



New South Wales

Local Government Amendment (Councillor Misconduct and Poor Performance) Bill 2015

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to reform the legislative scheme for addressing councillor misconduct and poor performance and council maladministration by, in particular, streamlining processes, improving the effectiveness of performance improvement orders and providing additional relevant powers to the Minister and the Chief Executive of the Office of Local Government (the *Departmental Chief Executive*).

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Local Government Act 1993 No 30

Schedule 1 [2] amends section 275 of the *Local Government Act 1993* (the *principal Act*) to include, as a ground on which a person is disqualified from holding civic office, the ground that the person has been suspended from civic office for a third time by either the Departmental Chief Executive or the Civil and Administrative Tribunal because of misconduct. The disqualification occurs when the third order for suspension takes effect and lasts for 5 years. Suspensions that occurred before the commencement of the provision count towards disqualification if a further order for suspension is made under the Act after that commencement. **Schedule 1 [33] and [34]** are related amendments to section 440L of the principal Act dealing with staying the effect of a disqualification if the third order for suspension is stayed by the Tribunal pending appeal.

Schedule 1 [3] and [4] amend section 434 of the principal Act to reduce the time in which a council is required to respond to recommendations made by the Departmental Chief Executive arising from the investigation of a council from 40 to 28 days.

Schedule 1 [5] and [6] amend section 438A of the principal Act and **Schedule 1 [8]–[11] and [13]–[16]** amend section 438C of the principal Act to enable the Minister to vary a performance improvement order.

Schedule 1 [7] amends section 438A of the principal Act to ensure that the Minister or any other person may take action under the Act in relation to a council or councillor while a performance improvement order is in force.

Schedule 1 [12] amends section 438C of the principal Act to provide that the consultation period for a notice of intention to issue a performance improvement order is 7 days in all cases. Currently, the period is 21 days except if there is a matter of urgency, in which case, it is 7 days.

Schedule 1 [17] amends section 438F of the principal Act to clarify that a performance improvement order may require a council to provide more than one compliance report and may set out requirements relating to the reports, including the intervals at which they are to be made.

Schedule 1 [18] amends section 438G of the principal Act to include a requirement for a temporary adviser to directly report to the Minister on compliance with a performance improvement order if a council fails to provide a compliance report to the Minister as required by a performance improvement order or fails to give the adviser an opportunity to comment on a compliance report as required by section 438H of the principal Act.

Schedule 1 [19] inserts a new section into the principal Act to provide relevant powers to the Minister and Tribunal to deal with non-compliance by an individual councillor with a performance improvement order issued to a council. Proposed section 438HA empowers the Minister to issue a compliance order to a councillor which effectively prohibits the person acting as a councillor except for the purpose of taking action as required by a performance improvement order. The order initially remains in force for a period of up to 3 months with a possibility of being extended to up to 6 months, but the Minister must withdraw the order if the councillor complies with the performance improvement order. Provision is included for referral of the matter to be dealt with by the Tribunal as a misconduct matter instead of a compliance order being issued, after a compliance order has expired or while a compliance order is in force (for example, if it is clear that the councillor intends to refuse to comply with the performance improvement order despite the compliance order). **Schedule 1 [37]–[39]** contain consequential amendments extending Divisions 3 and 4 of Part 3 of Chapter 14 of the principal Act dealing with Tribunal proceedings to such referrals. **Schedule 1 [1]** contains a related amendment to ensure that a vacancy in office does not automatically occur as a consequence of a compliance order.

Schedule 1 [20], [21] and [22] amend section 440B of the principal Act to enable the Governor to disqualify a former councillor on the advice of the Minister if the Independent Commission Against Corruption (*ICAC*) has recommended that a person be suspended with a view to dismissal for serious corrupt conduct but the person has resigned or otherwise ceased to be a councillor before the matter can otherwise be taken to the Governor.

Schedule 1 [23] amends section 440C of the principal Act so that if a person who is suspended pending dismissal for serious corrupt conduct institutes proceedings relating to an ICAC report or an admission, the suspension continues while those proceedings are undertaken and, for the purposes of the limitations on the length of the period of suspension, the suspension will be taken to have commenced when those proceedings and any related review or appeal proceedings have been disposed of.

Schedule 1 [24] makes a similar amendment to section 440D which deals with council staff rather than councillors.

Schedule 1 [25] amends the definition of *misconduct* in section 440F of the principal Act to include as misconduct an act or omission of a councillor intended by the councillor to prevent the proper or effective functioning of the council or a committee of the council. For example, the

misconduct might include preventing a council from making a decision by deliberately leaving a meeting to deprive it of a quorum or misusing rescission motions to prevent councils from revisiting a matter for an extended period. This will enable appropriate disciplinary action to be taken against the councillor.

Schedule 1 [26] omits section 440G (2) of the principal Act which requires notice to be given of a motion at a council meeting to formally censure a councillor. The matter is to be dealt with by placing the relevant item on the agenda for the meeting and supporting that item with relevant reports or information.

Schedule 1 [27], [28] and [30] amend section 440H of the principal Act to enable the investigative powers of the Departmental Chief Executive to be used to require any person (rather than just a councillor, a member of staff of a council, a delegate of a council or an administrator) to provide information or produce documents. However, constraints are placed on that power relating to preserving the privilege against self-incrimination and legal professional privilege (except in favour of a public authority or former public authority).

Schedule 1 [29] amends section 440H of the principal Act by inserting a new subsection that enables the Departmental Chief Executive to arrange for a departmental report to be prepared without an investigation in certain situations where it is alleged that a councillor has engaged in misconduct. This is where the matter has been referred by the council and an investigation has already been conducted by the council, where, in the opinion of the Chief Executive, the allegation relates to a minor matter for which at most, the councillor would be counselled or reprimanded, and in other circumstances where the Chief Executive considers that arrangement appropriate.

Schedule 1 [31] amends section 440I of the principal Act to require the Departmental Chief Executive to give at least 14 days notice to a councillor of a proposal to take disciplinary action and to consider any submissions made by the councillor in accordance with the notice.

Schedule 1 [32] amends section 440L of the principal Act to remove the right of appeal to the Civil and Administrative Tribunal against disciplinary action comprised only of counselling or reprimanding a councillor.

Schedule 1 [35] amends section 451 of the principal Act. The section requires a councillor who has a pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council or committee at which the matter is being considered to disclose the nature of the interest and absent himself or herself from relevant discussions and voting. Subsection (4) contains an exception in relation to certain planning matters if the councillor has made a special disclosure of the interest in accordance with the regulations ahead of a meeting. The proposed amendment limits the exception to special disclosure of an interest of the councillor in the councillor's principal place of residence or, if the interest of another person is relevant under section 443 (for example, a spouse or relative), an interest of another person in that other person's principal place of residence.

Schedule 1 [36] amends the heading to Part 3 of Chapter 14 to reflect the content of the Part.

Schedule 2 Law revision amendments of Local Government Act 1993 No 30

Schedule 2 amends the principal Act for law revision purposes. The Dictionary and other provisions of the principal Act are amended to update references to the Department of Local Government to the Office of Local Government and references to the Director-General to the Chief Executive of the Office of Local Government (referred to as the Departmental Chief Executive).

The Schedule also contains amendments that update terminology and references relating to Public Service agencies, heads of agencies and Public Service employees as a consequence of the *Government Sector Employment Act 2013* and includes other miscellaneous amendments that are consequential on the making of past administrative changes orders.

**Schedule 3 Consequential amendment of Local Government
(General) Regulation 2005**

Schedule 3 amends the form of special disclosure of pecuniary interest set out in the regulations under the principal Act as a consequence of the proposed amendment to section 451 (4) of the principal Act.