

Proposed recording and live streaming of local government council and committee meetings

By Denis McLeod

The issue: proposed recording of council meetings

In Western Australia there has been a long running debate on the question of whether Council meetings should be streamed live online, with the recordings being made available to electors by uploading to the local government's website as soon as practical, and maintained online as an archive.

After more than 40 years as a lawyer acting for and against local governments, I have formed the firm view that any recording of Council and committee meetings should be used for the purpose of confirming the correctness of the Minutes of meetings, but should not be otherwise published. The Minutes should then remain available as the public record of the meetings.

The article that follows provides an explanation of that view. As a starting point, my view is premised on acceptance of the proposition that local government is a worthwhile institution that should be preserved and encouraged, and not presented with obstacles calculated to discourage the participation of well intentioned men and women of good sense. Perhaps not all Council members are in that category, but my proposition is that the significant majority who are, should not be discouraged from participating.

The Westminster System of Government

Discussion of the meeting recording and live streaming issue should start with recognition of the basic principles of the Westminster System of government, which apply to the WA State Government, and which focus principally on the three

distinct branches of government, being:

1. Parliament: which makes laws to facilitate government. Under s.2(2) of the Constitution Act 1889 (WA) (Constitution Act), the Parliament in WA consists of the Monarchy, Legislative Assembly and Legislative Council.
2. Executive: which administers the government in accordance with the laws. (The Cabinet is the effective part of the Executive, which is subject to the strict conventions of Cabinet confidentiality and solidarity).
3. The Courts and Tribunals: which interpret the laws and apply them to resolve disputes. (S.54 of the Constitution Act ensures the independence of Supreme Court judges, which generalises to all the States' judicial persons and tribunals).

Not only are those three branches of government intended in principle to function separately, but they are in fact administered separately. Local Government within the Westminster System

Local Government within the Westminster System

Although Local Government operates within the Westminster System, there are critical features and differences, including the following, that go some way to explain why Council meetings should not be streamed live online, etc, as some critics propose:

1. The Council of a local government may perform in any given meeting the role of all three branches of government: government's laws including

(a) Legislative function of Council:

Council makes and amends the local government's laws including:

- local laws; and
- planning schemes.

(b) Executive functions of Council:

Council performs the same function for its district as State Cabinet performs for the State.

(c) Judicial functions of Council:

Council makes quasi-judicial decisions, such as determining applications for planning approval. In doing that a Council is expected to act like a Court or tribunal by complying as far as possible with principles of judicial fairness. A difference here is that unlike Courts and tribunals, a Council's deliberations are required to be in public, and determined by majority vote, which requirements impose special rigors on Council members who are:

- part-time in their Council role;
- essentially untrained in legal and judicial process and principles; and
- subject to popular election and re-election (unlike judges and tribunal members).

2. Council acting as the Executive branch of local government makes decisions on policies and strategies of government and on contract and financial issues like the Cabinet in the State Government, but in stark contrast its deliberations are required to be in public, and Councils do not have the protection of Cabinet confidentiality and solidarity.

3. So far as Councils' quasi-judicial functions are concerned, Council members are expected to explain, discuss and debate their opinions as they evolve, in public meetings, and their decisions are made by majority vote in open ballot. This is in stark contrast to the privacy and confidentiality of judicial and tribunal members' deliberations towards reaching a decision.

4. Unlike all members of the judiciary in Australia, Council members are popularly elected, and must be prepared to defend their public decisions to their electors at the four-yearly Council elections. A decision properly made consistent with planning and legal principle may nevertheless be very unpopular with the electors. Council members who act properly, but contrary to the wishes of the electors, have a burden of explanation to electors going beyond the requirement of judges and Tribunal members to give reasons for their decisions, and they don't have to be concerned about electoral consequences of their decisions.

5. Council members are subject to very strict laws on financial interest, and impartiality interest, which by comparison are only very loosely and weakly applied to members of Parliament. State political parties can receive very substantial and regular donations from lobby and pressure groups which would result in serious penalties in the case of local government Council members.

6. Council members do not enjoy the protection of absolute privilege from actions for defamation for what is said in their meetings, in stark contrast with the protection of absolute privilege enjoyed by members of Parliament for what is said in their sessions.

The above comments demonstrate that the fundamental features of the local government system necessarily expose it already to a high level of public scrutiny that makes it a very difficult process to participate in, and to function effectively.

Comparison of Council Executive functions with State Government Executive functions

The Council in its role as the Executive must discuss matters critical to good government, in open Council, where similar issues dealt with by the State Government Executive would be discussed and decided strictly behind closed doors, and the proceedings would be protected by the conventions of Cabinet confidentiality and solidarity. For a Council to have those essentially confidential discussions streamed online, etc as the critics propose, would make the process all the more onerous and complex for the Council. Consider what the reaction of the Premier and Cabinet Ministers would be if the public insisted Cabinet meetings be open to the public, much less streamed online.

The professional politicians in State Government are not required to cope with that. Yet the current debate would expose the part-time, non-professional, essentially unpaid Council members, to that rigour. That doesn't seem reasonable or fair.

Comparison of Council Quasi-judicial functions with Courts and Tribunals

The unreasonableness and unfairness is even clearer when it comes to Council's quasi-judicial functions, which apply whenever the Council is deciding on planning and building applications, and applications for a wide range of other licences, permits and approvals. Council members are expected then to perform their functions in a judicially correct way. Yet unlike all Courts and tribunals, Council members are required to discuss their thinking in public, which goes a long way beyond the normal requirement that judges give reasons for their decisions. Of course Councils must give reasons for their decisions, as judges must, but consider what the reaction of judges and tribunal members would be if the public insisted that judges and tribunals conduct in public their deliberations and the steps in their consideration of a case, much less produce a transcript of their confidential deliberations.

The highly trained lawyers and other professionals who serve as judges and tribunal members are not required to cope with that. Yet the current debate would expose the part-time, non-professional, essentially unpaid Council members to that rigour. That doesn't seem reasonable or fair.

Council's Legislative function

There may presently be some argument for a Council's legislative function to be held in public, and perhaps, unlike Parliament, streamed online, etc. The fact that Council members are not protected from defamation action by absolute privilege is probably a strong enough argument against that, and it is certainly an adequate argument against streaming of debate online, etc.

Consider then the contrast with the position of members of Parliament. Many of them do not speak on any issue in Parliament from month to month. And when they do wish to speak on legislation, they generally have much time to prepare their speeches, and they generally have research assistants available, and can prepare speeches for weeks in advance. By comparison, Council members attend ordinary Council meetings once or twice each month, and also special meetings and committee meetings, and from time to time electors and public meetings. At any of those meetings many issues could arise calling for discussion and debate by the Council members. At an ordinary Council meeting, there may be dozens of matters before the Council which call for debate and a vote by Council members.

Is it reasonable to suggest then to the Council members that every word they utter in the process of deliberations will be recorded and streamed online, and recordings made available to any member of the public who might decide to put their every word under microscopic scrutiny. Not even well prepared professionals or legal experts could reasonably be expected to withstand that kind of scrutiny, without the potential for regular embarrassment, and criticism and perhaps recrimination and Court action.

Likely consequences of recording or live streaming of Council meetings

A possible effect of introducing that kind of scrutiny would be that the detailed thinking and reasoning of Council members would go underground. Rather than giving the benefit of their deliberations to the members of the public who care to attend a meeting, they may make their decisions for their own private reasons, and not attempt to explain or discuss those reasons in the public forum. That would be dramatically bad for the system of open local government. Another consequence would be to force Councils to do all their effective work, and to carry on their real debate, in non-formal Council briefing sessions or the like, which are not required to be open to the public. That could also be quite adverse for the system of open local government. More significantly, exposure to that level of scrutiny and risk is likely to function as a significant disincentive to persons interested in election to the office of councillor, which would undermine community participation in local government.

Other considerations

There are other considerations worthy of brief mention including:

- Members of the public, at Council meetings are able to speak in question time and on deputations or representations on issues arising at Council meetings. The Council has no control over their comments, but the recording and live streaming of the proceedings could result in the local government being liable in defamation for the republication of defamatory remarks, or being otherwise responsible for insulting or malicious comments.
- On listening to a recording of a Council meeting, it is often difficult to identify the person responsible for a particular comment. That is likely to lead to confusion and complications, with the local government being required to identify speakers in order to deal with complaints.
- To expect a local government to edit the recordings of meetings to guard against defamatory or otherwise hurtful comments, and to identify speakers, would place an unreasonable burden on the local government administration. There would be a further burden of work and expense in obtaining legal advice on possible defamation.
- A Council acts as a collegiate body. The views of individual Council members are for practical purposes irrelevant. The only view that counts is that expressed in a resolution of the Council. To record and stream live the comments of individual Council members during debate has the potential to deflect attention away from the most important statement on the topic, which is the resolution passed by the Council and any reasons it identifies for its decision.
- Even newspapers would not contemplate allowing its reporters to present their views on a topic in a direct recording of their thinking processes, without the opportunity for careful independent editing and the possibility of scrutiny by the newspaper's lawyers. That applies no matter how well the reporter may have researched the topic.
- The threat of Court action for defamation can be a very disturbing prospect for a Council member whose personal and family assets may be at risk. A wealthy/powerful or vexatious complainant may press even a bad action through lengthy and expensive litigation processes, and the fact that the action may ultimately fail is little consolation to a Council member whose life for months or years may be dominated by the presence and risks of the action.
- Any member of the public interested in an issue to be considered at a Council meeting can and generally will attend the meeting. Many of those who press for recording and live streaming of the proceedings online may be more interested in targeting Council members whose views they wish to criticise, than to inform themselves on the issues.

- Those concerned about the standard of debate at Council meetings are presumably intelligent and sensitive persons. They are the very people who should offer themselves for election to that important public service. That should improve the standard of debate far more effectively than recording and live streaming of meeting proceedings, and will be of more benefit to the public.

Conclusion

Those are some of the reasons for my view that Council meetings should not be streamed live online, with recordings made available to electors by uploading to the local government's website as soon as practical and maintained online as an archive. For the reasons I have discussed above, in my opinion the minutes of Council meetings should remain as the basic public record of meetings, without the additional processes of exposure and scrutiny which are being proposed by the local government critics.

I know that some local governments do record their meetings and then make the recordings available to the public on their website. That is a decision any Council can legitimately make, but it is another matter for Councils to have that regime imposed on them.

For further information in regard to the above, contact Denis McLeod on 9424 6201 or dmcleod@mcleods.com.au. The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.