

21 May 2019

Our ref: DK-GA

Committee Secretary
Economics and Governance Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [REDACTED]

Dear Committee Secretary

**Local Government Electoral (Implementing Stage 2 of Belcarra) and Other Legislation
Amendment Bill 2019**

Thank you for the opportunity to provide comments on the Local Government Electoral (Implementing Stage 2 of Belcarra) and Other Legislation Amendment Bill 2019 (the **Bill**) and for the short extension of time by which to provide this submission. The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

QLS makes the following comments with a particular focus on the interests of procedural fairness and natural justice. This submission has been prepared with the assistance of the QLS Occupational Discipline Law Committee.

It is not suggested that this submission represents an exhaustive review of the proposed amendments. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles, which we have not identified. By omitting to comment on the full scope of the provisions in the Bill, QLS does not express its endorsement of these.

General comments

QLS supports the intention of the Bill to improve diversity, transparency, integrity and consistency in the local government system. Local governments play an important role in Queensland's society and it is critical that Queenslanders have confidence in their local councillors and local governments. Where councillors engage in corrupt conduct, misconduct

or other serious offences, they undermine the trust of their constituents and the validity of the local government's decisions.

QLS acknowledges that a robust legislative framework is an important part of ensuring that local councillors are aware of and comply with their obligations.

However, QLS is concerned that some of the proposed amendments are inconsistent with fundamental legislative principles and the rule of law. In particular, QLS is concerned about the exclusion of the *Judicial Review Act 1991* and the reversal of the onus of proof proposed in clauses 118 and 144.

Further, when operational, some of the new obligations may not be practical and indeed expose local councillors to a real risk of prosecution for unintentional administrative oversights that do not amount to systemic corrupt activity. Such an outcome would appear to be an unintended consequence of the proposed reforms.

The proposed amendments place a significant burden on councillors not only to comply with the requirements of this now highly scrutinised and regulated profession, but for their compliance to be maintained.

QLS acknowledges that local government councillors occupy a position of trust and that they should be held to a high standard of behaviour. However, this has to be balanced with the practicality of the day-to-day operation of a local government and these changes will result in significant ongoing compliance requirements that for some may even involve daily or weekly duties in the compliance space.

For this reason it is suggested that it is vital that a responsible agency, perhaps the Office of the Independent Assessor, be properly funded and resourced to facilitate the ongoing training of councillors and their staff and to provide advice when needed. Training needs to be available as a minimum both upon being elected and otherwise on an annual basis.

There should be consideration for legislating appropriate funding and resources to ensure that intentional and systemic corrupt activities are identified and detected, rather than councillors being penalised for simple administrative oversights due to workload or a lack of training or resources.

1. Reversal of onus of proof

Legislation should not reverse the onus of proof in criminal proceedings without adequate justification. However, clause 144 proposes to insert a new section in the *Local Government Act 2009* (the **LGA**) as follows:

150FB Presumption of knowledge of particular gifts or loans

- (1) In a proceeding for an offence against this chapter relating to a relevant gift or loan given or made to a councillor, the councillor is presumed to know the following matters unless the contrary is proven—
 - (a) that the relevant gift or loan was given to the councillor; and
 - (b) the source of the relevant gift or loan.

The Society is concerned about the insertion of this presumption (and its equivalent sections 177Y in the *City of Brisbane Act 2010* (the **COBA**) and 162A in the *Local Government Electoral Act 2011* (the **LGEA**)).

Currently, the prosecution must prove the circumstances surrounding the gift or loan. These changes will reverse the onus of proof and place the onus on the councillor to prove that they did not know that the gift or loan was given to the councillor and also to prove the source of the gift or loan.

In 2014, the Department of the Premier and Cabinet published [*The Queensland Legislation Handbook*](#) (the **Handbook**). The Handbook is designed to assist departmental policy officers when drafting of Acts of Parliament and subordinate legislation, and outlines relevant policies, recommendations, information, and procedures. Its chapter on fundamental legislative principles provides guidelines on considering the principles of procedural fairness, and in particular, on the reversal of the onus of proof (page 33):

"Generally, for a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidentiary means and the defendant would be particularly well positioned to disprove guilt."

A provision making a person guilty of an offence committed by someone else with whom the person is linked, and providing defences allowing the person to disprove connection with the offence, is an apparent reversal of onus of proof and must be justified. Common situations where these concerns have arisen are when executive officers of a corporation are taken to be guilty of offences committed by the corporation, or a corporation is taken to be guilty of offences committed by its executive officers. However, the onus of proof should not be reversed in provisions making directors and executive officers liable for contraventions by corporations. Further, these provisions are only justifiable in limited circumstances. See chapter 2.11.16 for information regarding the limited circumstances in which liability of directors and executive officers for statutory contraventions by corporations may be justified."

QLS is concerned that the proposed reversal does not fall within the acceptable "limits" of when a reversal might ordinarily be justified under the principles in the Handbook.

That a person is "innocent until proven guilty" is a fundamental tenet of our justice system and a reverse onus should not be introduced lightly. In particular, a reversal of the onus of proof should not be introduced merely for the administrative convenience of prosecuting an offence and should only be contemplated in the limited circumstances outlined in the Handbook.

2. Conflicts of interest

Clause 106 proposes the insertion of new Chapter 5B to deal with councillors' conflicts of interest, replacing the terms "*material personal interest*" and "*conflict of interest*" with new terms "*prescribed conflict of interest*" and "*declarable conflict of interest*".

New Chapter 5B proposes the introduction of new integrity offences. Some of these offence provisions, examples of which are listed below, are incredibly broad and will capture conduct (inadvertently or otherwise) that may not be inappropriate in many circumstances.

- Section 150EK Councillor must not participate in decisions
 - Maximum penalty—200 penalty units or 2 years imprisonment
- Section 150EL Obligation of councillor with prescribed conflict of interest
 - Maximum penalty—200 penalty units or 2 years imprisonment
- Section 150EQ Obligation of councillor with declarable conflict of interest
 - Maximum penalty—100 penalty units or 1 year's imprisonment
- Section 150EY Offence to take retaliatory action
 - Maximum penalty—167 penalty units or 2 years imprisonment
- Section 150EZ Offence for councillor with prescribed conflict of interest or declarable conflict of interest to influence others
 - Maximum penalty—200 penalty units or 2 years imprisonment

For instance, section 150EZ states:

150EZ Offence for councillor with prescribed conflict of interest or declarable conflict of interest to influence others

(1) This section applies to a councillor of a local government who has a prescribed conflict of interest or declarable conflict of interest in a matter.

(2) The councillor must not direct, influence, attempt to influence, **or discuss the matter with**, another person who is participating in a decision of the local government relating to the matter.

Maximum penalty—200 penalty units or 2 years imprisonment.

The effect of subsection (2) is that a councillor may discuss a development with another councillor in passing after seeing a proposed development on a council meeting agenda but before reviewing any reports to council which identify the parties to the application.

It may only be at a later stage, when reviewing the reports in preparation for the council meeting, that the councillor identifies that one of the impacted parties was a donor to his or her campaign in the 2016 election. The councillor would be inadvertently in breach of proposed section 150EZ.

The drafting of the provision should be amended to remove the reference to “discuss the matter with”, given that the intent of the section is to ensure that the councillor with the conflict does not “influence” decisions in relation to the matter, rather than inadvertently raise the matter in a “discussion”.

Whilst we are concerned at the potential for an inadvertent breach of section 150EZ, QLS does note that the maximum financial penalty for the breach of the provisions identified above is 200 penalty units (presently \$130.55 per unit; the maximum penalty would amount to \$26,100). Some of the decisions that could be influenced by a councillor in breach of the above provisions, could result in a potential financial benefit far exceeding the value of \$26,100.

The deterrent of a prison sentence exists in most of these offences for conduct at the most egregious end of the spectrum. However, QLS queries whether it might be appropriate to reconsider and increase the maximum financial penalties to respond to those circumstances where a councillor might obtain a significant financial profit (e.g. from a development approval

in favour of the councillor or a related person).

3. Councillors' registers of interests

The Bill proposes numerous additions and amendments to councillors' obligations to inform the chief executive officer of the councillors' interests.

Under existing section 171B of the LGA, councillors have an obligation to correct their register of interests. The maximum penalty is currently 85 penalty units for unintentionally failing, and 100 penalty units for intentionally failing, to correct a register of interests.

Clause 149 proposes the amendment of section 171B, by replacing the two-tier offence with a single offence of failing to correct a register of interests and a maximum penalty of 100 penalty units. This removes the lower penalty of 85 penalty units, which is presently available where the offence is unintentionally committed. QLS considers that there should be a clear intention to apply a lower penalty where the offence is unintentionally committed.

Additionally, clauses 148 and 150 propose the insertions of new sections 171AA and 172:

171AA Obligation of councillor to inform chief executive officer of particulars of interests at start of term

- (1) This section applies if a councillor, at the start of the councillor's term, has an interest that must be recorded in a register of interests under a regulation in relation to the councillor or a person who is related to the councillor.
- (2) The councillor must, in the approved form, inform the chief executive officer of the particulars of the interest within—
 - (a) 30 days after the day the councillor's term starts; or
 - (b) a longer period allowed by the Minister.
- (3) ***A person ceases to be a councillor if the person does not comply with subsection (2).***

(emphasis added)

172 Obligation of councillor to inform chief executive officer annually about register of interests

A councillor must, within 30 days after the end of each financial year, inform the chief executive officer, in the approved form—

- (a) whether a register of interests under a regulation in relation to the councillor or a person who is related to the councillor is correct; and
- (b) if the councillor has an interest that must be, but is not, recorded in a register of interests under a regulation in relation to the councillor or a person who is related to the councillor—of the particulars of the interest that must be recorded in the register of interests under a regulation; and
- (c) if there is a change to an interest recorded in a register of interests under a regulation in relation to the councillor or a person related to the councillor—of the change to the interest.

Maximum penalty—100 penalty units

It is acknowledged that these clauses impose obligations upon councillors that are similar to State Members of Parliament. However, councillors do not receive nearly the same level of resources and training, and these obligations place a significant compliance burden on councillors, the penalties for which appear to be highly disproportionate.

One of the consequences for failing to comply with these provisions is that the person **ceases to be a councillor**. As acknowledged in the Explanatory Notes at page 47, this is a greater consequence than for a State MP who fails to comply with equivalent disclosure requirements.

QLS is concerned at the significant penalty for failing to comply, particularly where the failure might be unintentional and could also potentially be as a result of an unintentional failure to identify an interest associated with a person **related** to the councillor. Such a significant penalty seems extraordinary in these circumstances.

4. Expansion of State intervention powers on public interest grounds

The legislation governing local governments was recently amended in 2018, when the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* was passed.

The amendment introduced to section 123 of the LGA gave the Minister the significant power to dissolve the local government if the Minister reasonably believes it is in the public interest that every councillor be suspended or dismissed.

The Bill now proposes further amendments to Chapter 5, Part 1 of the LGA to apply the public interest test to other powers of intervention. These include:

- Division 2 (Monitoring and Evaluation) –
 - Section 113 What this part is about;
 - Section 115 Gathering information;
 - Section 116 Recommendation to Minister;
 - Section 117 Advisors;
 - Section 118 Financial controllers;
- Division 3 (Remedial action by the Minister) –
 - Section 121 Removing unsound decisions.

For example, section 121 currently reads as follows:

- (1) This section applies if the Minister reasonably believes that a decision of the local government is contrary to any law or inconsistent with the local government principles.

Clause 68 proposes the following alternate wording:

- (1) This section applies if the Minister believes—
 - (a) a decision of the local government is contrary to any law or inconsistent with the local government principles; or

- (b) it is otherwise in the public interest to suspend or revoke a decision of the local government.

The term “public interest” is not defined. In the interests of transparency and providing some certainty to the intended application of the sections, a definition of “public interest” should be considered.

QLS is concerned that the amendments also have the effect of removing the requirement that the Minister “**reasonably believes**” that a decision is unsound (section 121), a councillor should be removed (section 122), or a local government should be suspended (section 123).

If amended as proposed, the standard for exercising these powers will now simply be that the Minister “**believes**” that there is an issue, rather than “**reasonably believes**”. The exercise of these powers results in the loss of livelihood and significant damage to reputation, potentially in circumstances where allegations of improper behaviour will not be tested by a Court.

Given the serious consequences for those affected by a decision, the absence of a requirement of “**reasonable**” belief is not acceptable.

QLS considers that either:

- the word “*reasonably*” should be reinstated; or
- “*belief*” should be defined as “*on the evidence before the Minister, on the balance of probabilities*”, there is a reason to exercise the powers in these provisions.

QLS also notes that the amended section 116(4) would provide that if the Minister takes remedial action, the Minister “**may publish**” certain information including the way in which the local government or councillor is not performing or is not complying with the applicable laws.

QLS suggests that in practical application and in the interests of ensuring that the Minister’s decisions are properly scrutinised, there should be a preference for publishing this information unless there is a sound reason for not doing so. One reason for not publishing might be that the non-compliance was relatively minor or unintentional and the Minister is satisfied that with additional training, it is unlikely that the non-compliance would occur again.

If the remedial action proposed to be taken by the Minister includes action under sections 122 (Removing a councillor) or 123 (Suspending or dissolving a local government) of the LGA, it is suggested that the reasons for taking such a decision should be published as this would be in the public interest.

It is noted that section 121 (Removing unsound decisions) requires particular information to be published in a gazette notice, which ensures that the public is aware of how the decision is contrary to law or which it is otherwise in the public interest to suspend or revoke the decision.

5. Right of review – *Judicial Review Act 1991*

Clause 118 removes the existing section 244 of the LGA and replaces it with a section providing that where the Act declares a decision to be not subject to appeal, judicial review under the *Judicial Review Act 1991* (JR Act) is only available if the Supreme Court decides that the decision is affected by jurisdictional error.

However, unless the decision involves jurisdictional error, the effect of this section is that those persons whose interests are adversely affected by the decision will not be able to access the judicial review procedures in the JR Act.

The proposed amendment is an improvement on the existing section 244, as it acknowledges the Supreme Court's supervisory jurisdiction in matters of jurisdictional error cannot be limited by the legislature, as held by the High Court in the case of *Kirk v Industrial Court of NSW*:

*"[t]he supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court ... Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power."*¹

Although the proposed amendment clarifies that decisions affected by jurisdictional error are appropriately subject to the JR Act, QLS holds concerns about any limitation on the availability of statutory review processes under the JR Act and any restriction on the ability of the Supreme Court to review the administrative decision making processes of Government.

QLS, as a long-standing advocate for appropriate access to the Courts for the protection of a person's rights, opposes legislation which restricts a person's right of review or appeal of an administrative decision which could have significant consequences for the person's livelihood and reputation.

Judicial review is about the review of the process of a decision, rather than the merits of the decision itself. As noted by the Australian Law Reform Commission:

"Access to the courts to challenge administrative action is an important common law right. Judicial review of administrative action is about setting the boundaries of government power. It is about ensuring government officials obey the law and act within their prescribed powers." (footnotes omitted)²

The *Constitution of Queensland 2001* entrenches the Supreme Court of Queensland. Section 58 of the Constitution confirms that the Supreme Court has "*all jurisdiction necessary for the administration of justice in Queensland*" and that the Supreme Court "*has, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise.*"

This unlimited jurisdiction is referred to as the original or inherent jurisdiction of the Supreme Court.

It is a fundamental legislative principle, set out in section 4(3)(a) of the *Legislative Standards Act 1992*, that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

¹ (2010) 239 CLR 531 at 580-581

² Australian Law Reform Commission (ALRC Report 129), 2 March 2016, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Chapter 15, paragraph 15.1 available at https://www.alrc.gov.au/sites/default/files/pdfs/publications/fr_129ch_15_judicial_review.pdf

It is the view of QLS that the JR Act provides a readily accessible form of review which is consistent with this fundamental legislative principle and any dilution of these rights should be avoided.

The JR Act was introduced in Queensland in direct response to the issues highlighted in the "Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct", known as the Fitzgerald Inquiry (**Inquiry**), conducted by Tony Fitzgerald QC.

The report that was delivered as a result of the Inquiry acknowledged that there was "no general process of independent determinative external review of administrative action in this State" and that a person must rely on "cumbersome judicial procedures" to obtain judicial review of administrative action.³ The Inquiry recommended the establishment of the Electoral and Administrative Review Commission which was to consider a range of matters of priority, including "the provision of independent administrative appeals and of simpler procedures for obtaining judicial review of administrative decisions."⁴

The JR Act was enacted as a result of both the Fitzgerald Inquiry report and the report of the Electoral and Administrative Review Commission (December 1990).

In essence, Part 3 of the JR Act introduced a simplified statutory process by which generally, a person whose interests are adversely affected by a decision of an administrative character under an enactment may apply to the Supreme Court for a statutory order of review (ie, judicial review) on certain grounds. These grounds are set out in section 20 of the JR Act.

Section 10 of the JR Act expressly provides that the rights conferred by the JR Act on a person to seek [statutory] judicial review are in addition to any other rights that the person has to seek a review of the matter. Section 41(2) of the JR Act (in Part 5 of the JR Act) also confirms that the Supreme Court continues to have jurisdiction to grant common law remedies for judicial review. Part 5 of the JR Act essentially preserves the judicial review processes that were available prior to the enactment of the JR Act.

The purpose of the JR Act being to introduce a simpler form of judicial review and to the fundamental legislative principle set out in section 4(3)(a) of the *Legislative Standards Act 1992*.

If legislation does restrict access to the JR Act, then even though the Supreme Court retains its inherent jurisdiction for judicial review outside of the JR Act process (and under this legislation, a right to statutory review of decisions affected by jurisdictional error), the restriction must inevitably raise questions of whether such a review process is practically accessible given the complexity of determining the correct process to apply to the Supreme Court and the "cumbersome judicial procedures" identified by the Fitzgerald Inquiry.

QLS considers that there should be no restriction on the availability of judicial review for decisions under this legislation.

³ Fitzgerald Inquiry report at page 128, available at <http://www.ccc.qld.gov.au/about-the-ccc/the-fitzgerald-inquiry>

⁴ Fitzgerald Inquiry report at pages 359-360, available at <http://www.ccc.qld.gov.au/about-the-ccc/the-fitzgerald-inquiry>

6. Prescribing additional integrity offences under the *Local Government Electoral Act 2011* and increase in penalties

The Bill proposes increases in maximum penalties to some offences, some of which include:

- Section 174 Obstructing electoral officers;
 - Increase from 10 penalty units to 20 penalty units or 6 months imprisonment;
- Section 176A(2) Confidentiality of information;
 - Increase from 40 penalty units or 18 months imprisonment to 100 penalty units;
- Section 192(3) Secrecy of voting; and
 - Increase from 10 penalty units to 20 penalty units or 6 months imprisonment.

The Bill also prescribes additional integrity offences under the LGEA, some of which include:

- Section 126 Requirement for candidate to operate dedicated account;
- Section 127 Requirement for group of candidates to operate dedicated account;
- Section 183 Engaging in group campaign activities; and
- Section 195(1) and (2) Offences about returns.

The Society is concerned that without evidence of a sufficient nexus between the offence and likelihood of imminent risk of physical or significant harm to the public interest, the proposed increases in maximum penalties and the addition of integrity offences raises a question of proportionality.

It is our position that the introduction or amendment of legislation of this nature should be evidence-based. The material provided does not demonstrate that there is data supporting the need for change to the offences concerning the operation of accounts and engagement in group campaign activities. For example, such an offence should not be introduced without a demonstrated link between councillors' recidivous activity and an increase in their use of credit cards for campaign expenses.

In our opinion, there are more effective, fair and just ways to discourage the above-mentioned behaviour of councillors without the imposition of an integrity offence or additional penalties.

If you have any queries regarding the contents of this letter, please do not hesitate to contact the Legal Policy Team by phone on (07) 3842 5930 or by email to policy@qls.com.au.

Yours faithfully



Bill Potts
President