

LOCAL GOVERNMENT AMENDMENT (SUSPENSION AND DISMISSAL) BILL 2018

Second Reading

Resumed from 27 June.

HON DONNA FARAGHER (East Metropolitan) [3.14 pm]: I rise as the opposition lead spokesperson for the Local Government Amendment (Suspension and Dismissal) Bill 2018. I indicate at the outset that the opposition will be supporting the legislation.

Essentially, this bill provides a new framework and new powers to the Minister for Local Government that are not within the current act. In my contribution, I want to go through a couple of key aspects. The bill provides a new framework for the minister to suspend and/or order an individual council member to undertake remedial action. In order for the power to be exercised, the minister must be satisfied that it is inappropriate for that member to continue to act in their role. I refer to proposed section 8.15E in clause 15, which sets out the suspension mechanism. There is a bit involved here, which is very clear within the bill, but I think it is important to reflect on it. Proposed section 8.15E, “Minister may suspend council member or require member to undertake remedial action”, states —

- (1) If satisfied that it is appropriate to intervene under this section, the Minister may, by order, do either or both of the following —
 - (a) suspend a council member;
 - (b) require a council member to undertake any remedial action specified in the order within the time specified in the order.

The question is: when can the minister be satisfied? That is obviously identified as follows —

- (2) The Minister can only be satisfied that it is appropriate to intervene under this section if one or more of the following factors exist —
 - (a) the member has been charged with a disqualification offence;
 - (b) the Departmental CEO has, under Part 5 Division 9, made an allegation to the State Administrative Tribunal that the member has committed a serious breach or a recurrent breach, as those terms are defined in section 5.102A;
 - (c) the circumstances set out in subsection (3) have occurred.
- (3) The circumstances referred to in subsection (2)(c) are that —
 - (a) the Departmental CEO has advised the Minister in writing that the Departmental CEO suspects on reasonable grounds that at least one of the following apply —
 - (i) the member has failed, or is failing, to perform the member’s role, functions or duties under this Act;
 - (ii) the member’s conduct has adversely affected, or is adversely affecting, the ability of another person to perform their role, functions or duties under this Act;
 - (iii) the member’s conduct has adversely affected, or is adversely affecting, the ability of the local government to comply with the principles that apply to it under section 5.40;
 - and
 - (b) the Minister is satisfied that the seriousness or duration of the suspected failure or conduct requires intervention under this section.

The bill further extends the current powers within the act with regard to the minister’s ability to suspend a council, if appropriate, either before or during an inquiry by an inquiry panel. Inquiry panels are obviously not new. They already have the ability to investigate and report on a matter relating to the operations or the affairs of a local government. However, the extended power allows the minister to suspend an individual council member rather than necessarily the whole council. If the minister thought that the inquiry would be seriously prejudiced if the individual were not suspended, this would be done by the necessary order, which is outlined in the bill and the act.

The bill necessarily includes clauses relating to the ability to extend the suspension of certain council members while an inquiry is conducted, the reinstatement of a council member under certain circumstances, and the ability to suspend a council member if that member fails to undertake remedial action as previously ordered by the minister. Additionally, the bill will remove the entitlement of a council member. This also would include a mayor or shire president, as the case may be, receiving a sitting fee or an allowance while the suspension is in place; that

would be appropriate. The bill, however, does not deal only with suspension; it also deals with dismissal. Proposed section 8.15K outlines the circumstances in which the minister may recommend that a council member be dismissed. This is a significant power, as it can be unrelated to an inquiry being undertaken by the inquiry panel. I refer to that proposed section more particularly. Obviously, as I said, this is quite a significant power that will be placed upon the minister. Proposed section 8.15K(2) states that the minister can recommend to the Governor that a council member be dismissed, but he can do that only if he is satisfied that it is appropriate to intervene, which is when the minister —

- (a) is of the opinion, based on the advice in writing of the Departmental CEO, that either or both of the following apply —
 - (i) the member is impeding the ability of the local government to perform its functions and duties under this Act;
 - (ii) it is in the best interests of the local government that the member be dismissed;
- and
- (b) is satisfied that the seriousness of the situation for the local government requires intervention under this section.

That is quite a significant power that will be placed with the minister. He will not be able to just decide overnight that this is what he is going to do. As I understand, a show cause notice—for want of a better term—will be required to be provided to the council member. They will have 21 days to consider that recommendation and provide any response to the minister, and then the minister will take into consideration that response and any other information that is provided to him or her. Should the minister still take the view that that council member should be dismissed, the Governor can, by order made under the recommendation of the minister under the provisions outlined in this bill, dismiss that member of the council. That is the mechanism for the minister, as I understand, which can be unrelated to any inquiry being undertaken. Of course, the other mechanism can be used. The inquiry panel will also have the ability to recommend the dismissal of an individual council member to the minister. If that were agreed to by the minister, then a recommendation would go to the Governor.

Overall, the opposition supports the intent of this legislation. I have a couple of questions for the minister and if she is able to respond to those in her second reading reply, it would not be my intention to go into the Committee of the Whole stage. My first question is on clause 15, proposed section 8.15M, which relates to the report setting out grounds to be made available to the public. It states —

- (1) On the day an order dismissing a council member under section 8.15L takes effect, the Minister is to make available to the public in any manner that the Minister thinks fit a report that contains the grounds on which the Minister made the recommendation to dismiss the member under section 8.15K(1).
- (2) Despite subsection (1), the Minister may withhold the report, or any part of its contents, to the extent that the Minister considers that making it available might prejudice a matter that is likely to come before a court of law or to be the subject of an allegation to the State Administrative Tribunal.

I accept the reason for proposed subsection (2); however, I am keen to understand what mechanism would be used under subsection (1) to make the report public. Does that include, for example, something being placed in *The West Australian* or the *Government Gazette*? I am keen to know, because it states, “that the Minister thinks fit”. That is fairly broad and we need some clarity of what is proposed. The other query I have is about clause 16, “Section 8.19A inserted”. Proposed subsection (1) states —

Before or after appointing an Inquiry Panel to conduct an inquiry and make a report about a local government, the Minister may, by order, suspend a member of the council of the local government if the Minister thinks that the conduct of the inquiry would be likely to be seriously prejudiced if the member were not suspended.

I have read the bill and I can see where everything leads to, but I am keen to understand the types of circumstances in which the minister may seek to suspend a member whilst an inquiry is underway. My final question is about clause 19, “Section 8.24 amended”. Proposed subsection (4A) on page 19 of the bill, states —

If, and only if, the Inquiry Panel has recommended that a council member be dismissed, the Minister may recommend that the Governor dismiss the member, but the Minister does not have to so recommend.

I am interested in that latter part. I understand that there is already a similar provision within the act about the dismissal of a council, and despite the inquiry panel perhaps recommending that a council be dismissed, the minister does not have to recommend that to the Governor if he or she chooses not to. It may just reflect current practice and I am not aware of it, but I am keen to understand what, if any, requirements will be placed on the

minister to give reasons for not recommending that? Will those reasons be made public if the minister does not decide to recommend to the Governor that the council member be dismissed?

With that, I again indicate that the opposition supports the bill. As I said, save for those few questions that I have, if they are answered satisfactorily, I am happy not to seek to go into the Committee of the Whole stage.

HON ROBIN CHAPPLE (Mining and Pastoral) [3.27 pm]: For the record, I am the lead speaker on the Local Government Amendment (Suspension and Dismissal) Bill 2018 on behalf of the Greens. I would like to start by thanking those who briefed the Greens on this bill: Luke Stevens, Tarnya Widdicombe and the minister himself. It was very pleasing to have that level of conversation on this bill. The bill will amend the Local Government Act 1995 to give the minister power to suspend an individual council member and/or to order him or her to undertake remedial action in certain circumstances. Power will also be given to the minister to recommend that the Governor dismiss an individual council member in some circumstances. Currently, the act authorises various processes to commence the scrutiny of local governments, their operation and affairs. These include inquiry by the minister or departmental CEO, inquiry by an independent panel appointed by the minister and proceedings to recover misapplied funds or property via the court. It is also possible for the entire council to be suspended or dismissed. It is not currently possible under the act to suspend or dismiss an individual council member. This gap is what the Local Government Amendment (Suspension and Dismissal) Bill 2018 addresses. In many respects, the drafting mirrors the act's existing provisions for the suspension and dismissal of an entire council, but brings them into focus on an individual. The bill also includes an option for the minister to order a councillor to undertake remedial action as well as, or instead of, suspending him or her. Such remedial action is envisaged to be training, extra training or, indeed, mediation.

The explanatory memorandum contains flow charts showing how the provisions will work. I ask the Leader of the House, who has carriage of the legislation in this place, to confirm for the record that the bill is not a complaints process activated by complaints by one councillor against another. I understand that lately a record number of complaints have been made to the Local Government Standards Panel by councillors against other councillors—several of which are vexatious but some of which are valid. The Minister for Local Government said that the bill will not address that. These provisions are intended to be activated only when a councillor's conduct jeopardises his or her role, duties or functions. The minister has said that he therefore expects that the provisions for suspension and dismissal will be used sparingly.

I ask the Leader of the House to confirm that this process will not be a first resort, but is to be used when other appropriate alternatives have been eliminated. I am satisfied that the wording of the bill reflects that intention. I also ask the Leader of the House to confirm that the bill is not retrospective. The question is whether intervention is currently needed. Past actions may be relevant to this, but are not of themselves sufficient triggers.

The bill does not change the timing of ordinary or extraordinary local government elections; a suspended councillor's term will continue to run. Should a local government election occur during a period of suspension, the bill will not prevent a suspended councillor from being a candidate for their own seat or for another council vacancy. However, if re-elected, the councillor will still need to serve the remaining suspension period. This is to stop suspended councillors from resigning and then re-standing for office.

There are a few issues. The bill does not apply to local government managers, and that is of significant concern to me because in many cases therein lies some of the substantive problems we now have in local government. The bill does not address concerns that some local government managers and/or CEOs override elected councillors. Under part 5, division 4, of the act, the hiring and firing of local government employees is by the council; the state government does not intervene. However, some councils have considerable tensions between elected and non-elected members. Of the feedback the Greens have received from stakeholders about the bill, this is the only concern about the bill that has been raised—that it does not address this problem. This problem, in my view, is becoming systemic.

Hon Tim Clifford and I have raised similar concerns directly with the minister in respect of certain councils in our own electorates. The minister is aware of the issue and I understand that the current review of the act is intended to address it. In the meantime, I understand that councillors who are in this situation are able to call the Department of Local Government, Sport and Cultural Industries directly for information about their current options under the act. I also understand that the minister will be introducing a further bill—probably this year—that will mandate universal training for all local government councillors about their own responsibilities and the options they have, not only in this situation but also in respect of other challenging situations councillors may face during their term.

The Greens are very supportive of comprehensive training for councillors, and I am satisfied that the bill gets the balance right. The circumstances in which the minister can intervene are suitably limited, and there is procedural fairness for the councillors concerned. Judicial review in the Supreme Court is available if the councillor believes she or he has not been afforded procedural fairness. If the councillor is dismissed, the minister must make available to the public a report of the grounds for the dismissal.

I have two questions I would like the Leader of the House to answer; hopefully I can get answers in her response to the second reading debate. If, like my colleague Hon Donna Faragher, I am satisfied with the answers, I see no reason to go into Committee of the Whole House. First, to assist with future interpretation, I would like to drill down into clause 15, specifically on proposed new sections 8.15K(2)(a)(i) and (ii) on page 13, to get some clarification on the record. I note that those provisions are tightened by both proposed sections 8.15(2)(b), which relates to seriousness, and 8.15M, which provides for a public report to be made available. I ask first: would the minister please confirm that the word “impeding” in proposed section 8.15K(2)(a)(i) sets a high standard and means more than “an adverse effect”? My second question is: will the minister please describe the sorts of situations that proposed section 8.15K(2)(a)(ii) aims to address?

I also have further questions about the intended content of public reports made by the minister if a councillor is dismissed: how detailed will the report be? Will it be a register—for example, like the Legal Practice Board’s register of disciplinary action—or will it be a full report, or something in between?

The bill will remove suspended councillors’ entitlements to fees and allowances during suspension and will permit the local government to recover any fees and/or allowances already advanced to the suspended councillor. Councillors are not employees. As the Salaries and Allowances Tribunal stated in its first-ever determination for councillors in 2013, the fees, expenses and allowances they receive are not intended to be a full-time salary. There is a recognised element of voluntary community service in a councillor’s role. Under the act, they receive sitting and meeting attendance fees, which may be paid as an annual fee; and reimbursement of expenses, which may be paid as an annual allowance. Mayors, presidents and chairs receive an annual allowance, and a local government can decide to pay its deputies an allowance. This is to reflect their extra-statutory functions, ceremonial and civic duties—including local government business entertainment—and responsibilities. I understand that the bill is aimed at annual allowances, as there is otherwise currently no mechanism to stop or reimburse them if a councillor is suspended—that is, sitting fees and reimbursements that are paid each time they are incurred would already have been stopped. I also understand that my good friends at the Western Australian Local Government Association support the bill, including this provision.

In concluding, I indicate that the Greens will support this legislation, and I look forward to the Leader of the House’s response to the questions that Hon Donna Faragher and I have asked in our contributions.

HON RICK MAZZA (Agricultural) [3.39 pm]: I also rise in support of the Local Government Amendment (Suspension and Dismissal) Bill 2018. In this state there are 138 local governments. Each council is charged with governing the local government’s affairs and being responsible for the performance of the local government’s functions. Some of those functions and responsibilities include the day-to-day activities that occur in the suburbs throughout the state such as the provision and maintenance of footpaths, parks, sporting facilities, ports, libraries and museums; providing waste collection services; and involvement in the areas of child care and aged care. Local government plays quite a big role within the state, which is crucial, of course. The essence of this bill is to provide for the suspension and dismissal of individual councillors rather than the requirement currently to dismiss the entire council. Various councils over the last few years have had problems. In September 2014, the City of Canning’s council was dismissed for the second time in 13 years for failing to provide good governance to ratepayers. In January 2015, the Shire of York’s council was suspended for six months following complaints about its ability to provide good governance. In January 2017, the Shire of Exmouth’s council was suspended for six months following a damning Corruption and Crime Commission report that found the council was unable to govern effectively. In those cases, many of the councillors were probably quite good councillors who were quite innocent but were dismissed because that was the only option available to the minister. Unfortunately, when the whole council is dismissed, all its members are tainted by the fact that they were part of a council that was dismissed. This bill will provide for individuals to be either suspended or dismissed, depending on the outcome of a panel review. The minister can set up a panel review and order interventions for certain councillors. Those councillors might have to undertake some training or they may be suspended. If the recommendation is that they be terminated from their position, the minister can choose whether to accept that recommendation and refer it to the Governor.

Another feature of the bill is that, while the councillor is under suspension, their sitting fees can also be suspended. There was some controversy over the City of Perth’s suspended councillors continuing to receive their pay, so that is another good feature of this bill. In 2015–16, Western Australian local governments raised more than \$2.1 billion in rates, received more than \$280 million in commonwealth government and financial assistance grants and managed assets worth more than \$40 billion—it is not loose change. Local government, as the third tier of government, plays a vital role and handles very large amounts of money. Ratepayers who elect council members do so with the expectation that they will carry out their duties in a professional, accountable, informed and dignified manner. Each councillor must have the appropriate training to ensure that they meet the necessary skill set needed to competently undertake their role to ensure that the council as a whole works proficiently. Good corporate governance must occur at every level of local government and, should breaches occur, they must be properly investigated and the responsible persons held to account. Should individual council members or the

council as a whole not provide good governance, not behave in a way that is expected or not undertake its duties in a satisfactory manner, the minister can and has used his powers under the current act to suspend or dismiss the whole council to protect the public interest. Of course, when a council is dismissed it creates a large degree of turmoil within the community. Quite often a lot of social media surrounds that event and people are very nervous about what is going on and uncertain about their community's future. In the meantime, commissioners are put in place to run the council, which creates a degree of uncertainty. Being able to identify individuals and deal with them without dismissing the whole council is a very positive step. Of course, early intervention and correcting the situation is certainly a key element. Allowing the minister to suspend or dismiss individual council members will protect those who have done nothing wrong and allow the council to continue to operate.

I am satisfied with the provisions of the bill that safeguard council members by allowing them to comment on the recommendations from the inquiry panel so that natural justice occurs. I am also satisfied with the recommendation that allows the minister to reinstate a council member should the inquiry recommend that the member not be dismissed. However, I would like a little more clarification on clause 19, which inserts into section 8.24, proposed subsection (4B), allowing the minister to reinstate the suspended member even when the inquiry panel has recommended that the council member be dismissed. I would like to know under what circumstance this provision would be used and what provisions are put in place so that this clause is not abused. In short, I support the bill.

HON SUE ELLERY (South Metropolitan — Leader of the House) [3.45 pm] — in reply: I thank members for their contributions to debate on the Local Government Amendment (Suspension and Dismissal) Bill 2018. I anticipate that I will be able to provide a response to everyone, but I will use this opportunity while I am on my feet to indicate to the advisers that I need a note on the last query raised by Hon Rick Mazza because I have not had time to have a quick click through the file. I hope that someone makes sure that that note about clause 19 and the amendment to section 8.24 is passed onto me. Hon Donna Faragher raised three issues.

Hon Peter Collier: They were very good points.

Hon SUE ELLERY: That is good to know. The first related to clause 15 and the requirement that the report setting out the grounds is to be made available to the public. It is expected that the report would be made available by being either tabled in Parliament or published on the department's website. My expectation is that those options are not mutually exclusive and that both would be carried out, and a media statement would advise of the release of the report. That is what is expected.

The second question raised by Hon Donna Faragher was about clause 16 and proposed section 8.10A, which is headed, "Suspension of a council member while inquiry is held". An inquiry panel that has the powers of a royal commission can be appointed to inquire into and report on any aspect of a local government or its operation or affairs. The Local Government Act currently provides for the suspension of a council when the conduct of the inquiry is likely to be seriously prejudiced if the council were to continue in place while that inquiry was being conducted. Some examples of when a council has been suspended while an inquiry has been undertaken include the City of Cockburn in 1999, the City of South Perth in 2003, the City of Joondalup in 2005 and the City of Canning in 2013–14. This proposed section allows the suspension to be more targeted. It would be used if the conduct of the inquiry could be seriously prejudiced by the actions of a council member through, for example, the destruction of records or an inappropriate influence on the activities of council or the administration during the conduct of that panel inquiry.

The third question asked by Hon Donna Faragher was about clause 19, which is the same provision that Hon Rick Mazza asked about. Under section 8.24 the minister decides what action to take based on the inquiry panel's report. The act does not require the minister to give public reasons for not accepting the inquiry panel's recommendations. However, it does require that the minister provide a copy of the report to the local government, each council member if the local government is suspended, and any individual council member that is suspended. Although the minister must also make the inquiry panel's report available to the public, other provisions in the bill allow parts to be withheld on the advice of the inquiry panel itself—not at the minister's own random discretion—if it could prejudice legal action being taken. The council, council members or suspended members have 35 days in which to provide written advice on what has been done or is proposed to be done based on the recommendations of that report. The minister then decides what action to take based on the report. If the minister considers that a council member is taking or has taken the appropriate and necessary steps to address the recommendations, the minister may decide not to accept the inquiry panel's recommendations. I think the question was about the minister being required, or not required, to give public reasons for not accepting the inquiry panel's recommendation. If it is followed logically through, given that the minister has to provide a copy to the people affected by it and provide a copy of the report to the public, the court of public attention, if you like, would focus very much on the minister having to justify why he or she has not accepted those recommendations. I cannot imagine a circumstance in which the minister of the day would not have to be able to explain publicly why they had not accepted the recommendations, when they have had to make those recommendations public. Somebody will ask. That is the advice I have been provided on that.

In response to the contribution of Hon Robin Chapple, I can confirm that this is not a complaints process for other council members or members of the public. The structure of the legislation is such that there are safeguards to deal with the potential for vexatious complaints by one elected member against another. The provisions in the bill are about a council member failing to perform their role, functions or duties under the Local Government Act, or whose conduct results in another person, or the council, being unable to perform their functions. The protections in place to make sure that that is not abused include: to be satisfied that it is appropriate to intervene, the minister must act in good faith and not arbitrarily or capriciously; a suspension other than on the grounds of charges being laid or allegations being made to the State Administrative Tribunal can only be on the written advice of the chief executive officer of the Department of Local Government, Sport and Cultural Industries; the CEO must have reasonable grounds for their suspicion; the minister must be satisfied that the matter is of such seriousness or duration that intervention is required; the minister must give written notice to the council member, providing a description of the facts on which the proposed order is to be based; a council member must be given a minimum of 21 days to show cause why the minister should not make the proposed order; the minister must consider any response provided before making a decision; the minister and the departmental CEO could take into consideration information from a range of sources before making a decision, including reports by authorised inquiries, an inquiry panel, a standards panel, the Corruption and Crime Commission, the Auditor General, WorkSafe, or any other relevant source; and the advice of the State Solicitor would need to be sought as well.

Hon Robin Chapple also asked a couple of other questions. In relation to proposed section 8.15K(2)(a)(i), the honourable member was seeking advice about the use of the word “impeding”. Impeding sets a higher bar than adversely affecting. An adverse effect means there is a negative impact on the ability of the local government or another person to carry out their functions and role. Impeding means that the local government is restricted in its ability to function effectively, so that is a higher bar. In respect of the honourable member’s second question about the sorts of situations that that provision and the subsequent subparagraph (ii) are meant to address, it is dependent on circumstances. It is difficult to predict when circumstances would warrant the use of this power. Councils have in the past been dismissed, with all of the council members losing their positions, and that affects both those who have been contributing to the dysfunction and others who may have played no role whatsoever. It has been, on some occasions, using a sledgehammer to crack a nut. This provision will allow a more targeted approach to be taken, if it is necessary.

Hon Robin Chapple: Minister, if I may, can I ask a question that you may get on to later? When it comes to impeding, if a CEO or an administrator of a council believes that a person is impeding the good work of the council, is that a matter that can be brought before the minister?

Hon SUE ELLERY: I read out the measures that were in place. The measures in place about how it is determined that a matter be taken further—give me a minute to find it —

Hon Robin Chapple: I remembered your list, and I did not see them mentioned in that list.

Hon SUE ELLERY: Just let me have a look. I might finish what I am saying about other matters, and while I am doing that, I might get some advice on what action a CEO of the relevant council might take, and hopefully that is coming fairly quickly.

The third question asked by Hon Robin Chapple was about the contents of a report written pursuant to proposed section 8.15M, and how detailed the report would be. For example, would it be a register in the same form, for example, as the Legal Practice Board’s register of disciplinary action? The report will outline the behaviour that has led to the dismissal, and the impacts of that behaviour. It must set out the grounds on which the minister has made his or her decision. Again, the contents of that report will be dependent on the circumstances surrounding the council member. The report would be similar to an authorised person’s report, which is an existing provision in the legislation—for example, the recent report into the Shire of Wiluna. As to the question about the powers of the chief executive officer of the council, anyone can raise matters or concerns, but the evidence would need to be gathered to confirm whether there is a basis for that matter to proceed further, and the seriousness of it, to inform the minister before he or she is able to exercise those powers. With those comments, failing an indication of anything I have missed, I thank members for their contributions and support, and commend the bill to the house.

Question put and passed.

Bill read a second time.

Leave granted to proceed forthwith to third reading.

Third Reading

Bill read a third time, on motion by **Hon Sue Ellery (Leader of the House)**, and passed.