

# **Submission to the Office of Local Government – Feedback on the Phase 1 review of the *Local Government Act 1993***

March 2016

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## Introduction:

Local Government NSW (**LGNSW**) is the independent peak organisation representing 152 general purpose councils, associate members including 12 special purpose councils, and the NSW Aboriginal Land Council. All councils choose to be members of the Association. We represent the views of councils by:

- Advocating councils' views to governments and other stakeholders;
- Promoting local government to the community; and
- Providing specialist advice and services.

LGNSW thanks the Office of Local Government (**OLG**) for the opportunity to provide a submission concerning the Phase 1 review of the *Local Government Act 1993* (**LG Act**).

## Purpose

This submission is a response to the OLG's request for feedback on the Phase 1 review of the LG Act, with reference to the 2016 Explanatory Paper *Towards New Local Government Legislation Explanatory Paper: proposed Phase 1 amendments* (**Explanatory Paper**).

## Background

The Explanatory Paper sets out the policy principles behind the OLG's proposed amendments to the LG Act, some of which have been subject to previous consultation by the Independent Local Government Review Panel in 2012 and 2014, as well as the Local Government Acts Taskforce in 2013.

The Explanatory Paper notes that because many of the proposals have been the subject of previous consultations, the paper is as streamlined as possible, and is focused towards developing modern, principles-based local government legislation.

## Section A: General comments

### 1. Consultation Process

LGNSW has participated in the previous consultation processes and appreciates that some suggestions made in previous submissions have been reflected in the current proposals. LGNSW wishes to continue to work collaboratively with OLG to improve outcomes for the local government sector and their communities.

LGNSW also appreciates the concise nature of the Explanatory Paper. However, meaningful consultation requires:

- Early engagement with stakeholders;
- Sufficient time for all stakeholders to consider relevant proposals;
- Opportunity to consider proposals in context;
- Sufficient detail and specificity, particularly being able to consider the actual terms of draft legislation;

- Availability of associated regulatory impact statements articulating the costs and benefits of the proposals;
- An appropriate way of providing feedback on the proposals; and
- A subsequent feedback loop to indicate how the proposals were changed (or not) as a result of consultation, and how and why that conclusion was reached.

Most of these elements are missing in the current consultation.

While the NSW Government has been discussing legislative reform of the Local Government Act for a number of years, the nature and process of that reform has changed over time. Previous proposals have been refined or changed, and others are completely new.

The Government has also adopted a phased approach, rather than undertaking a more holistic review of the Act. The only information released to date relates to Phase 1, with no information available about the matters that subsequent phases will address, and associated timeframes.

### **a) Timing of Consultation**

The timing of the consultation has been disappointing.

The Explanatory Paper was released in early January, at a time when many people are traditionally still on holidays. The consultation time period also coincided with the period in which councils subject to amalgamation proposals had to attend public inquiry meetings and formulate their merger proposal responses. For those councils, this has effectively reduced the available time for consultation to two weeks. This is particularly problematic given council meeting schedules, at which meetings responses would need to be endorsed.

LGNSW has promoted the Act review actively through its weekly communications with councils and attended forums with council staff and councillors to discuss the changes. LGNSW has also participated in, and greatly appreciated, the working group established under the auspices of the Ministerial Advisory Group on local government reform. This group has worked in a very constructive and collaborative manner, and LGNSW wishes to credit the staff involved for the genuine way in which they have engaged with the stakeholders. LGNSW would welcome the opportunity to participate in future processes of a similar nature as the legislative reforms (and other reviews re codes of practice etc) progress.

However, OLG has done little to promote the changes or provide the sector with an opportunity to ask questions and discuss them. The only real engagement with the sector has been via the webinar broadcast on 8 March 2016. The nature of the presentation, which was to basically read through what was included in the Explanatory Paper, would have been better suited to coincide with the *release* of the Explanatory Paper, rather than providing information to stakeholders a week out from when the consultation period closed. Additionally, a weblink to a recording of the webinar was not provided until three days before the consultation closed.

Some of the proposals are also interdependent with parallel processes (e.g. the IPART review into the reporting and compliance burden on local government, which does not release its final report until approximately six weeks after the Phase 1 consultation period closes). It is therefore possible that the proposals under consultation may not even be the final ones that go forward, and stakeholders will have no opportunity to provide feedback on them. The other serious concern about this is that these interdependencies were not made clear to stakeholders in the explanatory paper.

Finally, the NSW Government has indicated that it is intended to introduce the amending legislation into Parliament as quickly as possible, in time to take effect with council amalgamations (which have previously been slated for announcement in July 2016). To give effect to this, amendments to the legislation are being drafted in parallel with the consultation.

The speed with which the legislation is being finalised and the advanced degree of drafting call into question the NSW Government's commitment to genuinely taking on board issues raised by stakeholders.

Given that this is the governing piece of legislation for the local government sector in NSW, LGNSW recommends that the process be amended and extended to enable proper, comprehensive and genuine consultation to occur.

### **b) Provision of Context**

The Explanatory Paper was streamlined and very easy to read. It also focused on establishing the principles-based framework under which the remaining provisions of the Act will sit.

LGNSW supports the move to principles-based legislation, but only if it offers true flexibility for councils to deliver required outcomes.

This cannot be judged on the basis of the material provided in the Explanatory Paper, because:

- The paper is *too* streamlined, resulting in some proposals containing insufficient detail and specificity about how they might work;
- There is no clear discussion about how the LG Act, associated Regulations, discretionary guidelines, mandatory guidelines and codes of practice might fit together;
- A number of terms are undefined and unclear (for example "long term sustainability" in section 1.3);
- Some of the proposals seem to be a grab-bag of issues needing to be addressed rather than having a coherent context and relevance to each other.

This is further discussed in section 2 below, concerning the purpose and characteristics of the proposed amendments.

### **c) Detail and Specificity**

The lack of specificity (and context) in the Explanatory Paper also prevents an assessment whether there might be any flow-on effects from the proposals, or unintended consequences.

The most effective way to address this issue is for the Government to consult on an exposure draft of the legislation, prior to finalising it for introduction to Parliament. LGNSW identified this early in the consultation process and it was proposed and unanimously supported by stakeholders at the Ministerial Advisory Group meeting of 3 February 2016.

An exposure draft would also address concerns that the wording of the proposals in the Explanatory Paper could easily change during the drafting process, and it is possible for the policy intent to be lost (despite the best intentions of OLG and the drafters).

The framing of certain sections of the Act will also be critical in determining the way in which the legislation would apply to the sector.

LGNSW considers it essential that the sector be given the opportunity to review and comment on an exposure draft.

#### **d) Impacts of Proposals**

LGNSW also considers it essential that the sector be given the opportunity to understand and comment on the likely costs and benefits of the proposals.

While some of the proposals are conceptual in nature, a number of the proposals will have direct cost implications for councils. There is no evidence that the costs and benefits of the proposals have been properly assessed, and the sector has not had any opportunity for review of and input to the impact assessment.

This is particularly relevant in the context of IPART's current review into the regulatory and compliance burden on councils, where the focus is on reducing red tape and cutting costs.

The NSW Government's Guide to Better Regulation requires application of the Better Regulation Principles, and preparation of a Better Regulation Statement or Regulatory Impact Statement. There is no evidence that this has been done for the current suite of proposals. LGNSW requests that the impact assessment be made available in tandem with the exposure draft.

#### **e) Feedback Mechanisms**

LGNSW acknowledges that the use of an online survey for the submission of views on the Act review proposals will enable OLG to quickly analyse and report on the responses. However, the survey is simplistic, and discourages responses that are nuanced (for example, agree with this part of the proposal but would prefer that this bit be changed). This could lead to misinterpretation of the data if the detail in any qualifying statements in the comments boxes is not taken into account. The survey method also discourages people putting forward alternatives to or suggestions about the proposals.

It is also not clear how OLG will be able to determine whether a submission from a councillor, mayor, general manager or staff member is the official position of the council's governing body, or whether it is a personal view of the person making the submission.

It is recommended for future consultations that an online survey not be used.

The process as currently articulated also contains no step where feedback is provided to stakeholders about the nature of the submissions, how the proposals have been amended as a result (if amended) and the reasons why or why not.

LGNSW requests that this type of feedback be provided as an accompanying paper to the exposure draft and impact assessment.

## 2. Context and Overall Approach to the Legislation

As flagged above, it is difficult to assess the proposed amendments properly because the Paper is extremely streamlined and offers no meaningful guidance on the Government's broad approach to revising the Act. For example:

- What further changes are still under consideration?
- Which of the Local Government Acts Taskforce and ILGRP proposals are still on the table and which have been ruled out?
- Will the overall structure and content recommended in the Acts Taskforce report be adopted?

Without these questions being answered – at least in a preliminary way – it is impossible to judge whether the Phase 1 proposals are simply placing yet more detailed provisions and regulation of local government into the Act, or represent the beginning of a genuinely fresh approach.

There are two fundamental questions here:

- Is the Government willing to make a decisive move away from detail and prescription towards more flexibility – enabling councils and communities to adapt generalised provisions to local circumstances and preferences (in effect, applying the principle of subsidiarity)?
- How is the overall package of legislation going to evolve and be structured – what will be the respective roles of the Act itself, Schedules, Regulations, Codes and Guidelines?

### a) Purpose and characteristics of Phase 1 amendments

The Phase 1 amendments include a number of valuable measures that meet the three objectives set out by OLG in the Explanatory Paper, and that lay the foundations for a 'new look' Act – notably the re-framing of the purpose of the Act and the role of local government; several new statements of principles; the revised definitions of the roles of the governing body, councillors, mayors and general managers; and the changes to various aspects of Integrated Planning and Reporting and auditing.

However, whilst there are clear benefits in having a number of these amendments in place before the next council elections (for electoral purposes or to facilitate decisions that need to be made by incoming councils, such as the organisation structure), others do not appear urgent and would benefit from further consideration once the overall shape of Government policy on the future of local government has been determined. This applies to the purpose of the Act (1.1), the role of local government (1.2) and the Guiding Principles (1.3). There is a case for not proceeding with proposals 1.1, 1.2 and 1.3 pending further discussions on an overall legislative package.

Also, there are other proposals for relatively minor changes that might best be considered as part of later phases of revising the Act following more extensive analysis of options. These

include in particular the proposed amendments relating to Financial Controllers (3.9), Code of Conduct matters (6.1 and 6.2), and the abandonment of State of Environment reports (8.2).

It is also debatable whether firm principles for financial management (8.6) can be agreed at this stage, given the pending review of the rating system, finalisation of arrangements for the Auditor General to oversight local government audits, and consideration of some related outstanding ILGRP recommendations.

### **b) Centralised control or flexibility and subsidiarity?**

Whilst the proposed Phase 1 amendments go some way towards a revised Act that is more principles-based, it remains unclear whether later phases will consolidate that approach. There are two reasons for doubt:

- First, because the amendments introduce new avenues for central oversight, notably the proposal for Financial Controllers
- Second, because many require detail to be spelled out in Regulations, Codes or Guidelines – which might indeed prove flexible but might also involve yet more prescription, and which may prove to be inconsistent with other subordinate provisions.

Local government acts in some other States have introduced measures that facilitate a greater degree of self-regulation and greatly reduce the oversight and intervention of the Minister and relevant State agency. An important issue here is the capacity of the agency, in this case the Office of Local Government, to undertake all the oversight responsibilities placed upon it by the Act. Anecdotal evidence – such as timeframes for handling Code of Conduct matters – suggest that OLG's workload in regulation and oversight is already beyond its capacity, and displaces valuable tasks in policy development and support to councils.

### **c) Overall structure of legislation**

The explanation of the Phase 1 amendments raises important questions about how the Government intends to use different elements of legislation. The following critical issues need to be addressed before the amendments are passed:

- Does the Government anticipate wholesale shifts of provisions from the body of the Act to Schedules and Regulations? If so, it should be possible for OLG to indicate now which areas of the Act might be affected, and it should do so.
- Will the Government adopt the Taskforce recommendation for a separate Elections Act (such as those in South Australia and New Zealand)?
- Does the Government intend to extend the use of *mandatory* Guidelines or Codes, issued by the Minister or Chief Executive?

The last point is crucial. Mandatory Guidelines issues by the Chief Executive already apply to IPR and extension of their use was recommended by the Taskforce. Proposed amendments 3.7, 7.6 and 8.4 seem to involve just that.

The problem here is that local government is a democratic institution and mandatory requirements should be subject to a proper assessment of benefit and cost, and Parliamentary scrutiny, either through amendments to the Act or tabling (and potential disallowance) of

Regulations. Giving a Minister or public servant the individual power to make up and apply new rules without some form of scrutiny or due process is undemocratic and open to abuse.

LGNSW strongly asserts that the use of mandatory guidelines is inappropriate and should be discontinued. The fact that such guidelines already exist in the Act is not a case for perpetuating their use, but rather for progressively removing them as the Act is reviewed. If the requirements are important enough to be mandatory then they should be captured within the Act or Regulation.

#### **d) Context of LGNSW Response and Future Phases**

Given the uncertainties about the overall legislative package outlined above, LGNSW has some concerns about responding on the proposed amendments in isolation, and is concerned that doing so could result in a situation where the comments made here cease to be applicable once the detail of the remainder of the amendments and the subordinate instruments are known.

LGNSW therefore reserves the right to revisit the issues covered in this submission if subsequent information is made available that alters the context of the comments made here.

## Section B: Specific comments on Explanatory Paper

### 1. Guiding principles for the Act and local government

LGNSW supports the principle of modernising the Local Government Act and making Act more accessible to councils, councillors and the community. A specific response has been provided on each section of the Explanatory Paper, but as indicated above, there is a case for not proceeding with the proposals contained in section 1, pending further discussions on the overall legislative package.

LGNSW is also concerned that the new Act risks being overloaded with principles. That is, the proposals contained in sections 1.2 and 1.3 increase the potential for differing interpretations and confusion to arise. It may be useful to (for example) streamline the role statement for local government, and concentrate on the principles instead.

Proposed Amendment	LGNSW Response
<p>1.1 Purposes of the Local Government Act</p> <p><b>Current provision</b> Section 7</p>	<p><b>LGNSW generally supports the proposed amendments, but has some reservations as to the lack of defined terms.</b></p> <p><b>LGNSW suggests that the following points are considered when drafting the amendments to the LG Act and, where relevant, are included as purposes of the LG Act:</b></p> <ul style="list-style-type: none"> <li>• The LG Act should recognise that local government is an autonomous, elected sphere of government and not an agency of the State of NSW;</li> <li>• The LG Act should equip councils to be the leaders, identity and place makers, and service providers their communities want them to be;</li> <li>• The LG Act should avoid unnecessary prescription and/or regulation of councils and the communities they serve;</li> <li>• In relation to the second dot-point applicable to responsibilities and powers, a reference to revenue raising powers should be included - e.g. “... <i>the nature and extent of the responsibilities, powers and corresponding funding and revenue raising powers, including taxation powers, of local government</i>”; and</li> <li>• In relation to the third dot-point, “<i>sustainable</i>” is not defined within the LG Act. LGNSW is of the view that the current section 7(e) which directly requires council, councillors and council employees to have regard to the <b>principles of ecologically sustainable development</b> (as defined in the LG Act) when carrying out their responsibilities should not be removed or replaced with an undefined term. LGNSW notes that the principles of ecologically sustainable development were incorporated into the LG Act pursuant to the</li> </ul>

	<p><i>National Strategy for Ecologically Sustainable Development</i> which was endorsed by the Council of Australian Governments in 1992 and is directly linked to Australia's obligations under international environmental law;</p> <ul style="list-style-type: none"> <li>• Also in relation to the third dot-point applicable to the creation of a system of local government, LGNSW strongly believes that the purpose '<i>maximises value for money</i>' must be amended to '<i>maximises value for community</i>'. For example, council should be able to offer land for sale to (say) the State of NSW at a reduced rate, provided that Council is able to dictate the beneficial use of the land (eg for the development of a school).</li> <li>• LGNSW suggests that dot-point 3 should include words to the effect of: <i>'to create a system of local government that is democratically elected, engages with and is accountable to community, is <del>sustainable</del>, flexible, effective and maximises value for <del>money</del>community, and adheres to the principles of ecologically sustainable development.</i></li> </ul>
<p><b>1.2</b> Role of local government</p> <p><b>Current provision</b> Section 8</p>	<p><b>LGNSW is of the view that the current LG Act charter as set out in section 8 should not be replaced by the proposed amendments. If the charter is to be updated, it should be in line with the proposed amendments set out in the Acts Taskforce.</b></p> <p><b>LGNSW has concerns that the following have not been incorporated into the proposed amendments:</b></p> <ul style="list-style-type: none"> <li>• Current section 8(2) is not addressed. This section should remain in the LG Act to ensure Council is not pursued under a civil cause of action;</li> <li>• The proposed role of local government '<i>to provide local democracy, strategic civic leadership, stewardship and sound governance to achieve sustainable social, economic, environmental, health and wellbeing and civic engagement</i>' as set out in the Acts Taskforce Final Report does not appear to have been incorporated into the proposed amendments. LGNSW is of the view that this description of the role of local government should be incorporated into any amendments to the LG Act;</li> <li>• Democratic leadership should be the first dot-point and should include the words '<i>democratic representation of its community</i>', as this is the most important role of local government;</li> <li>• Proposed dot-point 2 '<i>Working cooperatively with other bodies</i>' should not override Council's power to disagree with the views of a State or agency, and for local government to make decisions that benefit the community it represents;</li> <li>• Any reference to '<i>effective stewardship of lands and other assets to affordably meet current future needs</i>' (as per proposed dot-point 3) should include a specific reference to</li> </ul>

	<p>the principles of ecologically sustainable development (as set out above, the principles of ecologically sustainable development were incorporated into the LG Act pursuant to the <i>National Strategy for Ecologically Sustainable Development</i> which was endorsed by the Council of Australian Governments in 1992 and is directly linked to Australia's obligations under international environmental law);</p> <ul style="list-style-type: none"> <li>• Any reference in the concepts in proposed dot-point 4 or dot-point 5 should include a specific reference to a revenue framework that: <ul style="list-style-type: none"> <li>○ Provides the flexibility to deal with varying local needs and preferences as well as the varying cost of performing functions and delivering services and infrastructure;</li> <li>○ Provides the capacity and flexibility to respond to emerging challenges;</li> <li>○ Provides for transparency and accountability in local governance;</li> <li>○ Recognises the varying revenue raising capacity of different local government areas; and</li> <li>○ Enhances the financial sustainability of local government;</li> </ul> </li> <li>• The Charter should recognise local government's purpose and/or role in the relevant constitutional instruments specifying it as the sphere of government dealing with local matters and generally assigning corresponding revenue raising powers; and</li> <li>• The Charter should also incorporate a mechanism to allocate specific functions between local government and other spheres of government to avoid wasteful duplication of service provision and confused responsibilities resulting in a lack of transparency and accountability to constituents and prevent cost-shifting.</li> </ul>
<p><b>1.3</b> The guiding principles of local government</p> <p><b>Current provision</b> Section 8</p>	<p><b>LGNSW generally supports the proposed amendments.</b></p> <p><b>LGNSW suggests however that the following points are considered when drafting the amendments to the LG Act:</b></p> <ul style="list-style-type: none"> <li>• The guiding principles should be observed in local government to enable councils to '<i>provide wholly elected community based representative democracy</i>';</li> <li>• Councils have specific responsibilities under industrial awards and employment related legislation to involve and support their staff. As such, in relation to dot-point 12, the words '<i>endeavour to involve and support</i>' should be removed from the final principle in this amendment and retain the existing wording of section 8 '<i>be a responsible employer</i>';</li> <li>• The subsidiarity principle should be incorporated as a guiding principle of local government. The principle of subsidiary involves the notion of making local choices at a local level, i.e. where the most localised sphere of government should deliver public functions, except where other spheres of government can undertake these functions more</li> </ul>

	<p>effectively. This principle should in turn be recognised by other spheres of government; and</p> <ul style="list-style-type: none"> <li>• The reference in dot-point 8 to '<i>long term sustainability</i>' is unclear, and should be properly defined (e.g. with reference to financial sustainability, if that is what is meant.).</li> </ul>
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**2. Structural framework of local government**

<b>Proposed Amendment</b>	<b>LGNSW Response</b>
<p><b>2.1</b> The role of the governing body</p> <p><b>Current provision</b> Section 223</p>	<p><b>LGNSW generally supports the proposed amendments, however requests that the following comment is considered:</b></p> <ul style="list-style-type: none"> <li>• The requirement in dot-point 4 to '<i>ensure as far as possible the financial sustainability of the council</i>' seems an odd choice of words. LGNSW suggests instead that the governing body should instead '<i>make decisions which support and advance the financial sustainability of the council</i>'.</li> </ul>
<p><b>2.2</b> The number of councillors</p> <p><b>Current provision</b> Sections 224 and 224A</p>	<p><b>LGNSW supports the proposal to have an odd number of councillors in principle, and on the basis that specific consideration is given to the needs of any merging councils.</b></p> <ul style="list-style-type: none"> <li>• LGNSW supports the concept that councils would have an odd number of councillors to avoid the mayor needing to use a casting vote, and the need for mayoral elections to be determined by the drawing of lots;</li> <li>• However, the transitional arrangements for merging councils are not yet clear, and LGNSW would not support the transitional arrangements be constrained by this type of requirement;</li> <li>• For example, equal representation of councillors from merging councils would be preferred during any transition process that includes the appointment of councillors until the next election;</li> <li>• It is therefore recommended that an exemption provision be included to enable an even number of councillors in the case of a merged entity formed prior to council elections.</li> </ul>
<p><b>2.3</b> Rural councils</p> <p><b>Current provision</b> Sections 224A and 365</p>	<p><b>LGNSW has reservations relating to the proposed amendments, and is unable to support the amendments in dot-points 1 and 2:</b></p> <ul style="list-style-type: none"> <li>• If the proposal were to be adopted, a definition of 'small rural council' in the LG Act would be required;</li> </ul>

- LGNSW notes that councils have raised concerns that proposed dot-point 1 could allow an abuse of process by political parties (where they have the numbers to control the governing body);
- Conversely, other Councils have questioned why these proposed amendments would only apply to small rural councils as they could potentially benefit all councils
- LGNSW is of the view that the current arrangements should be maintained to enable further consultation on the specifics of the proposal and be addressed in Phase 2 of the Act review. It is particularly inappropriate to adopt these provisions without enabling the sector to understand which councils would be affected.

**LGNSW also notes that the ‘Rural Council’ model proposed by the Independent Panel found no support at any fora of councils and has been opposed by the councils that might be considered to be potential candidates.**

**LGNSW does not oppose dot-point 3 in principle, but is of the view that there should be a minimum requirement for at least six meetings to be held in a year, and that extraordinary meetings should also continue to be available.**

### 3. The governing body of councils

Proposed Amendment	LGNSW Response
<p><b>3.1</b> The role of the mayor</p> <p><b>Current provision</b> Section 226</p>	<p><b>LGNSW supports the proposed amendments, with the exceptions of dot-points 7 and 10.</b></p> <ul style="list-style-type: none"> <li>• LGNSW opposes dot-point 7 as it is a significant step beyond the existing power for the mayor to make decisions between meetings – if a policy needs changing, it would be preferable to call an extraordinary meeting;</li> <li>• LGNSW is of the view that with regards to the appraisal of the general manager, this should not be limited to the mayor, rather, the general manager’s performance in the role must be discussed with the elected body. LGNSW proposes that dot-point 10 be amended to include words to the effect of <i>‘lead the performance of the general manager in consultation with councillors’</i>.</li> </ul> <p><b>In addition to the proposed amendments, LGNSW also proposes that the mayor’s role be</b></p>

		<p><b>expanded to include leadership in the following areas:</b></p> <ul style="list-style-type: none"> <li>• Community consultation and accountability;</li> <li>• Securing the commitment of councillors to the preparation of draft strategic plans and delivery programs and promoting them to councillors, the community and other stakeholders;</li> <li>• Promoting consistent and concerted implementation of adopted plans and policies;</li> <li>• Reporting to the community as the council’s spokesperson; and</li> <li>• Leading and guiding the councillors in the discharge of their responsibilities.</li> </ul>
3.2	<p>The mayor’s term of office</p> <p><b>Current provision</b> Section 230</p>	<p><b>LGNSW supports the proposals that mayors are elected to office for a term of two years and the introduction of compulsory voting by councillors in mayoral elections, but rejects the election of mayors by councillors for a four year term.</b></p> <ul style="list-style-type: none"> <li>• The Act already contains the opportunity for mayors to be elected for four years, via a popular election, and it is considered appropriate that this be maintained as the only way in which elections for four years can be undertaken.</li> <li>• While compulsory voting in mayoral elections is supported, the concept that a specific councillor might be prevented from voting in an election in order to avoid an even number of voters is rejected.</li> </ul>
3.3	<p>The role of councillors</p> <p><b>Current provision</b> Section 232</p>	<p><b>LGNSW supports the proposed amendments to the roles of councillors.</b></p> <ul style="list-style-type: none"> <li>• Feedback from the sector has indicated that the dual nature of the role currently outlined in the Act is confusing.</li> <li>• The dot points in this proposal refer to “the local government”. This language should not be used. Instead such references should be to “the council”. This would apply wherever it occurs in the Explanatory Paper.</li> </ul>
3.4	<p>Councillors’ term of office</p> <p><b>Current provision</b> Sections 233 and 234</p>	<p><b>LGNSW presumes that this amendment is to cover mid-term vacancies for Directly Elected Mayors.</b></p> <ul style="list-style-type: none"> <li>• LGNSW supports the principle that no one should have two votes but recommends that if the provision is being amended to deal with Directly Elected Mayors then it should be amended to address this directly, rather than using the more generic term “civic office”, that is defined quite broadly in the Act. That would prevent unintended consequences;</li> <li>• LGNSW has identified that an unintended consequence could mean that a councillor who becomes a county council chairperson could lose their position as a councillor as a result</li> </ul>

– drafting of the section should be clear that this would not occur.		
<p><b>3.5</b> Oath or affirmation of office</p> <p><b>Current provision</b> None</p>	<p><b>LGNSW supports the requirement that councillors and mayors take an oath or affirmation prior to commencing duties.</b></p> <ul style="list-style-type: none"> <li>• LGNSW notes that the requirement that the oath or affirmation be taken within one month could cause issues for councillors who have life events that might prevent them from meeting this timeframe (e.g. an operation, unforeseen medical issue, etc). LGNSW suggests instead that the oath or affirmation be taken ‘<i>at the commencement of their first council meeting</i>’ and within three months of assuming office. LGNSW agrees that the councillor should not undertake the duties of the role without first having taken the oath or affirmation.</li> <li>• LGNSW notes that this proposal could be usefully linked to the proposal for induction programs and professional development.</li> </ul>	
<p><b>3.6</b> Councillors’ expenses and facilities</p> <p><b>Current provision</b> Sections 235 – 254A and Schedule 1</p>	<p><b>LGNSW supports this amendment in principle, and makes the following comment for consideration:</b></p> <ul style="list-style-type: none"> <li>• Provided that the proposed amendments are designed to reduce the compliance burden on councils, LGNSW recognises that this is a sensible way to cut red tape; and</li> <li>• LGNSW notes that as the guidelines associated with this section of the Act were developed in 2009 an update may be required in the near future. LGNSW has on previous occasions been consulted during the revision of such guidelines, and requests a formal role in revision of such guidelines, and that this role be included in the Act.</li> </ul>	
<p><b>3.7</b> Mayor/councillor professional development</p> <p><b>Current provision</b> None</p>	<p><b>LGNSW supports this amendment in principle, subject to the following amendments and comments:</b></p> <ul style="list-style-type: none"> <li>• LGNSW supports the idea of councils offering a common induction program for new and returning councillors, tailored to the circumstances of each council, its needs and budget.</li> <li>• LGNSW also supports councillors being provided access to on-going professional development that is tailored to their specific needs.</li> <li>• However, professional development should not be mandatory for councillors, and reporting against training opportunities offered and taken up should avoid naming and shaming.</li> <li>• LGNSW suggests that the wording in the Act should make clear that the councils do not necessarily have to develop the induction program themselves, but rather arrange for it to be developed or made available. Some councils may wish to prepare induction programs</li> </ul>	

	<p>themselves, whereas others may wish to require that certain external programs be undertaken (for example that might be developed or offered by external training providers); and</p> <ul style="list-style-type: none"> <li>• LGNSW should play a legislated role in developing these requirements, and will also take a leading role in programs and guidelines for formulating and delivering appropriate professional development programs.</li> </ul>
<p><b>3.8</b> Role and functions of administrators</p> <p><b>Current provision</b> Sections 255-259, 438I, 438M and 438Y</p>	<p><b>LGNSW supports this amendment.</b></p> <ul style="list-style-type: none"> <li>• LGNSW suggests that this provision should also confirm that administrators will fulfil the role of the governing body.</li> </ul>
<p><b>3.9</b> Financial controllers</p> <p><b>Current provision</b> None</p>	<p><b>LGNSW cannot support the proposed amendment at this time. It is a brand new provision with minimal detail provided in the Explanatory Paper. LGNSW requests that consideration of this item be deferred to Phase 2 of the Act review to enable a better understanding of how the financial controller provision might work, and proper consultation with the sector on the detail. LGNSW suggests that in the meantime, additional support and guidance for Councils in sustainable financial management and through the IP&amp;R guidelines should be provided and promoted by OLG.</b></p> <ul style="list-style-type: none"> <li>• The proposed amendment has some merit in that it has the effect of circumventing the potential dismissal of councils and the appointment of administrators;</li> <li>• However, the way in which the provision will operate is poorly defined in the Explanatory Paper, and does not allow the sector to form a proper view on whether to support the provision. For example: <ul style="list-style-type: none"> <li>○ LGNSW is of the view that this provision should only be rarely used – is that OLG’s intention?;</li> <li>○ what is the trigger/threshold that would result in a financial controller being appointed (ie the terms “<i>poorly performing</i>” and “<i>high financial sustainability risk</i>” are not defined) – might they include a finding by IPART that a council was not “fit for the future”?;</li> <li>○ how long is it expected that the financial controller would be in place for?;</li> <li>○ what are the criteria for the financial controller to complete its appointment?;</li> <li>○ would the financial controller be required to have regard to the Community Strategic Plan while in place?</li> <li>○ what would be the relationship with the general manager?</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ who would pay the financial controller – LGNSW is of the view that in the circumstances council would not have the capacity to do this and it should fall back to the OLG to finance the financial controller;</li> <li>○ what dispute resolution mechanisms would be available?</li> <li>● The Explanatory Paper indicates that the powers will be modelled on those that exist in Queensland. The Queensland powers require the council to pay the costs of the financial controller. This is strongly opposed by LGNSW.</li> <li>● It is also understood that the Queensland powers have only ever been used three times in times of acute financial crisis, and only after consultation with the Local Government Association of Queensland. In two instances the power was used in relation to very small indigenous councils that had only recently joined the mainstream of local government. The legislation must require OLG to consult with LGNSW before using the powers, and the power should be used as rarely as in Queensland.</li> </ul>
<p><b>3.10 Meetings</b></p> <p><b>Current provision</b> Sections 9 - 11 and 360 - 376</p> <p>Clauses 231 -173 of <i>Local Government (General) Regulation 2005</i></p>	<p><b>LGNSW supports the proposed amendment.</b></p> <ul style="list-style-type: none"> <li>● LGNSW believes that it has a legitimate role to play in formulating the proposed Model Meeting Code, and requests that the LG Act be amended to recognise that LGNSW be engaged in the development of the Model Meeting Code.</li> <li>● LGNSW also supports the modernisation of meeting procedures and the removal of any unnecessary prescription and red tape, but does not support an unwarranted level of intervention via the code in the way that councils go about their business.</li> <li>● As stated previously, LGNSW opposes the use of mandatory guidelines.</li> </ul>
<p><b>3.11 Delegation of functions</b></p> <p><b>Current provision</b> Sections 377 - 381</p>	<p><b>LGNSW does not support the previously-mooted proposal to omit section 377(1)(i) from the list of prohibited delegations as drafted, and has further comments about other amendments proposed at the same time.</b></p> <ul style="list-style-type: none"> <li>● The Explanatory Paper proposes to make changes to procurement delegations that were mooted in 2015. However, it is unclear whether the full range of proposals identified then are being pursued now (for example the changes to threshold amounts for councils).</li> <li>● Further changes are proposed in relation to community financial assistance, and it is also unclear whether these would be in addition to the delegations currently in the Act, or whether it is proposed to remove or somehow streamline the delegations in the Act.</li> <li>● The Government should properly indicate the specific amendments it is seeking in order to enable a proper response from stakeholders and it is recommended that this issue be deferred to Phase 2 to enable those details to be revealed.</li> </ul>

- LGNSW’s previous and current position is that allowing delegation to anyone is too broad – it would be better to specify, for instance, that delegation could be to the General Manager:
  - It is unclear how the omission of section 377(1)(i) from the list of prohibited delegations would help councils avoid or minimise corruption.
  - It is also unclear whether there might be any unintended consequences from the proposed change, and whether the body of work conducted by ICAC in terms of corruption risks relating to local government procurement and tendering has been taken on board.
  - These comments were made at the time of the legislation being put forward and have not been addressed in the Explanatory Paper.
  - On this basis LGNSW can see no reason to change its position and the omission of s377(1)(i) is opposed.
- LGNSW also previously welcomed the lifting of the tender threshold from \$150,000 to \$250,000, but opposed the creation of two classes of councils, one of which had access to the increased threshold and one of which did not. Under the Bill as it was then drafted, the councils not judged Fit for the Future were disadvantaged procedurally in terms of their contract ceiling when compared to those that were so judged. This is opposed on the basis that it is likely to be smaller councils that could be disadvantaged, and they are the ones that can least afford to go to tender. The drafting of the Bill also suggested some future red tape in the regulations, the content of which had not (and has not) been revealed.
- In the absence of further information the LGNSW position is unchanged from what was previously submitted.

#### 4. Elections

Proposed Amendment	LGNSW Response
<b>4.1</b> Extension of the option of universal postal voting to all councils  <b>Current provision</b> Sections 310B	<b>LGNSW has significant reservations about exclusive postal voting.</b> <ul style="list-style-type: none"> <li>• LGNSW supports voters having the choice between three ways to vote at each election – pre-poll, attendance, or postal. Exclusive postal voting is a step too far.</li> <li>• LGNSW opposes the device of extending exclusive postal voting to local government areas by regulation. Application of the provision should be dealt with openly and transparently in the</li> </ul>

Clauses 313 and 321 of  
*Local Government  
(General) Regulation 2005*

legislative process.

- The arguments against exclusive postal voting include:
  - The arrangements for voting for all spheres of government should be the same
  - It may favour candidates who can afford expensive direct mail campaigns but who otherwise don't have local supporters and the local support to staff polling booths;
  - It may erode the traditional Election Day turn out, denying candidates and voters the opportunity for direct engagement;
  - It may disenfranchise a significant proportion of the voting population, especially young people and those with less permanent addresses; and
  - It will create confusion and uncertainty among voters, in the case where some councils have exclusive postal voting while their neighbours don't.
- Exclusive postal voting does not have widespread support in the sector.
- As noted above, LGNSW supports pre-poll, attendance and postal voting used together. The availability of the postal voting option would mean that the voting systems across the three spheres of government are as similar as possible.

## 5. Council's workforce

Proposed Amendment	LGNSW Response
<p><b>5.1</b> Determination of the organisation structure</p> <p><b>Current provision</b> Sections 332-333</p>	<p><b>LGNSW supports the proposed amendment only if amended to reflect that the governing body should decide the overall functional areas of the council and high level structure, and the general manager the detailed structure within each functional unit.</b></p> <p>LGNSW agrees that the delineation of the roles of the mayor, councillors and general managers must be clear and unambiguous.</p> <p>Councillors should be involved at the strategic level to determine the functional areas of the Council, in accordance with the priorities set out in the Community Strategic Plan, and the high level structure in the context of the functional areas. The general manager should be required to deliver the tasks in the plan that are within the budget and using their own structures below the high level structure set by the Council.</p> <p>In practice, general managers should present a draft structure to Council that outlines the</p>

functional areas and senior/executive level structure, for endorsement. However, Councils should not be involved in any approval of structures below that level, nor of all positions that report directly to the general manager (such as operational and specialist positions like personal assistants, public relations and human resources professionals etc) .

Section 333 of the LG Act also requires councils to “re-determine” the organisation structure within 12 months after any ordinary election of council. LGNSW is of the view that setting a minimum requirement for a council to examine its organisation structure is appropriate, as it presents a council with the opportunity to reassure itself that the current organisational structure relates well and is able to deliver the matters identified in the council community strategy plan, resourcing strategy, delivery plan and operational plan. In LGNSW’s experience, however, having the opportunity to re-determine its structure will not necessarily mean that a council decides to change its structure.

Accordingly, LGNSW is of the view that instead of section 333 of the Act requiring that the organisation structure of a council “*must be re-determined*” within 12 months after any ordinary election of the council, the appropriate approach would be that a council “*must consider and may re-determine*” its organisation structure within 12 months after any ordinary election of the council. LGNSW advocates that the new or revised LG Act include the amendment of sections 332 and 333 as follows:

**332 Determination of functional areas and structure**

(1) The governing body of the council must determine:

- the functional areas of the council, in accordance with the priorities contained within the Community Strategic Plan
- an organisation structure to the level of the Executive Band of the Local Government (State) Award that directly reports to the general manager.
- *the resources to be allocated towards the employment of staff.*

(2) The general manager must determine the balance of the organisation structure in consultation with the governing body of the council.

<p><b>333 Re-determination <u>of functional areas and</u> structure</b></p> <p><i>(1) The <u>functional areas and</u> organisation structure may be re-determined by the council from time to time.</i></p> <p><i>(2) <u>The functional areas and organisation structure must be considered and may be re-determined within 12 months after any ordinary election of the council.</u></i></p>	
<p><b>5.2</b> The role of general managers</p> <p><b>Current provision</b> Section 335</p>	<p><b>LGNSW supports the proposed changes.</b></p>
<p><b>5.3</b> The requirement to report annually to the council on senior staff contractual conditions</p> <p><b>Current provision</b> Section 339</p>	<p><b>LGNSW supports the proposed omitting of this section, and provide the following comments for consideration:</b></p> <ul style="list-style-type: none"> <li>• The Act should have requirements for the reporting of salaries that parallel that required of State Government agencies.</li> <li>• While ever senior staff remain employed under the terms of the standard contract, it is the case that reporting their contractual conditions to council on an annual basis appears an unnecessary regulatory burden.</li> <li>• In any case, s332(2)(b) of the LG Act must be updated to reflect the provision of the <i>Government Sector Employment Act 2013</i>.</li> </ul>

**6. Ethical standards**

Proposed Amendment	LGNSW Response
<p><b>6.1</b> Consolidation of the prescription of ethical standards</p> <p><b>Current provision</b></p>	<p><b>LGNSW supports the proposed amendments, provided that:</b></p> <ul style="list-style-type: none"> <li>• The pecuniary interest provisions are <i>consolidated</i> into the Code of Conduct and the ethical standards are removed from the Act to ensure they only appear in one place;</li> <li>• Any review of these provisions takes into consideration the existing Model Code of</li> </ul>

<p>Sections 441 – 459</p> <p>Clauses 180 - 192 of <i>Local Government (General) Regulation 2005</i></p>	<p>Conduct provisions relating to pecuniary interests;</p> <ul style="list-style-type: none"> <li>• The pecuniary interest provisions should focus on the obligations of individual civic office holders, as there can be damage to the reputation of the whole of council where those obligations are not met; and</li> <li>• LGNSW also supports the development of a Good Governance Guide, as recommended in the Independent Panel’s report, and requests involvement in the development of the Guide as well as any redrafting of the Model Code of Conduct.</li> </ul>
<p><b>6.2</b> Investigation of pecuniary interest breaches</p> <p><b>Current provision</b> Sections 440F – 440P and 460 – 486A</p>	<p><b>LGNSW supports the proposed amendments provided that:</b></p> <ul style="list-style-type: none"> <li>• the pecuniary interest investigation provisions are written in plain language, are easily understood and have any unnecessary red tape removed.</li> </ul>

## 7. Councils’ strategic framework

LGNSW seeks to be formally required in the new Act to assist in the development and adoption of guidelines and frameworks, including the IP&R guidelines, the new performance measurement framework and the guidelines for community engagement strategies. It is critical that sector views are taken into account in developing these materials. LGNSW can offer expertise and member engagement to improve the quality and appropriateness of the outcomes.

<b>Proposed Amendment</b>	<b>LGNSW Response</b>
<p><b>7.1</b> Integrated planning and reporting principles</p> <p><b>Current provision</b> Sections 402 - 406</p>	<p><b>LGNSW does not support the introduction of an additional set of principles.</b></p> <ul style="list-style-type: none"> <li>• The majority of the principles are already included in other parts of the LG Act, including in sections 7 and 8 which set out the purpose of the LG Act and Council Charter.</li> <li>• The proposed amendments risk the LG Act becoming overloaded with sets of principles and role definitions that will be difficult for councils to implement and the OLG to enforce.</li> <li>• For example, LGNSW opposes dot-point 1 which proposes that councils ‘<i>lead and inspire residents, businesses and others to engage with their council</i>’, on the grounds that this would be impossible to quantify or to include data on it in an annual report.</li> <li>• LGNSW agrees that there is a need for continued and expanded guidance to councils in relation to integrated planning and reporting (<b>IPR</b>), including long-term financial, asset and</li> </ul>

	<p>workforce planning. Rather than introducing an additional set of principles into the LG Act, the existing IPR provisions should be simplified with any prescriptive detail contained in either the Regulation (where mandatory) or guidelines (where discretionary).</p> <ul style="list-style-type: none"> <li>• LGNSW supports uniform performance indicators for councils and performance monitoring, provided the indicators replace rather than add to existing reporting requirements and do not impose additional red tape and/or costs on councils.</li> </ul>
<p><b>7.2</b> Streamlining the existing integrated planning and reporting provisions</p> <p><b>Current provision</b> Sections 402 - 406</p>	<p><b>LGNSW does not oppose this proposed amendment but is unable to support it without further information.</b></p> <ul style="list-style-type: none"> <li>• This proposed amendment sounds positive on face value and LGNSW supports the objective of simplification, however it is impossible to provide feedback without reviewing proposed changes to the LG Act or the proposed process requirements.</li> <li>• In particular, sections 402 to 406 do not seem overly prescriptive and complex in their current form, so it is difficult to imagine how they would change.</li> <li>• LGNSW would like to play a stronger role in developing and adopting these guidelines and frameworks. LGNSW can offer expertise and member engagement to improve quality and appropriateness of the outcomes, and seeks formal recognition within the amended LG Act for such a role.</li> </ul>
<p><b>7.3</b> Council's integrated planning and reporting to reflect regional priorities</p> <p><b>Current provision</b> Sections 402 - 404</p>	<p><b>LGNSW is unable to support the proposed without further information and recommends that it be deferred to Phase 2 for consideration in the context of Joint Organisations.</b></p> <ul style="list-style-type: none"> <li>• The Phase 1 amendments do not include reference to the formation of Joint Organisations and their responsibilities for regional strategic planning;</li> <li>• LGNSW supports the concept of taking regional priorities into account, but considers it important that a clear framework be provided for determining those priorities, including the process by which priorities are identified, agreed and funded, and what councils' role is in terms of delivering strategies to meet these;</li> <li>• Clarity is also required that this will not result in cost-shifting for councils to deliver regional commitments of State authorities;</li> <li>• LGNSW supports the formation of Joint Organisations, and would suggest that this proposed amendment include a responsibility for councils to include into their community strategic plans the consideration of regional plans prepared by Joint Organisations;</li> <li>• A framework for dispute resolution should also be included in the circumstances where councils are unable to agree on regional priorities;</li> <li>• LGNSW has concerns that the proposed amendment will create the perception in the</li> </ul>

	community that local government elected members are responsible and or accountable for regional priorities – in circumstances where priorities might be imposed by an external party and council has little control over achieving related outcomes council will be placed in a difficult situation.
<p><b>7.4</b> Expanded scope of delivery programs</p> <p><b>Current provision</b> Sections 402 - 406</p>	<p><b>LGNSW supports this proposed amendment subject to “activities” being defined as the major services provided by councils, and not routine business-as-usual operations and adds the following for consideration:</b></p> <ul style="list-style-type: none"> <li>• LGNSW notes that the ILGRP recommended that the IPR requirements for Delivery Programs incorporate regular service reviews. Some councils undertake this as a regular practice, and many others included it with their FFTF Improvement Plans.</li> <li>• The new role statement for the governing body includes a requirement ‘to keep under review the performance of the council and its delivery of services’.</li> <li>• LGNSW notes that regular service reviews can assist in achieving greater financial sustainability, and can also become a vehicle for councils to work with their communities to determine appropriate levels of service.</li> </ul>
<p><b>7.5</b> Fiscal sustainability</p> <p><b>Current provision</b> Clause 201 of <i>Local Government (General) Regulation 2005</i></p>	<p><b>LGNSW does not support this amendment for the following reasons:</b></p> <ul style="list-style-type: none"> <li>• This proposal would be better suited to complement the proposals outlined in section 8.6 of the Explanatory Paper, as revenue policies are for the long term – there would be little to gain by requiring councils to prepare revenue policies annually, and this proposed amendment will have the effect of imposing additional and unnecessary red-tape on councils;</li> <li>• The structure of the rating system should be based on taxation principles and again this is not something for the operational plan, it is better suited to being included under delivery programs and long term financial planning.</li> <li>• It is unclear why improvements to resourcing strategies would be dealt with separately from the IPR Guidelines (although noting that LGNSW does not support the use of mandatory guidelines as discussed elsewhere in this submission).</li> <li>• This amendment should not be made in the absence of the final reports of the IPART reviews into the compliance and reporting burden on councils, and the rating system.</li> </ul>
<p><b>7.6</b> Expanded scope of councils’ community engagement strategies</p>	<p><b>LGNSW supports the intention of this provision, but is unable to support the proposed amendments without more information:</b></p> <ul style="list-style-type: none"> <li>• LGNSW is of the view that councils’ Community Strategic Plan should be developed</li> </ul>

<p><b>Current provision</b> Sections 14, 18 – 20, 402</p>	<p>through a robust Community Engagement Strategy, and that the Community Strategic Plan should:</p> <ul style="list-style-type: none"> <li>○ be developed and endorsed by the council;</li> <li>○ identify the main priorities and aspirations for the future of the area covering a period of at least 10 years;</li> <li>○ establish strategic objectives and strategies for achieving those objectives;</li> <li>○ address civic leadership, social, environmental and economic issues in an integrated manner;</li> <li>○ be based on social justice principles of equity, access, participation and rights;</li> <li>○ be developed having regard to relevant State and Regional Plans of the State Government;</li> </ul> <ul style="list-style-type: none"> <li>• LGNSW is of the view that the Community Engagement Strategy should be developed by councils themselves to meet the needs and individual characteristics of communities, and has concerns that prescribing minimum community consultation requirements will have unintended and unforeseen consequences; and</li> <li>• LGNSW seeks that the legislation provide assurance that there are no grounds for legal challenges on this basis, eg by community members who are of the opinion that council has failed to take into account a view put forward by a community member, or failed to consult someone on something etc.</li> </ul>
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## 8. Council performance

Proposed Amendment	LGNSW Response
<p><b>8.1</b> Annual reports</p> <p><b>Current provision</b> Sections 428 – 428A</p>	<p><b>LGNSW supports the introduction of internal audits in principle, however has some reservations about the introduction of an internal audit committee as set out in 8.4 below and does not support signing off on annual reports.</b></p> <ul style="list-style-type: none"> <li>• LGNSW notes that the proposed amendment is not clear as to whether the annual reports being referred to are limited to those currently required under sections 428 (the Annual Report) and 428A (State of the Environment Report) of the LG Act. If the intention of the provision is to capture all annual reports prepared by a council, this intention should have been clearly identified, as it is difficult to provide feedback without clarity and specificity.</li> <li>• LGNSW is of the view that the requirement that annual reports be endorsed as factually</li> </ul>

	<p>accurate by the internal audit committee would be unnecessarily onerous, further diminish timeliness of annual reports, and is completely impractical – how would the audit committee be able to satisfy itself that every single statement in the report was correct?;</p> <ul style="list-style-type: none"> <li>• LGNSW also suggests that the LG Act will require a definition of ‘<i>factually accurate</i>’;</li> <li>• With regards to Annual Reports prepared pursuant to section 428 of the LG Act, these documents are a report on councils’ achievements in implementing their delivery program and the effectiveness of related principal activities (e.g. the community strategic plan and more detailed operational plan). It is assumed the assessment of ‘<i>factual correctness</i>’ is to mainly relate to these achievements and the effectiveness of those principal activities. In the view of LGNSW, this would be a subjective assessment and therefore any comment on an Annual Report’s ‘factual correctness’ would in fact be a matter of personal opinion;</li> <li>• The Annual Financial Report and other financial returns will be subject to the Auditor-General’s financial audit;</li> <li>• Additionally, LGNSW refers to the Institute of Internal Auditors Australia definition of internal audit: ‘<i>internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organisation’s operations. It helps an organisation accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control and governance processes</i>’. Internal auditors are not responsible for the execution of the activities of entities, rather their role is to provide advice to managers and the Board of Directors (or equivalent) as to better ways to execute their responsibilities. In the view of LGNSW, this precludes internal committees from being able to sign off on individual annual reports – any amendment to the LG Act requiring this to be done would exceed the traditional and industry accepted role of an internal auditor.</li> <li>• The role of internal audit committee should not be to audit every single annual report, rather, the internal audit committee’s role should be to review systems, processes, policies and procedures to ensure that the right checks and balances are in place to ensure the integrity of councils’ operations. This may involve sample and spot audits or audits in response to a complaint. E.g. an audit of a particular report may be done one year, but then may not be done again for another couple of years.</li> </ul>
<p><b>8.2</b> State of the environment reports</p> <p><b>Current provision</b> Section 428A</p>	<p><b>LGNSW supports the proposed amendment, and makes the following comments for consideration:</b></p> <ul style="list-style-type: none"> <li>• Provided that reporting on environmental issues can continue to be included in Annual and End of Term reports, LGNSW does not oppose the amendment.</li> </ul>

<p><b>8.3</b> Performance measurement</p> <p><b>Current provision</b> Section 429</p>	<p><b>LGNSW supports this amendment in principle, subject to the following comments:</b></p> <ul style="list-style-type: none"> <li>• LGNSW supports the adoption of a limited set of common performance indicators which do not add to councils' regulatory burdens, and providing the indicators are: <ul style="list-style-type: none"> <li>○ Primarily based on a council's performance against the Community Strategic Plan;</li> <li>○ Easily understandable by the community;</li> <li>○ High level and not designed for the micro management of councils by the Office of Local Government;</li> <li>○ Trend indicators used for comparative purposes; and</li> <li>○ Developed in partnership with and endorsed by the local government sector through LGNSW.</li> </ul> </li> <li>• An agreed set of data will enable councils to compare their performance against other councils.</li> <li>• LGNSW suggests that the performance management and reporting framework ties in with any sector-wide audits.</li> <li>• LGNSW does not support dot-point 5 at this stage, as there is insufficient information available about the exact purpose of the surveys, what would be done, who would pay, etc. If the Government wished to proceed with this proposal then it is recommended that it be deferred to Phase 2 of the review so that further discussion can occur. LGNSW would oppose any such surveys being at the cost of local government.</li> </ul>
<p><b>8.4</b> Internal audit</p> <p><b>Current provision</b> Discretionary guidelines issued under section 23A</p>	<p><b>LGNSW supports the introduction of internal audits in principle, however has some reservations about the introduction of an internal audit committee:</b></p> <ul style="list-style-type: none"> <li>• Further information is required as to the structure and composition of the internal audit function;</li> <li>• The scope of the internal audit activity lacks detail. Clarification is required as to whether the audit goes as far as strategic service delivery audit (i.e. prudence and efficiency of strategic service plans, fit-for-purpose audit of IPR process).</li> <li>• It is important that the internal audit committee does not take on a decision making role in terms of service priorities (as the committee is not the elected body);</li> <li>• Clear guidelines will be needed to ensure that the audit committee stays within the boundaries of the role;</li> <li>• This proposal has the potential to add to the reporting burden on councils – e.g. councils will be required to finance a new committee, provide staff resources to support it and contribute more staff time, however, in LGNSW's view the proposal of strengthened</li> </ul>

	<p>internal auditing is generally sound and should help councils ensure internal processes are adequate even though it would add cost;</p> <ul style="list-style-type: none"> <li>• In dot-point 2, the terms “<i>adding value</i>” and “<i>continuous improvement</i>” need to be defined, and an explanation of how they will be measured needs to be clear - LGNSW recommends removal of that proposed clause as it will be difficult for OLG to enforce;</li> <li>• More detail is required as to the composition of the audit committee (e.g. number of members, required qualifications and how they would be selected). LGNSW suggests that the size of the audit committee will need to be scaled to the size of the council, as for smaller councils it could be a case of overkill;</li> <li>• The implementation of this amendment is likely to require capacity building for elected members, senior management and audit committee members. There could also be significant linkages to the proposed changes to IPR requirements;</li> <li>• As indicated earlier, LGNSW opposes the use of mandatory guidelines, and prefers that any mandatory requirements are subject to parliamentary scrutiny, either through amendments to the Act or tabling of regulations.</li> </ul>
<p><b>8.5</b> Sector-wide performance audits by the Auditor-General</p> <p><b>Current provision</b> None</p>	<p><b>LGNSW does not support this proposed new requirement.</b></p> <ul style="list-style-type: none"> <li>• LGNSW is of the view that any sector-wide audits should be financed by the NSW Government and the cost not passed onto councils;</li> <li>• LGNSW also insists that the sector be consulted via LGNSW on the topics that will be subject to the audit.</li> <li>• The audits should not focus on the merits of council policies and objectives, but rather on whether the objectives have been achieved and whether councils are operating efficiently and effectively.</li> </ul>
<p><b>8.6</b> Financial management</p> <p><b>Current provision</b> Sections 408 - 411</p>	<p><b>LGNSW supports these proposed amendments, and makes the following comment for consideration:</b></p> <ul style="list-style-type: none"> <li>• In relation to dot-point 3, sub-point 2, LGNSW suggests that the wording should be amended to: ‘<i>Asset operation and maintenance and asset renewal and enhancement/upgrade</i>’.</li> <li>• Future generations should also contribute to the cost of their services. That is, councils should be able to eg borrow for the delivery of services or infrastructure that will last well into the future.</li> </ul>
<p><b>8.7</b> Financial reporting</p>	<p><b>LGNSW supports this amendment in principle.</b></p>

<p><b>Current provision</b> Sections 412 - 421</p>	<ul style="list-style-type: none"> <li>• However, LGNSW is of the view that the reporting requirements themselves should have been made available for comment, as it is unable to provide feedback without these requirements being made publicly available.</li> <li>• LGNSW also opposes the use of mandatory guidelines, as indicated previously.</li> </ul>
<p><b>8.8</b> External audit</p> <p><b>Current provision</b> Sections 422 - 427</p>	<p><b>LGNSW does not support the requirement that the Auditor-General be responsible for external audits.</b></p> <ul style="list-style-type: none"> <li>• LGNSW is supportive of the Auditor General having an oversight and review role in the NSW Local Government external audit process, with the objectives being to improve the standard and consistency of external audits across the sector.</li> <li>• LGNSW does not support the Auditor-General becoming the mandated auditor for all councils, either using Auditor General’s own staff or contracting existing private audit practitioners.</li> <li>• LGNSW maintains that councils should maintain the right to engage their own external auditors.</li> <li>• LGNSW specifically rejects the implied intention for the Auditor General to produce a regular report to Parliament on the local government sector. Local government’s performance is already very heavily scrutinised.</li> </ul>

## Section C: Other Matters for Consideration

It is unclear whether the Government intends to consult further on other sections of the Act relating to the issues covered by the Explanatory Paper.

LGNSW therefore takes this opportunity to provide general feedback on the thematic areas included in the Phase 1 review where specific comments have not been sought by OLG at this point. LGNSW reserves the right to provide additional or different feedback in the future if the matters are included in future phases of the LG Act review.

### 1. Guiding principles for the LG Act and local government

#### a) Consolidation of all employment related provisions into the same chapter of the LG Act

Currently employment related provisions appear in various chapters of the LG Act. For example, section 218CA, concerning the maintenance of staff numbers in rural centres following the amalgamation of two or more areas, is found in Chapter 9, Division 2A of the Act.

LGNSW is of the view that it would be pragmatic to relocate the provisions of section 218CA to Part 6 of Chapter 11 of the Act, and that all employment related provisions be contained within the same chapter.

#### b) Returning the legal status of councils to body corporate

LGNSW continues to hold the view that the concept of a 'body politic' should be removed from the LG Act, and replaced with the term 'body corporate'.

In the view of LGNSW, it is opportune to address this issue in the Phase 1 review of the LG Act.

On 22 November 2008, section 220 of the LG Act was amended, changing the legal status of NSW councils from "*bodies corporate*" to a "*...body politic of the State with perpetual succession and the legal capacity and powers of an individual, both in and outside the state*".

The objective of the 2008 amendment was to remove councils from the federal industrial relations system so that they remained part of the NSW State industrial relations system.

In late 2009, the Australian Government and the NSW State Government then implemented a suite of legislative changes that facilitated the transfer of NSW private sector industrial relations to the Federal industrial relations system. As part of these changes, the then Minister for Industrial Relations, the Hon. John Robertson MLC, declared under law that all NSW councils are not national system employers, so that they remained part of the NSW industrial relations system.

This declaration obviated the need for the legal status of councils and county councils to be changed, and as a consequence, the legal status can and should now be restored to bodies

corporate without impacting upon whether councils or county councils belong to the State or Federal industrial relations system.

LGNSW remains concerned about 'unintended consequences' as a result of the removal of councils' status as bodies corporate. There are several known examples of where such removal has created legal and/or practical problems for councils.

In many of these examples the problem(s) were overcome through further legislative change, changes to State/Federal government policy and/or Ministerial intervention. However, such 'band-aid solutions' fail to address the underlying issue that councils are no longer a separate legal entity under federal and international law. The bodies corporate status should be restored to councils to provide certainty and to remove the potential for unintended consequences in the future.

The 2015 judgement of the *High Court of Australia in Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Ors v Queensland Rail & Anor [2015] HCA 11* (8 April 2015), which unanimously found that Queensland Rail (QR, now Aurizon Pty Limited) is a trading corporation within the meaning of s 51(xx) of the *Commonwealth of Australia Constitution Act 1900 (Cth)*, casts doubt on validity of NSW councils as 'bodies politic'. Relevantly, the submissions of the Commonwealth were that:

*"To say that a body is not a constitutional corporation merely because a legislative provision deems it not to be a corporation, or because it is stated not to be a corporation in its constituent documents, would be contrary to the purpose of s51(xx). It would enable legislatures (whether State or federal) or individuals, by a simple drafting device, to immunise certain entities from the reach of federal laws regulating constitutional corporations"*

...

*"...a matter of principle, whether a local council is described as a 'corporation' constituted by 'the mayor, aldermen, and citizens' of a particular place, or is labelled 'a body corporate' consisting of the elected aldermen, or is said to be a 'body politic of the State' but 'not a body corporate', the question of whether the council is a constitutional corporation must be answered by looking to whether – as a matter of substance, not form – it has the characteristics of a corporation for the purposes of s 51(xx)".*

In finding that QR was a body corporate, the High Court applied the well-established 'activities test' and determined that QR's trading activities formed a sufficiently significant proportion of QR's overall activities. The other significant observation made by the High Court was the endorsement of the Commonwealth's argument that an entity with continuing legal personality evidenced by perpetual succession, the right to hold property and the right to sue and be sued was in substance a corporation, irrespective of the statutory label prescribed to the entity. This was confirmed by his Honour Justice Gageler who handed down a separate judgement and articulated the view (at paragraph 67 of the judgement) that the statutory declaration that QR is not a body corporate does not deprive QR of any of its corporate attributes to own property, to contract and to sue. Gageler J was also of the view that:

*"...no doubt that the description which that legislature chooses to give to the body it so creates cannot determine the character of that body for the purpose of s 51(xx) of the Constitution" [at paragraph 62].*

LGNSW advocates that the new or revised LG Act include amendments of sections 220, 221, 388 and 389, and suggests provisions to the following effect:

220 Bodies corporate

A council is a body corporate.

221 What is a council's corporate name?

(1) The corporate name of a council of an area other than a city is the "Council of X" or the "X Council", X being the name of the council's area.

(2) The corporate name of a council of a city is the "Council of the City of X" or the "X City Council", X being the name of the city.

388 Bodies Corporate

A proclamation establishing a county council operates to constitute the county council as a body corporate under this Act.

389 What is a county council's corporate name?

The corporate name of a county council is to be "X County Council", where "X" is the name specified by the proclamation.

It is LGNSW's contention that these amendments will not have an impact on whether councils or county councils belong to the State or Federal industrial relations system.

#### **4. Elections**

##### **a) Directly elected mayors**

LGNSW opposed the ILGRP recommendation for the mandatory direct election of Mayors, and instead suggests that consideration be given to requiring all councils to hold a one-off referendum on the direct election of a mayor – thereby allowing electors to decide on the best models for their communities.

Implementation of this recommendation as part of Phase 1 is critical, as council elections are rapidly approaching.

#### **5. Council's workforce**

##### **a) Preservation of staff entitlement and numbers at rural centres**

The impact of council amalgamations on rural centres is a major concern for LGNSW and LGNSW supports the retention of legislated provisions to minimise the social and economic impacts of council amalgamations on such centres. However, section 218CA of the LG Act, in its current form, significantly reduces a merged council's capacity to achieve improvements in efficiency.

The obligation placed upon councils to maintain staff numbers in rural centres with a population of 5,000 people or fewer for an unlimited time (unlike the no-forced redundancy provisions of section 354F of the LG Act or the proposed amendment to section 354D of the LG Act) is excessively onerous and restrictive. Setting the population figure of 5,000 is an arbitrary figure and inexplicably the legislation does not contemplate the possibility of readjusting staff numbers to reflect changes in demand for the mix, scale and/or location of services across the local government area as a whole.

LGNSW proposes that the preservation of staff numbers at rural centres be limited to three years and that subsection 218CA(2) be amended as follows:

218CA Maintenance of staff numbers in rural centres

- (2) *The transferee council must ensure that the number of regular staff of the council employed at the rural centre is, as far as is reasonably practicable, maintained for up to 3 years after the transfer day at not less than the same level of regular staff as were employed by the previous council at the centre immediately before the amalgamation or alteration of boundaries took effect.*

**b) Preservation of entitlements of staff members**

LGNSW recognises there is merit in the legislation providing for the preservation of employee entitlements. The provision of employment protection provisions assists in facilitating an environment of positive change for an industry that may have to deal with amalgamations, boundary changes or transfers.

LGNSW, however, is of the view that the unlimited preservation of employees' terms and conditions is counterproductive to any potential change. As such LGNSW proposes that section 354D of the LG Act be amended in a manner consistent with the no forced redundancy provisions of section 354F of the LG Act to provide that the entitlements of employees are preserved for 3 years after the transfer. It is proposed that section 354D be amended as follows:

354D *Preservation of entitlements of staff members*

- (1) *If a staff transfer occurs, the employment of:*
  - (a) *a transferred staff member, and*
  - (b) *in the case of a boundary alteration:*
    - (i) *a remaining staff member of the transferor council, and*
    - (ii) *an existing staff member of the transferee council,*

*other than a senior staff member, continues on the same terms and conditions that applied to the staff member immediately before the transfer day, subject to section 354E, and cannot be altered without the staff member's agreement for 3 years after the transfer day.*
- (2) *Subsection (1) applies until other provision is duly made under any Act or law.*
- (3) *Neither the contract of employment nor the period of employment of a transferred staff member is taken to have been broken by the transfer for the purposes of any law, award or agreement relating to the employment of that staff member.*
- (4) *A transferred staff member is not entitled to receive any payment or other benefit merely because the staff member ceases to be a staff member of the former council.*
- (5) *The transfer of a transferred staff member does not affect any accrued rights the staff member had immediately before the transfer, including in relation to recreation leave, sick leave, long service leave and superannuation, but does not entitle the staff member to claim dual benefits of the same kind for the same period of service.*

### **c) Locum contract for GMs and revision of Temporary employment provisions**

The existing provisions of the *Local Government Act 1993* require a general manager to be employed under a performance-based contract. The *Standard Contract of Employment for General Managers of Local Councils in NSW* cannot have a term less than 12 months or more than 5 years. Consequently, councils wishing to engage locum general managers to cover short term vacancies or absences appoint such staff on terms and conditions covered by the *Local Government (State) Award 2014*.

The Association advocates that subsection (2) of section 338 of the new or revised Act be amended to provide as follows:

- (2) The term of a contract must not be more than 5 years (including any option for renewal). A term that is more than 5 years is taken to be limited to 5 years.

The above amendment would allow for the appointment of locum general managers using the *Standard Contract of Employment for General Managers of Local Councils in NSW* for periods of less than 12 months duration.

### **d) Redefining senior staff and whether such staff should be on term contracts at all**

Currently section 338 of the Act requires that the general manager and other senior staff of a council are to be employed under fixed term contracts of employment that are performance based. Such fixed term contracts of employment are currently required to be for a term of between 12 months and 5 years duration.

LGNSW supports a requirement that general managers of councils be employed under fixed term contracts of employment that are performance based. However, we reserve the right to make further observations during later phases of the Act review about the appropriateness or otherwise of the requirement to use fixed term contracts for senior staff below the level of general manager.

LGNSW understands that there has been a general move away from the requirement to use fixed term contracts of employment for senior executives that are employed in the NSW public sector.

In LGNSW's opinion, fixed term contracts of employment are not a substitute for performance management and should not be used as a device to dismiss poor performing employees.

LGNSW and local government unions are discussing the nature of contracts of employment for council general managers and senior staff and hope to make a joint submission on this issue in due course.

### **e) Temporary employment provisions**

The Act's temporary employment provisions should not be reviewed in isolation of sections 348, 349 and 350 of the LG Act.

Currently section 351 of the LG Act provides that if a position within the organisation structure of a council is vacant or the holder of such a position is suspended from duty, sick or absent then the general manager may appoint a person to the position temporarily. A person appointed to a position temporarily may not, according to the Act, continue in that position for more than 12 months or 24 months if the substantive holder of the position is on parental leave.

It is LGNSW's experience that the existing legislative provision has caused administrative difficulties for councils and LGNSW has appeared on behalf of councils in disputes relating to temporary appointments. The 12 month limit on the term of temporary appointments is too short and does not allow sufficient scope for engaging replacement employees to cover vacancies that arise from a range of factors: extended periods of family and personal leave; absences to undertake study, sabbaticals and secondment; staged return to work and rehabilitation programs and in more recent cases, locum general managers during proposal periods. Often, the nature and length of such vacancies cannot be determined in advance i.e. they may vary depending on the employee's entitlements and circumstances.

In LGNSW's view, the Act can better reflect contemporary and emerging workplace flexibilities, and administrative difficulties can be overcome by amending section 350 (concerning appointments to which sections 348 and 349 do not apply) and omitting section 351 from the Act altogether (as set out in more detail above).

LGNSW proposes that section 350 of the Act be amended to provide as follows:

**350 Appointments to which secs 348 and 349 do not apply**

*Sections 348 and 349 do not apply to:*

- (a) *an appointment by way of demotion, or*
- (b) *an appointment by way of lateral transfer, unless the council decides that those sections are to apply to the appointment, or*
- (c) *the re-appointment of senior staff, or*
- (d) *the temporary appointment of an employee if the term of employment (including any renewals) is for less than 2 years.*