor's review of the achievements of the council in an 'Annual Review' document sent to households did provide such an advantage.

Whether the scope of the 'advantage' under section 91A of the Elections Act extends to a perceived advantage is likely to be a matter for debate. Councils should, however, be aware of this view when making council resources available during an election period.

4.4 Normal council business or campaigning?

A breach of the prohibition on using council resources for the advantage of a particular candidate:

- can occur inadvertently; and
- does not require a specific council decision.

For example, if existing members of council are provided with a card which enables them to make copies of documents using council photocopiers (including copiers in a public library) and other candidates are not provided with this council resource, this would provide the council member with a (prohibited) advantage if they were permitted to use it for campaigning.

Other examples of council resources that, if used during the election period for campaign purposes, or purposes that would otherwise provide a genuine advantage to the candidate, which would contravene a council caretaker policy include:

- Mobile phones
- Council vehicles
- Council-provided landline phones, computers and other office equipment beyond that provided to members of the public (eg in a public library)
- Council-provided business cards
- Requests to council employees to perform tasks
- The ability to issue invitations to council events
- Council travel arrangements (eg access to council-negotiated rates for flights, accommodation or hire cars)
- Access to areas that members of the public cannot access, including areas within the property of third parties (eg a 'Mayor's Parlour' at a suburban football oval).
- Councils printed materials (e.g. brochures or other documents)

It is reasonable for councils to continue to provide resources where these are necessary for a council member to perform their duties as a council member, *provided* these resources are not used to advantage a candidate or group of candidates. For example:

(a) Access to council facilities, for the purpose of a council meeting. This may include refreshments, if usually provided as an adjunct to council meetings

(a) Access to a secure area of the council website, where council agendas, minutes and other council documents can be obtained.

Where council members are standing for re-election, the council should consider whether the continued provision of council resources during the election period will provide an advantage to existing council members (or other particular candidates) in their election campaigns.

Reasonable minds are likely to differ over whether the use of particular council resources will advantage particular candidates. A council's Caretaker Policy should consider all of the resources made available to council members and should set out which of these will not be available during an election period.

Specific scenario advice is provided in section 4.6 of this Guideline.

4.5 Use of council resources for personal benefit

The use of council resources for personal benefit is distinct from the prohibition against the use of council resources for the advantage of a particular candidate or group of candidates.

The use of council resources for personal benefit is regulated by legislation other than section 91A of the Elections Act. However, as the use of council resources by a council member for the purposes of an election campaign will be a use of those resources for personal benefit, the same activity may be regulated by both sets of rules.

Council members standing for re-election to council must take care that they only use council resources for normal council business and not to assist them in campaigning.

The general duties on council members under section 62 of the Local Government Act include offences for improper use of information[5] or position[6] to gain personal advantage for the council member or another person.

Section 78 of the Local Government Act provides for the use of council resources by council members. Section 78(3) of the Local Government Act states:

> *A member of a council must not use a facility or service provided by the council under this section for a purpose unrelated to the performance or discharge of official functions*

[5] Section 62(3) *Local Government Act 1999*
[6] Section 62(4) *Local Government Act 1999*

or duties (unless the use has been approved by the council and the member has agreed to reimburse the council for any additional costs or expenses associated with this use).

The use of council resources for personal benefit in breach of these requirements could be corruption in public administration for the purpose of the *Independent Commission Against Corruption Act 2012* (SA) or maladministration or misconduct for the purpose of the *Ombudsman Act 1972* (SA) and be the subject of a complaint to the office of Public Integrity **(OPI)** or Ombudsman respectively.

Conduct of a public officer that results in a substantial mismanagement of public resources may also be the subject of a complaint to the Ombudsman.

Disciplinary consequences or prosecutions may ultimately result from the unauthorised use of council resources for private purposes.

4.6 Specific council resource scenarios

The business of a council does not cease during an election period. Council resources will continue to be used during the election period. There is a distinction between the use of council resources in the ordinary course of council operations and the use of council resources by a candidate or group of candidates for campaigning purposes. Where resources are used for campaign purposes, this will be the use of council resources for personal benefit.

During an election period, council members and council staff must take care that council resources are not used for the purpose of election campaigning. Some specific scenarios are discussed below where this issue may arise.

4.6.1 Council publications during an 'election period'

The publication by a council of information for the advantage of a particular candidate or group of candidates is prohibited by section 91A of the Elections Act. Publishing includes publication by any medium, including but not limited to leaflets, newspapers, posters, email, websites, radio or television.

Councils have a statutory responsibility to publish certain information regarding general elections. Under section 12(b) of the Elections Act, each council is responsible for the provision of information, education and publicity designed to promote public participation in the electoral processes for its area, to inform potential voters about the candidates who are standing for election in its area and to advise its local community about the outcome of the elections and polls conducted in its area.

All election materials published by a council should fall within the types of material described in section 12(b) of the Elections Act and not contain any material which would advantage a particular candidate or candidates.

'Electoral material' is defined in the Elections Act as '*an advertisement, notice, statement or representation calculated to affect the result of an election or poll*'. Given that the purpose of electoral material is to persuade voters towards a particular candidate or group of candidates, it will not be appropriate for a council to publish electoral material.

Councils may publish other material during an election period. If council is considering publishing or distributing material during the election period, the council should consider whether or not the material would confer an advantage on a particular candidate or group of candidates for election. If an advantage would be conferred, then the material should not be published or distributed.

Where a council publication made in the ordinary course of council operations would be published during an election period, care should be taken as to the contents of these publications, to ensure that the council and council members are not criticised for publishing information which may assist or hinder the electoral prospects of particular candidates.

Council members are able to publish electoral material on their own behalf (provided that they comply with sections 27 and 28 of the Elections Act). Council members should not assert or imply that the electoral material originates from or is endorsed by the council. A council member also should not use council resources (not available to the general public) to create or distribute his or her electoral material, including through the use of council stationery, computers, printers, photocopiers or staff or the application of council logos.

4.6.2 Attendance at Events and Functions

Events and functions can take many forms including conferences, workshops, forums, launches, promotional activities, and social occasions (such as dinners, receptions and ceremonies).

Council members can continue to attend events and functions in their capacity as a council member during an election period provided that their attendance is consistent with the ordinary course of a council member's duties and is not used for campaigning.

Council members should consider whether or not their attendance at an event or function is likely to be viewed as campaigning. In part, this may depend on the conduct of the council member while in attendance at the event or function. Care should particularly be taken by council members if they are asked to give a speech at an event or function during an election period (other than at any public meeting of candidates).

4.6.3 Access to council information

Section 61 of the Local Government Act provides council members with a right to access council documents in connection with the performance or discharge of the functions or duties of the member. This right of access continues during an election period.

Council members should take care that access to council documents is in connection with the performance or discharge of their functions or duties of the member. Access to council documents for the purpose of campaigning or to gain an advantage in an election is an improper use of information gained by virtue of the council member's position as a member of council.

4.6.4 Media Services

Council's media services should be used to promote council activities or initiatives or community activities or initiatives which are endorsed or otherwise supported by council.

Media services should, during the election period, be used in the ordinary course of council operations. Care should be taken that media services will not be used to advantage a particular council member in his or her re-election campaign by profiling that member or activities which are closely associated with that member.

Council members should not use their position as an elected representative or their access to council staff and other council resources to gain media attention in support of an election campaign. To do so, would contravene section 62(4) of the Local Government Act which prohibits a council member improperly using his or her position as a council member to gain, directly or indirectly, an advantage for himself or herself or for another person. Council members can be prosecuted for this offence.

Access to media monitoring is likely to confer a campaigning advantage on recipients of monitoring reports. Media monitoring can be useful to council members in the performance of their official duties but is not usually essential. Councils should carefully consider suspending the access of council members to media monitoring during an election period.

4.6.5 Public consultation during an election period

Public consultation (sometimes called 'community engagement') must be undertaken during an election period if the consultation is mandated by legislation.

Where consultation is discretionary then the consultation can occur during the election period. Consideration should be given prior to the consultation being scheduled as to whether or not the consultation will influence the outcome of the election. If the matter subject to the consultation is likely to be closely associated in the minds of voters with a particular candidate

or group of candidates, then it may be prudent to delay the consultation until after the election period.

4.6.6 Expenses incurred by council members

Payment or reimbursement of costs relating to council members' out-of-pocket expenses incurred during an election period will only apply to necessary costs that have been incurred in the performance of normal council duties. This is consistent with general requirements applying to the reimbursement of council members under section 77 of the Local Government Act.

No reimbursements should be provided for campaign expenses or for expenses that could be perceived as supporting or being connected with a candidate's election campaign.

4.6.7 Council branding and stationery

Councils should not endorse particular candidates for election. Council logos, letterheads, or other council branding or council resources or facilities should not be used for a candidate's election campaign.

4.6.8 Support staff to council members

Council staff who provide support to council members should not be asked to undertake any tasks connected directly or indirectly with an election campaign for a council member, except where similar support is provided to all candidates.

In some councils, Mayor's will have access to support staff for assistance with email and diary management and coordination of activities related to the performance of their role. During an election period it is important to ensure clear separation of 'business as usual' (e.g. acknowledging or responding to emails received, coordinating calendar appointments) and campaigning activity (e.g. preparation and distribution of campaign flyers) and that council staff do not provide any assistance with the latter.

4.6.9 Equipment and facilities

Council resources such as council computers, stationery and business cards can continue to be used by council members during an election period for **normal council business**. For example, use of a council provided device to receive and read an electronic copy of the council agenda and use of the device during the council meeting. Council resources should not be used for campaign purposes, for example, use of the council provided email address and the council device to email a newsletter to community groups seeking their support in the election, as this will contravene the Local Government Act and the Code of Conduct for Council Members.

5 Council staff activities during an election period

Council staff should not undertake any activity that may influence the outcome of an election, except where the activity is required to facilitate the conduct of a fair election process or is otherwise authorised or required by law, and is authorised by the Chief Executive Officer.

Council staff should not authorise, use or allocate a council resource for any purpose which may influence voting in the election, except where it is required to facilitate the conduct of a fair election process or is otherwise authorised or required by law, and is authorised by the Chief Executive Officer. This includes making council resources available to council members for campaign purposes.

See below the specific requirements applicable to councils holding public meetings of candidates.

Council staff must not assist a council member with the member's election campaign during hours of work. Whilst it is not illegal for council staff to assist a council member with the member's election campaign in their own time, such campaign assistance creates reputational risks for the staff member, the candidate, the council and for the integrity of the election process.

Where an unauthorised use of council resources could be construed as being related to a candidate's election campaign, the incident must be reported to the Chief Executive Officer.

6 Equity of assistance to candidates

6.1 Candidate Assistance and Advice

Councils should not favour a candidate or group of candidates for election, over other candidates.

Any assistance or advice provided to candidates as part of the conduct of an election will be provided equally to all candidates.

For example, if a council intends to provide information sessions for potential candidates, as far as practicable, the same information should be provided to all candidates.

Existing council members or other candidates should not be provided with additional information that would confer an electoral advantage (eg a heads up about a State MP's street meeting or information about an agenda item coming up on the agenda of a meeting of an influential community group).

The types of assistance that are available will be documented and communicated transparently to all candidates in advance.

6.2 Election Process Enquiries

All election process enquiries from candidates, whether current council members or not, are to be directed to the Electoral Commissioner as the returning officer or, where the matter is outside of the responsibilities of the returning officer, to the Chief Executive Officer or his or her nominee.

7 Public meeting of candidates

7.1 Holding a public meeting of candidates

The default position under the Elections Act is that a public meeting of candidates is to be held for each general election. If a council proposes to hold a public meeting of candidates, it is not required to include anything within its caretaker policy to this effect.

The public meeting of candidates must occur after the close of nominations and before polling day for the general election. A council must hold 1 public meeting of candidates, at a minimum, but may hold additional meetings as it sees fit. All candidates in the general election must be given an opportunity to attend any public meeting of candidates held, although there is no requirement that they actually attend.

A public meeting of candidates must be presided over by the council's chief executive officer, or a person appointed by the chief executive officer. The person appointed by the chief executive officer must not be a candidate in the general election. The person presiding is responsible for ensuring the orderly and efficient conduct of the meeting, and has the powers in section 18A of the *Summary Offences Act 1953* to deal with disorderly conduct at such a meeting.

The Elections Act does not prescribe any minimum requirements relating to a public meeting of candidates. Councils holding a public meeting of candidates should therefore determine the format, agenda, timing (within the required period) and location of the meeting, and ensure that opportunity is provided for the meeting to address issues in the community relevant to the election and for the public to be informed of the policies and views of candidates. Issues of equity, fairness and convenience should be taken into account when decisions of this nature are made.

A public meeting of candidates may be held remotely using audio visual technology or any other means of communication determined appropriate by the council. Candidates and members of the public are not required to be physically present at the meeting.

7.2 Not holding a public meeting of candidates

The requirement to hold a public meeting of candidates does not apply if the council's caretaker policy:

- provides that a public meeting of candidates will not be held in respect of general elections; and
- includes a statement, certified by the principal member, setting out the council's reasons for not holding a public meeting.

It is a policy decision for individual councils as to whether to hold a public meeting of candidates. Councils that determine not to hold a public meeting of candidates must adopt a revised caretaker policy which specifically complies with the above requirements.

The Elections Act does not specify any basis upon which a council may determine not to hold a public meeting of candidates and so it is for individual councils to determine their own reasons and include them within the caretaker policy.

Some possible (non-exhaustive) reasons why a council would not hold a public meeting of candidates include:

- the council is satisfied that a meeting equivalent to a meeting of candidates is to be arranged by another person, body or group within its area;
- the council has determined that the costs of arranging and holding a meeting of candidates outweighs the benefits of such a meeting;
- the council is satisfied that the other statutory mechanisms provided for in the Elections Act for informing members of the public of the issues in the community relevant to the election and of the policies and views of candidates are sufficient to allow electors to make informed decisions at the election; and/or
- the council considers that the task of informing members of the public of the issues in the community relevant to the election and of the policies and views of candidates is best left to individual candidates, rather than the council.

The statement setting out the council's reasons for not holding the public meeting of candidates must be certified by the council's presiding member. In order to comply with this requirement, the presiding member should sign the policy immediately below the statement of the council's reasons as soon as practicable after the council adopts the reasons.

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