LOCAL GOVERNMENT AMENDMENT (COUNCILLOR MISCONDUCT AND POOR PERFORMANCE) BILL 2015

Bill introduced on motion by Mr Paul Toole, read a first time and printed.

Second Reading

Mr PAUL TOOLE (Bathurst—Minister for Local Government) [10.14 a.m.]: I move:

That this bill be now read a second time.

I am pleased to introduce the Local Government Amendment (Councillor Misconduct and Poor Performance) Bill 2015. It is often said that local government is the level of government closest to the people. It is for this reason that it is imperative that each local community can have confidence that their council will be focused on serving the public interest and its decisions will meet the highest standards of integrity. I am pleased to say that this Government has a proud record of legislating robust ethical standards for local government that are underpinned by a range of regulatory mechanisms that are designed to promote such outcomes.

In 2012 the Government legislated reform to provide for a more effective regulatory framework for prescribing the ethical and behavioural standards expected of individual council officials and the enforcement of compliance with those standards. In 2013 the Government sought to address dysfunction and poor performance by councils by enacting an early intervention framework to allow a more rapid response to poorly performing councils and to drive improvement. It did this through new powers to issue a performance improvement order, requiring action by councils and individual councillors to improve their performance, and new powers to suspend a council for up to three months, with a possible extension of a further three months if required. While these reforms have been largely successful in achieving their objectives, exercise of these powers has highlighted opportunities to strengthen the provisions.

The amendments proposed in this bill are designed to address these, to build on the earlier reforms by offering a more effective deterrent to serious and repeated councillor misconduct and to provide the means to ensure effective and timely action is taken to uphold the standards that local communities expect of their council and the councillors they elect to them. The bill also seeks to deliver on my commitment to amend the current provisions of the Local Government Act that allow councillors to participate in the consideration of changes to a planning instrument applying to the whole or a significant part of a council's area they have pecuniary interests in, subject to their making a special disclosure of those interests. Councillors hold their civic office in trust for the communities that elect them. It is therefore disappointing to see a very small minority of councillors who consistently fail to meet the behavioural standards expected of them and who persistently disrupt council business.

One councillor has now been suspended on six separate occasions for misconduct. Another councillor has been expelled for disorder from 12 council meetings since being elected in September 2012. Such conduct damages community confidence in councils and the local government sector as a whole. The amendments proposed in this bill are designed to more effectively address this behaviour. It is proposed that councillors who have been suspended on three occasions will be automatically disqualified from holding office for the next five years, that is, two terms of the council. Disqualification will only occur after the Chief Executive of the Office of Local Government and or the New South Wales Civil and Administrative Tribunal [NCAT] have established on three separate occasions that the councillor has engaged in misconduct that is sufficiently serious to warrant their suspension from civic office.

The proposed amendment is informed by the principle that councillors who repeatedly engage in serious misconduct have abrogated their responsibilities to the community that elected them and are no longer fit and proper persons to hold office.
~break/Norris
<3>
The amendments also seek to address wilfully disruptive behaviour by councillors that is calculated to prevent councils from meeting the needs of their communities. They do this by seeking to expand the definition of "misconduct" in the Act to include conduct that is intended to prevent the proper or effective functioning of a council or a committee of a council. This will allow the chief executive or the Civil and Administrative Tribunal of NSW to take disciplinary action in relation to such conduct. Examples of such conduct include: preventing a council from making a decision by deliberately leaving a meeting to deprive it of a quorum; submitting large numbers of notices or questions on notice with a view to preventing the council from getting through its business; and misusing rescission motions to prevent councils from revisiting a matter for another three months. Stronger penalties offer no deterrence where the means do not exist to support timely enforcement action. In some cases, the disciplinary process can take in excess of 18 months. The amendments contained in this bill seek to address this by streamlining the process for dealing with councillor misconduct to ensure faster but fair outcomes.

It is proposed to remove the requirement under section 440G for notice to be given of a motion at a council meeting to formally censure a councillor. This is a historical anomaly that predates the current prescribed Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW and causes confusion in councils. Under the prescribed procedures the only means by which a council can censure a councillor for misconduct is on a recommendation made by an independent investigator in their final investigation report. Under the procedures, this is to be reported to the council by way of a staff report in the agenda of a meeting and not by a notice of motion as currently contemplated under section 440G.

It is also proposed to remove the requirement for the Chief Executive of the Office of Local Government to undertake an investigation as a prerequisite to taking disciplinary action for misconduct in all cases, allowing them to dispense with an investigation where one is not required to establish whether grounds exist that would warrant such action. This will be the case where sufficient evidence already exists of the misconduct because the matter had been previously investigated under a council's code of conduct and had been referred by the council to the chief executive for disciplinary action under the misconduct provisions of the Local Government Act. Allowing the chief executive to dispense with the need for a further investigation in such cases will reduce the time involved in dealing with such matters by 9 to 13 weeks.

It is also proposed to remove the need for an investigation as a requirement for the chief executive to reprimand and counsel a councillor. This will allow the chief executive to deal with minor misconduct matters that do not involve the imposition of a significant penalty more efficiently solely on the basis of a departmental report prepared with respect to the alleged misconduct. This will reduce the time involved in dealing with such matters by 25 weeks. Given the minor and non-public nature of reprimands and counselling, it is also proposed to remove the right of appeal to the NCAT for decisions to reprimand or counsel.

It is also proposed to clarify the procedural fairness requirements that apply to disciplinary action by the chief executive under the misconduct provisions. Currently, the Local Government Act is silent on this. It is proposed to require that, prior to taking disciplinary action, the chief executive must give the councillor the subject of proposed disciplinary action at least 14 days' notice of his or her intention to take disciplinary action, including the disciplinary action that is proposed to be taken and the grounds upon which the proposed disciplinary action is to be taken and to consider any submissions made by

the councillor.

It is also proposed to improve the efficacy of investigations of councillor misconduct by the chief executive by expanding their evidence gathering powers to allow them to obtain information or documents from any person, not just councillors, council staff and delegates and administrators, as is currently the case. Consistent with section 21 of the Ombudsman Act 1974 and section 24 of the Independent Commission Against Corruption Act 1988, it is proposed to exclude from this information or documents that would attract a privilege where the person has not consented to compliance with the requirement to provide the information or produce the documents.

The bill also gives effect to my commitment to address the understandable community disquiet at the potential for misuse by councillors who are property developers of the provisions of section 451 that allow councillors to participate in the consideration of changes to planning instruments affecting the whole or a significant part of a council's area in which they have a pecuniary interest. These provisions were incorporated into section 451 to address the problem of significant delays to the implementation of standardised instrument Local Environmental Plans [LEPs] across New South Wales. The delay was being caused by councils unable to make decisions due to loss of quorum where councillors had a pecuniary interest. The subsection will be amended to ensure that it continues to meet this objective but to close off the risk of abuse by councillors who are property developers. It will do this by limiting its application to the interests councillors have in their and related persons' principal places of residence. Those councillors will still be required to disclose the affected interests but will be permitted to participate in the consideration of the planning changes. However, councillors with other property interests that are affected by the changes will be precluded from participating in consideration of them.

Regrettably, public confidence in councils has been shaken in recent years by findings by the ICAC that councillors have acted corruptly. The Local Government Act provides for the dismissal and disqualification for five years of councillors who engage in serious corrupt conduct. The Minister can also suspend a councillor for up to six months for serious corrupt conduct. However, the exercise of these powers has exposed loopholes which potentially compromise the capacity of the Minister to respond effectively to a finding of serious corrupt conduct against a councillor to restore community confidence. In one case, the councillor resigned before he could be dismissed and disqualified, meaning that there was nothing to prevent him from re-standing as a candidate at the upcoming election. The proposed amendments seek to address this by allowing former councillors to be disqualified from holding civic office.

In a second case, a suspended councillor instituted legal proceedings with respect to ICAC's findings. There was nothing to prevent him from resuming office after the expiry of the six months suspension, even with an unresolved finding of corrupt conduct against him. The proposed amendments seek to address this by providing that where such proceedings are instituted with respect to a finding of corrupt conduct, the suspension is to continue until the proceedings are concluded and up to six months afterwards to allow sufficient time for the councillor to be dismissed and disqualified where this is warranted.

Performance improvement orders are one of the more effective mechanisms available under the Local Government Act for compelling poorly performing councils to improve their performance. These are designed to operate as a rapid intervention mechanism to compel poorly performing councils and individual councillors to take steps to improve their performance. Orders can be tailored to require different actions by different councillors within the council. Where the council or individual councillors fail to comply with an order, the next step may be to suspend the whole council or to seek its dismissal following a public inquiry. The exercise of these powers has revealed deficiencies in them that these amendments are designed to remedy.

In the absence of urgency, 21 days' notice must be given before the Minister can issue an order. This means that 21 days must pass before any action can be required of a council to remediate its poor performance. It is therefore proposed to reduce the notice period to 7 days in all cases to facilitate faster remedial action. Currently, action cannot be taken to address non-compliance with requirements under an order until the order expires. The proposed amendments are designed to address this and to allow greater flexibility in managing non-compliance by allowing the Minister to require more than one compliance report during the term of the order and to vary the terms of an order on giving seven days' notice.
~break/Violet

<4>
The amendments will also allow other intervention action during the term of an order, such as suspension or the holding of a public inquiry, where it becomes apparent that the order will not deliver the required improvement in a council's performance.

In circumstances where a performance improvement order requires actions of individual councillors—for example, training or mediation—where one or some councillors fail to comply with these requirements the only response available is to suspend the whole council. Not only is that unfair to compliant councillors; it can also operate as an incentive for some councillors not to comply because they want to see the whole council suspended for political reasons.

To put in place an effective deterrent to non-compliance and to allow a response to non-compliance that differentiates between complying and non-complying councillors, it is proposed to empower the Minister to issue a compliance order to individual councillors who fail to take action required under a performance improvement order. Councillors will be prevented from exercising their functions until such time as the compliance order expires or is withdrawn. Compliance orders will continue until the councillor has complied with the order or for a period of up to three months with a possible extension of a further three months. That aligns with the maximum period for which a whole council may be suspended under section 438O.

Where the Minister considers that disciplinary action may also be required in relation to a councillor's non-compliance, he or she may request that the chief executive refer the matter to the NSW Civil and Administrative Tribunal [NCAT] for its consideration under the misconduct provisions of the Act. It is also proposed to reduce the period in which councils are required to advise what they propose to do to implement recommendations made by the chief executive as a result of their investigation of a council from 40 to 28 days. In circumstances where remedial action is warranted to address proven maladministration the current 40 days is too long.

It is imperative that communities can have confidence in their councils and the councillors they have elected. Repeated misconduct by individual councillors and poor performance by councils not only impacts on community confidence in the councils concerned but also erodes confidence in the local government sector as a whole. The sector has recognised this, which is why it has called for stronger action. The measures proposed in the bill are designed to improve the efficacy of the existing regulatory framework by offering a greater deterrence to councillor misconduct and disruptive behaviours and offering the flexibility to deliver a more effective and timely response to the types of behaviours that hinder councils in meeting the needs of their communities. I commend the bill to the House.

Debate adjourned on motion by Mr Guy Zangari and set down as an order of the day for a future day.