Local Government Amendment (Elections) Bill 2008

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Agreement in Principle

Mr PAUL LYNCH (Liverpool—Minister for Local Government, Minister for Aboriginal Affairs, and Minister Assisting the Minister for Health (Mental Health)) [11.31 a.m.]: I move:

That this bill be now agreed to in principle.

I am pleased to introduce the Local Government Amendment (Elections) Bill 2008. The bill reflects an ongoing commitment to providing a transparent and effective legislative framework for the administration of local government in New South Wales. The proposals in the bill have been developed to address recurring and significant issues identified in the usual review of local government election provisions conducted following the last council ordinary elections. The proposals are also designed to improve the local government electoral system and the effectiveness of local government generally. The bill will address concerns raised by the public, councils, the Local Government and Shires Associations of New South Wales and the New South Wales Electoral Commission regarding the conduct of local government elections.

The last council ordinary elections were held in 2004. A number of elections were postponed at that time due to the amalgamation of various areas under the Local Government Reform Program. Elections for these newly constituted councils were conducted during 2005 and 2006. Submissions received from individual councils, local government groups, candidates and electors have been considered in the course of the review co-ordinated by the Department of Local Government. The department has also consulted with the Electoral Commission and the Local Government and Shires Associations. Amendments made in 2006 to State election procedures in the Parliamentary Electorates and Elections Act 1912 have also been closely considered during the review process. Where appropriate in the local government context, those amendments are reflected in the bill. In doing so, the bill accords with the Government's policy that local government election procedures should as far as practicable follow those for the New South Wales Legislative Council. This is because of the common multi-representative nature of council and upper House electorates.

I will now turn to the detail of the Local Government Act amendments. Currently, the system for counting votes in a contested election for a ward or undivided area is to be optional preferential if the number of councillors to be elected is one or two, or proportional if the number to be elected is three or more. The system for election of a popularly elected mayor is optional preferential. The bill provides that the optional preferential system will apply to future elections and by-elections only where a single position is to be filled. That is, optional preferential will now apply only for the election of a popularly elected mayor and by-elections where one candidate is to be elected. It will also apply in the case of single councillor wards. Currently there are no such ward structures in New South Wales but the Act does not preclude this arrangement provided there are not less than five councillors for the whole local government area. Appropriately, the proportional voting system will in future apply to all multi-vacancy elections—that is, where two or more positions are to be filled in a ward or a council area.

The proportional voting system is generally used across all levels of government in multi-member electorates because it is designed to allocate seats or offices in proportion to the overall number of votes obtained by the candidates. On the other hand, because the optional preferential system requires candidates to achieve vote majorities in order to be elected, it is generally used only in single-member electorates. The proportional system is used in the multi-member electorates for the Legislative Council and the Australian Senate while the preferential system is used in the single-member electorates for the Legislative Assembly and the Australian House of Representatives. The voting systems for local government in other Australian States are similarly configured. The bill will ensure consistency in systems for counting of votes across all council areas.

Currently, the optional preferential system applies at ordinary elections in the case of only 11 out of 152 councils in New South Wales. This is because those 11 councils are divided into wards containing two councillors each. The proportional representation system already applies to the majority of councils, numbering 141. The bill will ensure continued alignment between local government and State electoral procedures. Members may be aware that the Government introduced significant amendments to the Local Government Act in 2000 that were designed to maintain parity between local government and Legislative Council election procedures. These reforms in relation to grouping of candidates also aim to give voters, rather than political parties, control over preference flows. Consistent with this important policy objective, the bill will ensure that, in future, the composition of a council will better reflect the proportion of votes received by the candidates because the proportional system will apply to all multi-vacancy electorates.

Members may also be aware that in 2005 the Government introduced a scheme allowing councils for a limited time to reduce their councillor numbers without first having to obtain approval to do so at a constitutional referendum. The scheme was introduced following requests from a number of councils to reduce their councillor numbers without the need to hold costly constitutional referendums. These requests were in partial response to the Government's policy of promoting structural reform in local government to facilitate improvement in the financial position of local councils. The decision was also informed by the findings of the Sproats inquiry of April 2001 regarding the significant cost savings for councils where councillor numbers are reduced and without detriment to the efficient operation of local government. An amendment to the then bill moved in Committee effectively prevented the councillor reduction opportunity from being available to councils with three or less councillors per ward.

During the 12-month application period commencing from 15 July 2005, 21 council applications to reduce councillor numbers were approved resulting in an overall reduction of councillor numbers by 47. The total savings from this initiative across New South Wales are between $298,600 and $598,000, or approximately $15,000 to $27,000 per council area. The reductions take effect from the ordinary elections on 13 September 2008. A number of other councils consisting of three or less councillors per ward that expressed an interest to make a councillor reduction application were prevented from doing so at the time due to the upper House amendment. This bill therefore proposes a further opportunity to reduce councillor numbers. It responds to the interest shown by councils that were unable, because of their ward structure, to take advantage of the previous opportunity to reduce councillor numbers without first conducting a constitutional referendum. It also responds to the interest shown by several other councils that missed the closing date for applications under the previous scheme, including Moree, which has raised the matter with me several times.

The councillor reduction opportunity is proposed to be available to all councils including those councils with three or less councillors per ward. However, a council will not be permitted to reduce its numbers to less than five councillors per council, which is the minimum set under the Act. Also, the current provisions requiring that the same number of councillors is to be elected for each ward, and that a popularly elected mayor is to be excluded when determining that number, will not be altered. The steps in the application process will generally be the same as those under the previous scheme. An application period will apply during which councils may seek ministerial approval to reduce councillor numbers. This period will be published in the *Government Gazette* on the commencement of the proposed amendments. However, the bill makes it clear that the application period must end no later than 30 June 2008, as the proposal will impact on the Electoral Commission's preparations for the next ordinary elections.

A resolution must first be passed by a council indicating its intention to make a councillor reduction application. The council must allow a period of 21 days public notice during which submissions can be made to it about the draft resolution. An applicant council that decides to proceed to apply for a reduction will be required to provide the Minister with a summary of the submissions and relevant comments received during the public consultation. I stress that this opportunity to reduce the number of councillors without a constitutional referendum is for a limited time only, and the process will be driven by the councils themselves and their communities. Successful applications will take effect at the 2008 ordinary council elections. As was the case under the previous councillor reduction scheme, the bill again provides that a casual vacancy in the office of a councillor is not to be filled before the reduction takes effect, unless the vacancy will result in the council having less councillors than the approved reduction.

A few of the councils that were given approval to reduce councillor numbers under the 2005-06 scheme and that have subsequently been affected by casual vacancies have expressed concern that they will experience difficulty in forming quorums at council meetings up to the September elections. This is because of the way that section 368 of the Act is currently drafted and the possible interpretation of that provision to mean that vacated offices must be counted when determining the numbers required to form a quorum for meetings. The bill will make it clear in future that in determining the number of councillors for the purposes of calculating quorums any casual vacancies in councillor offices are not to be counted. This consequential amendment is particularly relevant to the councillor reduction scheme, which expressly disallows the filling of casual vacancies before a reduction takes effect. The councillor reduction proposal reflects the Government's ongoing commitment to encourage councils to facilitate improvement in their financial positions through structural reform.

The bill also proposes to address the recurring and significant problem of inappropriate council decision making during the period leading up to council ordinary elections. The department receives complaints about major decisions, such as controversial developments, being fast-tracked to avoid election deadlines. In the weeks leading up to the 2004 ordinary elections the department received strong expressions of concern from the community regarding a particular metropolitan council's actions in moving a number of motions on contentious developments that would bind an incoming council. Complaints were also received regarding another council's consideration of a development application for a major shopping centre immediately prior to the 2004 elections. A third council appointed a general manager on the eve of the ordinary elections, which was not well received by the community.

In Victoria, councils are required by law to observe special caretaker government arrangements during the

period leading up to local government elections. I am advised that the Queensland and South Australian governments are also considering the introduction of similar arrangements as part of their reviews of local government electoral procedures in those States. This bill proposes to introduce a new principle in the local councils' charter under section 8 of the Act in relation to "caretaker government" responsibilities. The charter comprises a set of principles that are to guide councils in carrying out their functions. The proposed new principle will state that a council is to exercise its functions responsibly, including during the lead-up to ordinary elections, and to observe "caretaker government" conventions issued under guidelines to be prepared by the director general of the department. These caretaker conventions will apply for a six-week period leading up to the ordinary elections.

The types of decisions that a council in the exercise of responsible government should refrain from making during an election period would include: entering into major contracts or undertakings where tenders have not been called; the employment of a permanent general manager; and the determination of publicly controversial or significant developments. The amendment will guide councils when proposing to make major or publicly controversial decisions during an election period that would bind an incoming council, and also to consider the best interests of their communities. The proposed amendment will reinforce transparency and accountability in decision making during election periods and improve community confidence in councils.

The bill also proposes a number of amendments to streamline and improve electoral procedures. One of these streamlining amendments is to revise the deadline for the election of the mayor by the councillors after an ordinary election to within three weeks after the election is declared. Currently, where the mayor of a newly elected council is to be elected by the councillors from among their number, the Act requires that this take place at a council meeting within three weeks after the date of the ordinary election. However, problems have occurred in the past where declaration of the ordinary election result is delayed or an irregularity has occurred resulting in a reduced period during which the election of the mayor by the councillors can occur.

Three further proposals designed to streamline electoral procedures will also deliver efficiencies and significant cost savings. The first of these is to permit the Electoral Commissioner to provide mobile pre-polling booths and pre-polling teams in rural and remote locations where appropriate. A major challenge at local government elections is the vast distances over which the population is spread, and ensuring all electors can be given an opportunity to vote in the most efficient and cost-effective way. Currently, mobile polling booths are available for use only by electors in declared institutions such as nursing homes and hospitals. The Commonwealth Electoral Act 1918 provides for the use of mobile pre-polling and, according to the Australian Electoral Commission's report on the 2004 election, 12 mobile polling teams successfully visited various rural and remote areas. Apart from the increased convenience for electors, this proposal will deliver efficiencies and cost savings in terms of the provision of suitable election infrastructure.

The second of these proposals to streamline electoral procedures is to permit the appointment of returning officers who are responsible for the conduct of elections in more than one area. This will address difficulties experienced by the commissioner in the past in recruiting suitable persons or where the size of electorates is such that a returning officer could conduct more than one election. Councils that share a returning officer will also have lower election expenses. The third proposal is in relation to candidate information sheets. Under the Act, every candidate's nomination is to be accompanied by a candidate information sheet, which must include the candidate's name and address and may also include further details such as their qualifications, membership of organisations and statements as to their policies and beliefs. A copy of every nominated candidate's information sheet for the area is to be "displayed" at each polling and pre-polling place in the council area.

The requirement to provide candidate information sheets is valuable in assisting voters to get to know the candidates. However, the requirement to display these sheets is an onerous exercise and, in practice, at times impossible. Some 4,500 candidates nominated for the 2004 council elections and more are expected to nominate for the forthcoming elections. It is proposed to amend the Act to replace the requirement that candidate information sheets are displayed at each polling place with a requirement that this information is made available for public inspection at each polling place and published on the Electoral Commission website. Councils will also be required to publish this information on their own websites or provide a link to the relevant part of the Electoral Commission website. The proposal ensures that flexibility is built into the provisions without disadvantaging electors or candidates in terms of access to this information.

Other proposed amendments in relation to electoral administration are designed to generally make council election practices consistent with those for State elections. Therefore, the bill will update electoral administration terminology in the Act by providing for the appointment of "polling place managers" and "election assistants" to be known collectively along with returning officers as "election officials". Also, the bill will transfer certain functions of the returning officer to the Electoral Commissioner, whose powers of delegation will be clarified.

The provisions dealing with the death of a candidate will also be clarified under the bill. The Act currently provides that where a candidate who is nominated for election dies "before the day when the poll closes", the election fails and a new election must be held. It is proposed to amend the Act to bring council election procedures in line with State elections by making it plain that an election fails where a candidate dies after the nominations for an area have been declared and before 6.00 p.m. on polling day. It will also be made plain that

where a candidate dies after 6.00 p.m. on polling day but before the election is declared, the counting of the votes continues as if the candidate had not died, and a by-election is held if that candidate is taken to be elected.

Three final clarifying amendments are also proposed under this bill. The first is in relation to the alteration of ward boundaries. There are concerns that as the Act is currently drafted it is unclear whether a constitutional referendum is required to be held before a council may alter its boundaries so as to decrease or increase its ward numbers. Amendments were made to the Act in 2002 to introduce a requirement that councils undertake a public consultation process before a ward boundary alteration may be made. As part of that process, the council is required to exhibit a ward boundary plan—prepared in consultation with the Electoral Commission and the Australian Statistician—and consider all submissions made to the council during the exhibition period. These amendments were designed to provide proper accountability to the local community and transparency in council decision making. They were also designed to introduce a legislative mechanism to ascertain the local community's views before a ward boundary alteration could be made.

It was made plain in the speech introducing the 2002 amendments that an alteration of ward boundaries effecting a change in ward numbers could occur without the need to hold a constitutional referendum. It is an unnecessary and costly duplication of council and Electoral Commission resources to require a council to conduct a public consultation process in consultation with the Electoral Commission and then also to seek approval at a constitutional referendum before an alteration that effects a change in ward numbers can be made. The bill will therefore make it clear that a council is not required to obtain approval at a referendum before it may increase or decrease its ward numbers.

The second clarifying amendment is about the appointment of the Director General of the Department of Local Government as an administrator of a local council. The Local Government Act provides that the Governor may appoint an administrator to exercise all the functions of a council under that Act or under any other Act. The appointment of an administrator becomes necessary where a council is dismissed. The power of the Government to dismiss a council is used as an option of last resort only where it is shown that the council has had a fundamental breakdown in its operations or there is an inability on the part of councillors to perform their duties. The Government will usually dismiss a council only after a report from an independent public inquiry recommends such a course of action. The Act is silent as to who may be appointed as an administrator. The practice is that I recommend a suitably qualified and experienced person to the Governor in Council.

Councils dismissed for poor performance should be kept under close supervision by the appointment of experienced public administrators. This enables a council's full and expedited recovery. It has been regarded appropriate on two occasions to appoint the director general as an administrator of more significant or problematic councils. The director general is not separately remunerated for performing this additional function. The convention is that when the director general undertakes such an appointment, the deputy director general takes on the director general's functions in relation to that specific council. Also, from time to time during the course of an administrator's appointment the administrator may become unavailable because of personal commitments or because they may have a conflict of interest in relation to a particular matter before the council. On these occasions the director general and the deputy director general have stepped in as substitute administrators for that limited purpose.

It has been suggested that the director general cannot be both an administrator of a council and the Director General of the Department of Local Government. This is because a common law doctrine of incompatibility of office may apply unless excluded by statute. And that is what this amendment is intended to do. The amendment will make it plain that the Governor may appoint the Director General of the Department of Local Government as an administrator of a council without that appointment being incompatible with his executive position in the public service. There are benefits in having the director general or deputy director general appointed as an administrator of a council where the councillors have been removed from office. The director general brings expertise in relation to the role of local government and the administration of councils.

There is nothing new in this. The Public Sector Employment and Management Act 2002 excludes the doctrine of incompatibility of office by allowing executive officers such as the director general and the deputy director general to undertake work outside their duties if approved. To allay any concerns about conflicting roles, where the director general is appointed as an administrator of a council the deputy director general of the department will stand in the place of the director general of the department in relation to that council. The amendment will ensure that the public may have confidence in the decisions made by councils under administration and in the decisions made by the department.

The final clarifying amendment proposed in this bill is in relation to eligibility for nomination. Following the 2004 council ordinary elections, the New South Wales Administrative Decisions Tribunal upheld a challenge to the validity of the election of a councillor to civic office for a metropolitan council. The Administrative Decisions Tribunal was of the view that the candidate was not eligible for nomination or election as she was not a resident of the ward for which she stood at the time nominations closed. The Administrative Decisions Tribunal therefore ordered that the councillor be dismissed from civic office.

The Administrative Decisions Tribunal's interpretation of the relevant provisions of the Act varied from the

longstanding view of the Department of Local Government and the Electoral Commission that a candidate is eligible for nomination provided he or she is listed on the roll of electors at the time of closing of the roll. To provide certainty, the bill will make it abundantly clear that a person is validly nominated for election to civic office if, at the time of nomination, the person is enrolled as an elector for the area and, of course, is otherwise qualified for civic office. I commend the bill to the House.