

6.1 PROPOSED AMENDMENTS TO LOCAL GOVERNMENT ACT 1995

(No Wards) (Chief Executive Office)

KEY ISSUES

- The Minister for Local Government has invited the sector to comment on a number of proposed amendments to the Local Government Act 1995. The latest amendments to the Act occurred with the introduction of the Local Government (Official Conduct) Amendment Act 2007 and the proclamation of the Local Government Amendment Act 2009.
- WALGA welcomes the opportunity to provide comment prior to preparation of the drafting instructions and appreciates the influence this consultation process will have in developing amendments to the Local Government Act 1995.
- The Association requests that the Council gives formal consideration to the following proposals and provide comment by way of a Council resolution and inform WALGA by 7 January 2011.

It is recommended that the Council support the staff recommendations and comments as detailed in the Report.

BACKGROUND

The Minister for Local Government has invited the sector to comment on a number of proposed amendments to the Local Government Act 1995. The latest amendments to the Act occurred with the introduction of the Local Government (Official Conduct) Amendment Act 2007 and the proclamation of the Local Government Amendment Act 2009.

WALGA welcomes the opportunity to provide comment prior to preparation of the drafting instructions and appreciates the influence this consultation process will have in developing amendments to the Local Government Act 1995.

It is therefore of some consequence that this consultation process results in a strong response from the Local Government sector to ensure comments and feedback are representative of the majority of Local Governments.

The Association requests that the Council gives formal consideration to the following proposals and provide comment by way of a Council resolution and inform WALGA by 7 January 2011.

REPORT

The proposed changes involve seven areas, namely:

1. Reducing Elected Members to between six and nine.
2. Salaries and Allowances Tribunal to set the fees for Elected Members.

3. New mechanism for the temporary suspension of a Council.
4. Require Elected Members to resign where they are elected to State or Commonwealth Parliament.
5. Restricting the type of local government investments to low risk products such as those with the WA Treasury Corporation, major banks and government bonds.
6. Align criminal conviction criteria for Elected Members with that of Western Australian Members of Parliament.
7. To limit employee termination payments to one year's salary.

The detail presented lists the Minister's proposal in amendments to the Act, WALGA comment, staff comment and a staff recommendation.

The Council was briefed on the proposed amendments at a recent Briefing Session

1. Reducing Elected Members to between six and nine

Minister's Proposal

As part of the reform process, local governments were asked by the Minister for Local Government to consider reducing the number of elected members to between six and nine. The rationale is that a smaller number of elected members will encourage greater competition for positions on Council and contribute to a more strategic decision-making focus by councils. Fifty one local governments have committed to reducing the number to the range requested. Sixty one local governments already have Councillor numbers in this range.

It is proposed that section 2.17 of the Act be amended to reduce the number of elected members to between six and nine. Despite the new permitted range, local governments may continue with existing elected member numbers for up to an eight year period from the October 2011 elections. This will be for two full electoral terms. If they have not made the changes by then, the Local Government Advisory Board would take the action as set out in Schedule 2.1, Clause 6(3) to implement the necessary change for the 2019 elections.

WALGA Comment

The Association has expressed to the Minister on a number of occasions the continual opposition of this recommendation by the Local Government sector, most recently with the State Council resolving on 12 October 2010:

"That WALGA:

- c. Oppose the Local Government Reform Steering Committee Report recommendation 8 concerning prescribing the number of Elected Members to between 6 and 9."*

The reduction in the numbers to this extent would require Elected Members in large metropolitan Councils to become full time Councillors. A significant number of Local Governments have provided the Association with reasoned arguments explaining the detrimental nature of this one size fits all approach.

It has been suggested that the Minister engage the Department of Local Government in researching the benefits of this proposal in greater detail and provide to the sector similarly reasoned arguments in support of this proposal.

Staff Comment

The most relevant difference to this advice from the Minister and advice previously provided is that the implementation date is not the 2013 elections but the 2019 local government elections. Council may continue to have 15 Councillors through to that time. It should be noted, however, that due to the differential growth that is occurring throughout the City, Council is required to undertake a review of its elected representatives and Ward boundaries prior to the October 2013 Council elections.

Council's previous comments to the Minister, WALGA and the Department of Local Government following its meeting held on 13 October 2010 were that:

"The Report recommendation is opposed as it takes a view that 6 to 9 Councillors fits all cases. The Queensland scenario is that both the number of Councillors and how they are remunerated is set by the Salaries and Allowances Tribunal using criteria based on population, area, etc. Staff believe that this would be a more equitable method of determining Councillor numbers. For a Council the size of the City of Swan, 9 Councillors covering the area and population of the City would mean a high workload, whilst it is agreed that 15 councillors as we have at present may be too many."

Staff Recommendation

Council is of the view that reducing the number of Councillors from 15 to 9 would place a high workload on a Council with the size and growth issues affecting the City. Council contends that one size does not fit all in these circumstances and proposes that both the number of Councillors and their salaries should be set by the Salaries and Allowances Tribunal or the State Administrative Tribunal.

2. Salaries and Allowances Tribunal to set the fees for Elected Members

Minister's Proposal

Elected Members

At present, the head of power for the setting of elected member fees and allowances is provided under the Act and monetary values are prescribed in Regulations. The Governor approves the setting or amending of these fees and allowances on a recommendation by the Minister for Local Government. Elected member meeting fees have only been amended twice since 1996 and, in both cases, in line with changes to the Consumer Price Index.

It is proposed that the responsibility for the setting of the dollar values for elected member fees and allowances be transferred to the Salaries and Allowances Tribunal, through amendment to the Act and the Salaries and Allowances Tribunal Act 1975. The approach envisaged would be for the Tribunal to provide its advice to the Minister for Local Government who will then have the final decision about whether the fees and allowances were adopted.

The 2006 Local Government Advisory Board's report into Structural and Electoral Reform, as well as the 2008 WALGA Sustainability Study, both recommended that the Salaries and Allowances Tribunal be responsible for the setting of elected member fees.

Providing for an independent body to set the value of fees and allowances for local government elected members will bring the approach into line with that already in place for State Members of Parliament. In addition, other States have independent tribunals established to set fees and allowances for local government members.

The Minister for Local Government will also retain responsibility for the types of fees, allowances and expenses that elected members can be paid or reimbursed and the circumstances in which they are made.

Chief Executive Officers (CEOs)

At present, the Tribunal has a statutory role in making recommendations as to the remuneration to be paid or provided to local government CEOs. These recommendations are to be taken into account by the local government before entering into, or renewing, a contract of employment with a CEO.

It is proposed that the legislation be amended so that local governments are required to ensure the salaries of their CEOs are set within the salary bands recommended by the Tribunal. Similar to that for elected members, the approach envisaged would be for the Tribunal to provide its advice to the Minister for Local Government, who will then have the final decision about whether the salary bands are adopted.

WALGA Comment

Elected Members - It is pleasing to note that the setting of remuneration levels for Elected Members by the Salaries and Allowances Tribunal has not been linked to the State Government's plan to reduce elected members.

The Association has advocated on this issue since 2004 and reaffirmed this advocacy when State Council considered this matter in light of the 2006 Local Government Advisory Board (LGAB) Report on Structural Reform, subsequently resolving:

That Recommendation 1.35 of the Local Government Advisory Board report be supported and that the State Government be requested to amend the Local Government Act 1995 accordingly to achieve the following outcome:

"That the Western Australian Salaries and Allowances Tribunal be given the responsibility for establishing the range of fees and allowances for elected members, with each Local Government having the ability to set a fee within this range. The Tribunal also be required to update the fees and allowances on an annual basis."

- (a) That the State Government be requested to amend the Local Government Act accordingly;*
- (b) In the event the Local Government Act 1995 is amended as per the Association's advocacy:*
 - i. that the question of the quantum and extent of Councillor Fees and Allowances be sought from other states with a view of presenting this to the Western Australian Salaries and Allowances Tribunal to support any Association submission of this subject; and*
 - ii. that targeted research be undertaken on Councillor responsibilities, level of control and work values, so that these can be extrapolated as industry averages and provided to the Tribunal in further support of any Association submission.*

Chief Executive Officers (CEOs) - This is a recent addition by the Minister for the Local Government Act amendment proposals and did not feature in the Local Government Reform Steering Committee Report recommendations. WALGA takes a view that Local Governments should retain the general competence power to determine appropriate remuneration levels for their key executive.

Staff Comment and Recommendation

If Council agrees with the previous recommendation that Salaries and Allowances Tribunal should set the number of Councillors, then it is agreed that they should also set the fees paid to Mayor, Councillors and Chief Executive Officer.

3. New mechanism for the temporary suspension of a Council

Minister's Proposal

The Department delivers both proactive and reactive assistance and support to Councils to aid them in providing good governance to the people of its district. However, on occasion, division and conflict between Council Members, and between Council Members and the administrative officers, arises leading to Councils becoming dysfunctional.

Section 8.19 of the Act provides for the suspension of a Council, however this only applies where an Inquiry Panel is appointed by the Minister to inquire and report on a local government's operation or affairs within six months of the suspension. The operation of Inquiry Panels has been found to be effective in dealing with serious and systemic governance issues. However, because the Inquiry process can recommend dismissal of a council, it involves a process that is necessarily exhaustive, and correspondingly time consuming and costly. It is estimated that a Panel Inquiry would cost approximately \$1-1.5 million. It is not viewed as being an appropriate mechanism to deal with the type of situations outlined above.

Section 8.15(2) of the Act also provides for a council to be suspended in circumstances where the council has not complied with an order made with respect to the recommendations of an Authorised Inquiry that is conducted pursuant to section 8.3 of the Act. Although less costly and time consuming than a Panel Inquiry, an Authorised Inquiry still typically takes between 6 and 12 months from commencement to completion. As a consequence, an Authorised Inquiry does not provide an immediate response to issues that are detrimentally affecting the operation of the local government.

It is proposed that Part 8 of the Act be amended to provide an alternative mechanism for the Minister to utilise where the Minister becomes aware of significant issues that he or she believes may lead to a breakdown in the effective decision making process of an elected Council. This mechanism will allow for the suspension of a Council and the appointment of a Commissioner to act on behalf of the Council for a maximum period of six months. Prior to the end of this period, the Minister would decide whether to reinstate the Council or to keep it suspended and establish a Panel Inquiry, as required by section 8.19 of the Act.

This new approach is considered to provide a circuit breaker to allow the issues that have arisen to be quickly resolved by the Commissioner and for the Council to be reinstated. The addition of an alternative 'issue resolution' process will enable the Minister to choose the most practical 'suspension' mechanism for each specific circumstance.

Once the Minister becomes aware of a dysfunctional Council, the suspension powers would operate in the following manner. The Minister would request the Department of Local Government to carry out an assessment and provide a report on the issues about a local government that have been brought to his or her attention. Based on this information, the Minister would then decide whether to take any action and, if so, whether the new suspension power would be utilised, or a Panel Inquiry held.

If this new suspension power was used, the Council would be issued a 'notice of intent to suspend' by the Minister and be given a period of 21 days to respond to this notice. If the Minister chose to carry through with the intention to suspend, a Commissioner would be appointed and the elected members of council temporarily suspended for a period of no more than six months. Elected members would continue to receive their meeting allowance.

Prior to the end of the six month suspension, the Minister would either reinstate the Council, or appoint an Inquiry Panel in line with the current section 8.19 of the Act.

In summary, Part 8 would require amendment to incorporate the following steps:

- (a) The Minister issues the Council with a notice of intention to suspend due to issues arising that the Minister believes may lead to a breakdown in the effective decision making process of an elected Council;*
- (b) The Council will have a period of 21 days in which to respond to the Minister's notice detailing the Minister's reasons for providing a notice of intention to suspend;*
- (c) The Minister would give serious consideration to the reasons provided and determine whether the council should be suspended;*
- (d) If the Minister decides to suspend the Council, he or she has the option of suspending and appointing a Commissioner for a maximum period of six months (new power) or if the identified issues are considered so significant that a Commissioner would not be able to resolve them within six months, to immediately appoint an Inquiry Panel (existing power) to investigate the issues; and*
- (e) Prior to the end of the six month suspension period, the Minister is to reinstate the Council or appoint a Panel Inquiry.*

The Minister is to have the power to require council members to undertake remedial action, such as undergoing training or mediation, during the period of suspension.

WALGA Comment

The proposed amendment appears to have its origin in situations the Minister and his Department have encountered, where there was insufficient reason to conduct a Panel Inquiry yet the operations of a Council were affected by internal conflicts that could potentially escalate. From this perspective, WALGA appreciates there may be a need from extraordinary powers to immediately provide to a community a cost-effective remedy that will lead to the resumption of good governance.

WALGA's policy position on this issue was considered in 2008 where there was support for a mechanism to suspend individual Elected Members rather than an entire Council.

Staff Comment and Recommendation

The amendment to the Act is supported.

4. Require Elected Members to resign when they are elected to State or Commonwealth Parliament

Minister's Proposal

The Act provides that if a local government elected member is elected as a Member of Parliament, his or her council position does not become vacant until the next ordinary election day. There is no requirement in the Act, or other legislation, for the local government elected member to resign and, as such, a person can be an elected member of a local government Council and the Western Australian Parliament.

Section 36(1)(b) of the Constitution Acts Amendment Act 1899 requires a member of the WA Parliament to immediately resign when elected to Commonwealth Parliament.

It is proposed to amend the Act to require elected members to immediately resign (or for their position to become automatically vacant) when elected to State or Commonwealth Parliament. This will contribute to appropriate separation of responsibilities and reduce potential conflicts of interest that might arise if representing at a State or Federal and Local level simultaneously.

This will also align with the eligibility requirements for nomination of membership into State and Commonwealth Parliament set by the State Electoral Act 1907 and Constitution Acts Amendment Act 1899.

In 2008, WALGA requested the Minister consider an amendment of this type.

WALGA Comment

The proposal aligns with a State Council resolution of August 2007 -

That the Minister for Local Government be requested to consider amending the Local Government Act 1995 to require Elected Members to resign from Council immediately upon being declared elected to State or Federal Parliament.

Staff Comment and Recommendation

The Act provides that an elected Councillor upon being elected to Parliament does not have to resign until the next ordinary election day. There is no requirement for them to resign.

In a worst case scenario this could take two years to occur.

Amendment to require the Councillor to resign once they are elected to Parliament is supported.

5. Restricting the types of local government investments to low risk products such as those with the WA Treasury Corporation, major banks and government bonds

Minister's Proposal

The investment options available to local government were altered in 1997 when the prescribed list of investments in the Trustees Act 1962 was removed and replaced by the 'Prudent Person' rule. This rule is no longer viewed as providing sufficient clarity and guidance to local government investment management policies.

In 2007, it was revealed that eight local governments and two regional local governments had invested in Collateralised Debt Obligations with Lehman Brothers (formerly Grange Securities). This has resulted in multi-million dollar losses by the affected local governments and concerns have been raised in the community about the performance of local governments in this area.

It is proposed to amend the Act to allow for regulations to prescribe the investments that can be made by local government. This will include Government guaranteed and other low risk investments. A requirement for local governments to only invest in these types of products is expected to minimise the investment exposure of local governments and the loss of ratepayer funds.

At this stage, the following forms of investment are being considered to be included in this regulation:

1. *a deposit with the Western Australian Treasury Corporation or an investment facility of the Western Australian Treasury Corporation;*

2. *any public funds or securities issued by, or guaranteed by, the Commonwealth, any State of the Commonwealth or a Territory; and*
3. *interest bearing deposits with, and/or debentures or bonds issued by, an authorised deposit-taking institution (as defined in the Banking Act 1959 (Cwth)) where the Institution has a Standard & Poor's Rating of A-1+ (short-term) or AA (long-term, but excluding subordinated obligations).*

Further discussion is proposed to take place between the Department of Local Government, local governments and the WA Treasury Corporation to develop this regulation.

WALGA Comment

There remains subjectivity in the definition of the term 'low risk' in the context of this proposal. The WA Local Government Association supports the sector's right to retain the principle of general competency powers as provided under the Local Government Act 1995, and that Local Governments be allowed to continue to decide for themselves how best to deal with investment opportunities.

Staff Comment and Recommendation

Comment was made at the Briefing Session that an option may be for WA Treasury Corporation to control all the funds and to invest them accordingly on behalf of all Councils. Regardless of these comments, the matter is agreed.

6. Align criminal conviction criteria for Elected Members with that of Western Australian Members of Parliament

Minister's Proposal

It is proposed to amend the Act to preclude a person who has been convicted of an offence with a statutory penalty of imprisonment for five years or more from standing for election to local government.

This will align the eligibility requirements for local government candidates with those that apply to State Members of Parliament. This requirement will have a positive impact on the calibre of those standing and ultimately representing the community on Council.

These provisions need to be modelled on section 32(1)(b) of the Constitution Acts Amendment Act 1899 whereby a person is disqualified where he or she has been convicted on indictment of an offence for which the indictable penalty was or included:

- (i) imprisonment for life; or
- (ii) imprisonment for more than five years.

Serving elected members with such records will be able to serve out their terms, however would not be eligible for re-election once the legislation was amended.

WALGA Comment

This proposal is consistent with the Association's policy position.

It is suggested that for true alignment of criteria, the proposal take a holistic approach incorporating all aspects of Candidates/Elected Member qualification and disqualification rather than one aspect of disqualification, namely criminal convictions.

One option would be for this proposal to be broadened to "Align the qualification and disqualification criteria for Local Government election candidates and Elected Members with that of Western Australian Members of State Parliament".

Staff Comment and Recommendation

Amendment to the Act is supported.

7. To limit employee termination payments to one year's salary

Minister's Proposal

Recent consideration of the current provisions in the Act indicates that it is possible for employees of local governments, including CEOs, to receive up to two years' salary on redundancy. This situation has arisen out of an anomaly in the Act not intended when the Act was developed.

It is proposed that an amendment to regulations to limit payouts to all such employees to a maximum of one year's salary will bring local government provisions into line with Western Australian State and Commonwealth public sector arrangements and would be consistent with organisational practice in other jurisdictions.

This proposal will not affect the two year guarantee of employment as provided for in Clause 11(4) of Schedule 2.1 of the Act.

WALGA Comment

There is no current Association policy position on this proposal.

Staff Comment and Recommendation

Amendment to the Act is supported.

ATTACHMENTS

Nil

STRATEGIC IMPLICATIONS

Nil

STATUTORY ENVIRONMENT

Nil

FINANCIAL IMPLICATIONS

Nil

RECOMMENDATION

That the Council resolve to:

- 1) Support the Staff Recommendations and Comments detailed in the Report.

CARRIED