

Accredited Professional Schemes Discussion Paper

Submission

April 2018

LGA Submission on the Accredited Professionals Scheme Discussion paper

About the LGA

The Local Government Association of South Australia (LGA) is a membership association representing the State's 68 councils. The LGA's mission is to provide leadership support, representation and advocacy on behalf of South Australian councils, for the benefit of the community.

LGA position on the Accreditation of Professionals

The LGA has consulted with the State's 68 councils and welcomes the opportunity to comment on the Accredited Professional Schemes Discussion Paper.

The LGA understands that the Planning, Development and Infrastructure Act 2016 (PDI Act) enables the Minister to establish an accreditation scheme for planners, building certifiers and other industry professionals involved in making planning decisions.

The concept of having an accreditation scheme in place is to ensure a high degree of professionalism and accountable decision making is supported. An accreditation scheme can be further supported by the Codes of Conduct for Council Assessment Panels, which are currently in place. The creation of a centralised system has the positive aspect of bringing these together in a more focussed way and will provide transparency to the public by publishing accreditations online.

The benefits of a Professional Accreditation Scheme from the LGA's perspective are:

- Good urban and regional planning can only be achieved by planning professionals with a broad but particular mix of skills and knowledge not found in other professions. An accreditation scheme will enable planners to demonstrate their competencies and their commitment to professional growth, development and ethical practice;
- Sound decision making by planners and building certifiers which allows the community and all levels of government to have confidence in the quality and professionalism of planners in the system; and
- Ensure sound decision making by an appropriately qualified and experienced planners and building professionals.

The LGA believes a number of key matters need to be addressed to enable the Scheme to be successful. These issues are discussed below.

Financial Implications of the Scheme

It is noted from the Discussion Paper that the Scheme will involve various costs and fees, which include:

1. On-going training and development for professionals;

2. Insurance;
3. Accreditation fee;
4. Registration fee; and
5. Renewal fee.

While the LGA recognises that there will be costs involved in ensuring professionals maintain and enhance their skills, the LGA is concerned that many of these costs and fees may be incurred by both professional staff and/or councils and that these fees have not been clearly articulated.

The LGA is concerned that if these costs are borne by councils, it will place further cost pressures on councils at a time when the new State government has advised of its intent to pursue a council rate capping policy.

The LGA is also concerned at the further impacts on regional councils where it is likely they will be exposed to significant additional costs in order to attract professional staff.

There may also be longer term budget impacts (either favourable or unfavourable) on councils as a result of the new Act as a far greater percentage of assessment functions which have traditionally been undertaken by councils may be increasingly outsourced to Accredited Professionals.

An understanding is sought as to whether it is proposed, or being considered, that the cost of the Scheme borne by the State government would be included as an additional fee on every development application. Noting the potential benefits for applicants, consideration should be given to including an additional fee on all development applications to reduce the overall cost for the state government, local government and professionals.

The LGA is of the view that the various fees and costs should be clearly identified prior to the Scheme being adopted and to reduce the administrative cost for councils, any new fees be incorporated with the fees to be charged to councils in connection with the E-Planning system.

Administration of the Scheme

The LGA notes that there are existing professional bodies that currently provide accreditation for professionals. These bodies include PIA, AIBS and RICS amongst others. The LGA understands that while these bodies exist and have accreditation schemes, there is a proposal for the government to establish its own accreditation program.

The role of the state government is to accredit those bodies wishing to provide accreditation services and not establish a separate system. The establishment of a State based scheme is likely to further add to the overall cost of the Scheme, which would then most likely be passed on to local government and the professionals to be accredited.

The establishment of an Accredited Professional Scheme recognised under the Act, provides the opportunity for the market place to consider whether it wishes to provide these services or not. Professionals seeking accreditation can make choices through the market place as to which provider to use. These decisions can be based on cost or level of service.

In relation to the proposed renewal and training processes, it is considered that annual renewal requirements are too frequent and will create significant and unnecessary costs and

administrative burdens on council staff and panel members. It is recommended that renewal processes occur every two to three years. In addition, mandatory training should be focused on key knowledge for the role and be based on competency testing, interviews or other approaches, rather than lengthy and costly study modules.

Commencement of the Scheme

An incremental role out of the Scheme is supported due to the additional costs and administrative processes likely to be imposed on councils. It is however, recommended that the proposed introduction of panel members in 2019 be aligned instead to the conclusion of current sitting terms. It would be inefficient and costly for councils to introduce new processes and expenditure on fees prior to the end of a sitting term.

Better Decision Making

The LGA notes from the Discussion Paper that one of the benefits of the Scheme will be better decisions, as it 'will provide increased confidence for development applicants and communities that decisions are being made by qualified and experienced professionals.' While the LGA agrees in part with this statement, we believe that to enable full confidence in the planning system the following should occur:

1. State Commission Assessment Panel – the LGA observes that while there is a requirement for independent members of Council Assessment Panels to be accredited, the same does not apply for members of the State assessment panel. This approach is inequitable and does not provide for full confidence in the planning system. It is understood that the reasoning for the current decision not to require accreditation of State Commission Assessment Panel members (SCAP) members is due to the fact they are appointed by the Minister and the Planning, Development and Infrastructure Act identifies the expertise required. For consistency and transparency, the proposed Scheme should not set a higher standard of requirement for Council Assessment Panels through accreditation, registration, annual fees, annual continuing professional development training and auditing, complaints and investigation than required for the State Commissions Assessment Panel that makes decisions at a higher level of complexity under the Act.
2. Expansion of the Scheme – the current proposed Scheme applies only to those professionals assessing and making the decision on the application. The LGA contends that having a planning system where the community as a whole can have confidence in the Scheme should be extended to include:
 - a. Policy development – the proposed Scheme does not provide an accreditation requirement for planners engaged in the preparation or amendment to planning policy. With the emphasis in the new planning system of 'getting the policy right' to reduce conflict at the assessment stage, no accreditation requirements for policy planners is considered to be a significant flaw in the system. While it is noted that there is a proposal for a Practice Direction requiring a person or entity preparing or amending a designated instrument, (Code) to have received and considered the advice of an accredited planning professional for the

purposes of transparency and clarity, all professionals whether undertaking assessment or policy, are required to be accredited and meet the requirements of the Scheme.

- b. Providing advice on applications – these are a range of professionals who provide advice on applications on behalf of the applicant, these include arborists and traffic engineers. Councils are often required to seek further independent advice in relation to reports provided by external experts, which adds further cost and time to the assessment of applications. This could be overcome to some extent if these professionals were also accredited under the scheme and were then subject to professional code of conduct requirement and the complaint system where it was seen that their professional advice was not consistent with the planning policy.
- c. Private Certifiers – it would appear that Private Certifiers will only require limited experience (planning degree and one year experience) to enable them to be accredited at level 3 with the anticipated function being to ‘confirm accepted developments and code assessed which is deemed to satisfy specific areas or classes of development’. The LGA does not support this proposition. Noting that with local government planners there will generally be an Assessment Manager with a minimum of 5 years’ experience confirming the decisions made by others, this does not appear to be the case with Private Certifiers. The LGA contends that making decisions on whether a development is accepted or not should not be left to Private Certifiers with limited experience. It is recommended that Private Certifiers be required to have the same qualifications and experience as Assessment Managers.

Regional Councils

The LGA is concerned about the potential impacts of the proposed Scheme on regional councils. These concerns relate to:

- Costs, as previously identified above.
- Staff – the LGA understands that there would be professional staff in regional South Australia who may experience difficulties in meeting the accreditation requirements. It is noted from the Discussion Paper that the proposed Scheme should allow appropriate dispensation. The LGA is supportive of this approach but seeks further information on how the dispensations would be determined to ensure that an approach is equitable and does not have a negative impact on staff involved. It is recommended that where dispensation is granted a condition or notation be placed on the person’s accreditation.
- Council Assessment Panel Members – Regional councils can have difficulty in attracting members for their Assessment Panels. The requirement for independent members to be accredited could make this role more difficult to fill in regional areas. In addition, regional councils often seek independent members with different skills - for example Natural Resources Management. The Scheme should provide for dispensation to enable regional councils to attract panel members.

Insurance

The LGA notes from the Discussion Paper that ‘for local government staff and their assessment panel members it will be assumed that this is covered under the Mutual Liability Scheme. Regulations will be drafted to reflect this, as well as the minimum requirements of insurance’. The LGA has sought advice from the Mutual Liability Scheme on this assumption and the following advice has been provided:

“The Accredited Professionals Scheme Discussion Paper intimates that the **Regulations being drafted** will provide that *Accredited Professionals who are council employees or Council Assessment Panel members do not need to obtain private insurance cover as their liabilities are "covered under the Mutual Liability Scheme"*. This is broadly accurate but potentially misleading because the legislative effect is not that simple.

Accredited Professionals who are council employees will be protected from personal liability by operation of *s121 of the Local Government Act 1999* as long as in doing so they are acting honestly in the exercise, performance or discharge of powers, functions or duties under the Planning, Development and Infrastructure Act. There is no Regulation required to confirm that – the Local Government Act provides for this.

With respect to *Accredited Professionals who are appointed as members of council Assessment Panels but are not Council employees*, **there is a gap**. Currently the legislation does not provide an express personal immunity, even though the legislation does state that the liabilities associated with the activities of the CAPs are the responsibility of the appointing council, there is no equivalent to s121 of the Local Government Act (or to s56A(10) of the Development Act 1993).

The personal immunity wording in s121 of the Local Government Act immunity sets out:

LOCAL GOVERNMENT ACT 1999 - SECT 121

121—Protection from personal liability

(1) No civil liability attaches to an employee of a council for an honest act or omission in the exercise, performance or discharge, or purported exercise, performance or discharge, of powers, functions or duties under this or other Acts.

(2) A liability that would, but for this section, attach to an employee of a council attaches instead to the council.

The wording of the Development Act equivalent to cover a non-employee CDAP member is (s56A):

(10) A member of a council development assessment panel incurs no liability for an honest act done in the exercise or performance, or purported exercise or performance of powers or functions under this Part

together with:

(25) A council is responsible for any costs, expenses or liabilities arising in relation to the activities of its development assessment panel (but a council is not

responsible for any liability arising from anything done by a member of a panel that is not within the ambit of subsection (10)).

While this does not assure the Local Government Association Mutual Liability Schemes' (LGA MLS) cover for the individual, it does provide a statutory immunity for that individual, and when that applies, the LGA MLS will cover any liabilities transferred to the employing, or appointing, council.

Note the *Development Act* provision expressly protects the council from any liability from panel members' actions where the personal immunity does not apply.

The PDI Act already contains an equivalent to s56A(10) in s83(1)(h)(ii) of the new Act, **but does not contain the personal immunity** as currently in s56A(25).

If the Act or Regulations include both components – the (conditional) personal immunity and the transfer of liability to council as in both examples above, will mean that all CAP (i.e. appointed by council) members will be protected, and all council employed Assessment Panels will be protected, and any civil liability they create will rest with the council who are in turn members of the LGA MLS.

Operation of the immunity can only be assessed on a particular event / loss / liability and an enquiry/register of cover will assist, if the legislation includes the above provisions.

From the advice provided by the LGA MLS it is identified that the Planning, Development and Infrastructure Act requires amendment to include the existing provisions of the Development Act as identified above'.

With these changes included, it will be necessary to inform local government staff and assessment panel members that:

Accredited Professionals honestly performing roles as members of Council staff or members of Council Assessment Panels are protected from personal liability by the legislation. Any liability to third parties arising from the exercise of those statutory responsibilities are instead liabilities of the employing/appointing Council which is required to have civil liability cover.

In addition induction training should highlight that the regular protections from personal liability contained in the Local Government Act and, if added, the Planning Development and Infrastructure Act, will not protect the employee / CAP member if they act other than honestly or outside of their purported powers, functions and duties (including, for example, while they are acting in a different external/private role).

The discussion above on insurance highlights a flaw in the proposed Scheme, as for Independent Assessment Panel members to gain accreditation they will be required to obtain their own personal public indemnity insurance. While this is relevant and necessary for those independent members who may require it for other purposes, the requirement for public indemnity insurance for independent panel members who are not undertaking private certification or other activities requiring public indemnity insurance (for example a retired planner) is unnecessary as they would be covered by the LGA MLS as a member of the panel. The requirement is also an additional cost burden making it less likely that they will seek

membership of a panel. It is recommended that an exemption from requiring public indemnity insure be provided to those seeking membership of the Assessment Panels.

Land Division Accreditation

This aspect of the Scheme is not supported as land divisions often give rise to further issues, for example access, land contamination, stormwater management, and native vegetation. The ability for a contracted Surveyor Of Accredited Professional is not supported and this assessment power should remain with councils.

Delegated Powers

Under the proposed Scheme, accreditation is not required for council staff acting under delegation from the Assessment Manager or Assessment Panel. While the Discussion Paper does not make this clear, this is assumed to relate only to planning assessments. The regulations, which are yet to be drafted, should clarify this requirement as applying to only appropriate levels of planning assessment (Code Assessed and Land Division)

Assuming this will be limited to planning functions, further details will need to be developed to demonstrate how this applies in a practical sense.

Auditing and Compliance

The opportunities for a review of a decision are wide and varied. Consideration needs to be given to the possibility of multiple and concurrent challenges under these many processes and the parameters for which the various arbitrators will consider the grounds for review.

The Discussion Paper identifies that an unintentional lapse of accreditation will result in planning permissions being suspended until the accreditation is reviewed. This requirement provides further support for extending the renewal period.

It is also recommended that advice be sought to understand the legal ramifications of a decision made by a person or panel where a lapse of accreditation existed.

Building Accreditation

Level 3 Building Certifier should be equivalent to the current Building Surveying Technician level (i.e. maintain the same function in being able to assess and inspect all classes of buildings up to 500m² floor area, not be limited to assessing Class 1 and Class 10 buildings).

The proposed amendments would impact Councils who currently employ only Building Surveying Technicians – the Council would no longer be able to assess or inspect buildings other than Class 1 or Class 10.

The amendments would require some Councils to employ more highly qualified staff (i.e. Level 2 Building Certifiers), where it is already difficult to attract appropriately qualified professionals to regional areas.

Employment of graduate Building Certifier professionals at regional Councils is beneficial to the professional and to Council – the professional is exposed to a variety of classes of development and it is often easier to attract graduates to regional areas than more experienced professionals. The requirement for Councils to employ Level 2 Building Certifiers in order to be able to assess all classes of development would reduce the number of job opportunities for graduates and further impair the ability of regional Councils to attract suitably qualified professionals.

Summary

Recognising the importance of the Accreditation Professional Scheme on our member councils and also the staff within the councils the LGA would seek to continue working with the State Government on the development and implementation of the Scheme.

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