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Office of the President

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

By email: [redacted]

Dear Committee Secretary

Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019

Thank you for the opportunity to provide comments on the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 (**Bill**). 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.

This response has been compiled by the QLS Not for Profit Law and Occupational Discipline Law Committees, whose members have substantial expertise in this area. With respect to the Bill we raise the following:

- The chilling effect that the new electoral expenditure framework for "third parties" will have on the participation of not for profit (**NFP**) and charity organisations in the debate and development of social policy, where that particular issue is connected with their purpose;
- A recommendation that specific exemptions from the "third party" framework be included as follows:
    - charities registered with the Australian Charities and Not for Profits Commission. Charities are already regulated with respect to engaging in political advocacy. Consideration should also be given to excluding small NFP entities;

  - organisations already subject to robust disclosure obligations with high levels of transparency, including technical and professional services providers such as QLS;
  - Legal practitioners engaging in conduct within the scope of legal practice, regulated by the *Legal Profession Act 2007* (Qld) and similar legislation in other States; and
  - Any "expenditure" that an organisation incurs in responding to government consultation processes on legislation or other reforms, such as the parliamentary committee process or confidential consultation.

- A recommendation to remove proposed section 199(1)(c) or alternatively, the need for greater clarification about the threshold test of "*influence (directly or indirectly) voting at an election*" in the definition of "***electoral expenditure***".
- The new offences applying to ministers should be extended to members of parliament.
- The extensive reforms to the local government legislation need to be accompanied by ministerial guidelines and appropriate education and training for local government councillors (and their staff) to ensure compliance with the obligations imposed, particularly with respect to completing registers and determining what is an "interest" within the meaning of the relevant act.
- The creation of new offences and the investigation and prosecution of these need to be fair and reasonable.

A. Inadequate timeframe for consultation

QLS is extremely concerned at the timing and the timeframe for this consultation process.

The proposal to reform the framework for funding and expenditure for State elections is a significant political reform.

This legislation was introduced for public consideration on 28 November 2019, at the very end of the Parliamentary sitting calendar and just prior to the well-established traditional business closure between 25 December 2019 and 2 January 2020.

Submissions are required on 9 January 2019, barely 6 weeks later.

The timeframe allowed to understand the significant nature of these reforms is too short. It is also an inappropriate time of year to be conducting public consultation on such significant reforms. This is not genuine or proper consultation.

Within these constraints, QLS has endeavoured to identify key issues of concern. However, by not commenting on a particular matter, it should not be taken as having QLS approval or assent.

Chapter 2 - Amendments relating to funding and expenditure for State elections

This chapter of the bill seeks to amend the *Electoral Act 1992* (**Electoral Act**) to "improve actual and perceived integrity and public accountability of State elections and ensure public confidence in State electoral and particular processes".[1]

QLS submits that the drafting of some of the provisions in these proposed amendments does not support this intention and will have unintended consequences.

Third parties

Proposed sections 197A and 199 sets out the meaning of *participant in an election* and *electoral expenditure*, respectively.

The effect of these two proposed sections is that a third party who meets the criteria in the Bill must register with the Electoral Commission under the new framework if the third party spends more than $1000 on electoral expenditure in the year preceding an election (new section 280).

Electoral expenditure is essentially defined as expenditure relating to publishing an advertisement or election material, or carrying out an opinion poll, where the expenditure has the purpose of promoting a political party or candidate in an election or "*to otherwise influence (directly or indirectly) voting at an election*" (clause 9 of the Bill inserting a new section 199).

The element of "*otherwise influence (directly or indirectly)*" is extremely broad, as discussed further below.

A registered third party is then subject to a range of compliance obligations including those relating to a dedicated campaign account, maintaining records in relation to political donations, requiring donor statements from a donor, issuing receipts that comply with section 258, calculating whether donations contribute to the "donation cap" and ensuring that activities do not breach the electoral expenditure cap.

QLS is concerned that this legislation will have a chilling effect on the participation of NFP and charity organisations in the debate and development of social policy, where that particular issue is connected with their mission and achieving their purpose.

QLS acknowledges the analysis in the Explanatory Notes in relation to freedom of expression and political communication.

However, QLS is concerned that the effect of this legislation will be to remove the legitimate and valuable voice of charities and NFP organisations in modern Australian political discourse and debate, because of an organisation's fear of inadvertently advocating in a way which is perceived to have the purpose "*to otherwise influence (directly or indirectly) voting at an election*". QLS holds this concern notwithstanding the "dominant purpose" test proposed in section 199(5) of the Bill, due to the uncertainty created by the wide drafting of section 199(1)(c) of the Bill.

As grassroots organisations active in the community, these entities are well-placed to identify issues of concern to Australian society. These entities should be encouraged to generate community debate on matters within their area of expertise in light of their "on the ground"

[1] Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 – Explanatory Notes, page 1.

experience and intelligence. NFP groups bring a critical perspective on a wide range of social concerns including homelessness, disability services, other benevolent relief, education, medical research and animal rescue programs.

The imposition of significant registration and compliance obligations on "third parties" who are considered participants in an election will mean that charities and NFP entities who might fall within these categories will need to divert valuable and scarce funds into compliance costs. This diversion of funds will directly affect the financial ability of NFPs and charities to deliver their services, which then creates greater pressure on the public purse.

Remove proposed section 199(1)(c) from the Bill - "*to otherwise influence (directly or indirectly) voting at an election*" from section 199 of the Bill

QLS submits that the word "*influence*" (especially when combined with the introductory words "incurred for, or related to" and the subsequent words "directly or indirectly") is extremely broad in its potential application and operation.

QLS considers that the intent of the legislation would be achieved by removing proposed section 199(1)(c) from the Bill.

The purpose of the Bill is directed at regulating political campaigning for a particular party or candidate, which is achieved by sections 199(1)(a) and (b).

The inclusion of paragraph (c) is potentially confusing and raises the concerns identified in this submission about when a third party might inadvertently be caught by these provisions.

The risk with the word "influence" is that it could apply to issues on which a third party might advocate, rather than in relation to advocating for a particular party or candidate. If a third party wishes to advocate on an issue and raise community awareness of, for example, the prevalence of homelessness in society, it is not necessarily a political advertisement or statement even though it might be interpreted as seeking to "influence" the community's thinking on an issue.

However, if the third party advocates on an issue and then suggests that voting for a particular party or candidate will address or alleviate that issue, it is then clearly stepping into a political statement, which is within the scope of subsections 199(1)(a) and (b).

If it is proposed to retain section 199(1)(c), QLS recommends that the word "influence" be replaced with "procure", "secure" or "direct" voting at an election in a particular way. QLS notes that the equivalent Victorian legislation uses the word "directing".

In addition, QLS recommends that the words "or related to" should not apply in relation to paragraph (c) of the section.

If the decision is made to retain the word "influence", QLS recommends limiting the risk of unintended consequences for third parties by removing the following words from the operation of section 199(1)(c):

- "or related to";
- "otherwise"; and
- "(directly or indirectly)".

Exemptions required

If the third party electoral expenditure framework is progressed, QLS recommends that the Bill be amended to include a number of exclusions:

1. The Bill should explicitly exclude charities registered with the Australian Charities and Not-for-Profits Commission (**ACNC**) from the ambit of ***third parties*** in this Bill, given that they are already regulated at the Commonwealth level by virtue of section 11 of the *Charities Act 2013* (Cth), and their existing reporting obligations to the ACNC.

   Charities must be established for a "charitable purpose" and a charity can undertake advocacy to further or aid another charitable purpose (section 5 of *Charities Act 2013*).

   The effect of sections 11 and 12 of the *Charities Act 2013* (Cth) is that a charity cannot have a "disqualifying purpose", being:

   > (a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or
   >
   > (b) the purpose of promoting or opposing a political party or a candidate for political office.

   As discussed above, charities and NFP entities have a valuable contribution to make to political debate in Australia and it would be concerning if this legislation had the unintended effect of silencing these bodies due to fear of breaching the compliance obligations.

   In the case of registered charities with the ACNC, they are already subject to public reporting obligations to the ACNC. This reporting is made fully available on the ACNC Register (accessible by the public free of charge). Additionally registered charities risk losing their registered charity status (and associated tax concessions) if they offend the prohibited political activities contemplated in the *Charities Act 2013* (Cth).

2. QLS also recommends that there is an exclusion available for NFPs and charities where ***electoral expenditure*** is an incidental aspect of their activities and/or where the NFP and charity is a small organisation, given the potential cost and complexity of the compliance obligations. The size threshold could be the same as that set by the ACNC for small registered charities i.e. those with an annual revenue under $250,000.

3. A specific exemption is required for certain organisations already subject to robust disclosure obligations with high level of transparency. QLS submits that an exemption should be inserted for technical and professional services providers such as ours in circumstances where there is clear transparency and accountability both about an entity's financial position and the purpose of any public interest advocacy.

   The registration of such entities who undertake incidental advocacy as part of their professional role will not add significantly to the transparency of the political debate, given that any advocacy is clearly on behalf of its members and their interests. Such an exemption in a similar context appears for the Queensland Law Society in section 41(3)(b) of the *Integrity Act 2009* (Qld), being 'an entity constituted to represent the interests of its members'. Further, professional organisations such as QLS are already subject to extensive regulatory environments of their own. QLS is required to deliver a comprehensive annual report to the Queensland Parliament each year, as it is a body

which is incorporated under the *Legal Profession Act 2007* (Qld) and a statutory body for the *Financial Accountability Act 2009* (Qld) and the *Statutory Bodies Financial Arrangements Act 1982* (Qld).

4. There should be a clear exemption in the legislation so that this framework does not apply to a legal practitioner engaging in conduct within the scope of legal practice regulated by the *Legal Profession Act 2007* (Qld) and similar regulatory legislation in other States. From the point of view of transparency, it is clear for whom legal practitioners and other professionals act in any transaction - a solicitor who is undertaking incidental lobbying will identify themselves as acting for a particular client, for example.

   It is therefore critical that there be no possibility that a lawyer representing a client in a genuine lawyer-client relationship be caught by the third party framework because of the potentially wide ambit of the phrase "*to otherwise influence … voting at an election.*"

5. Exemptions should be included for the "expenditure" that an organisation incurs in the following circumstances:

   a. Responding to parliamentary enquiries about Bills introduced to the relevant parliament. This is a public consultation process which is critical to the democratic process. Penalising organisations for participating in a public consultation process is contrary to the idea of the community contributing to the development of laws. Open and fearless debate on these issues leads to improvements in draft legislation. Participation should be encouraged by specifically excluding the "expenditure" incurred in such participation from the calculation of electoral expenditure under this legislation.

   b. Confidential consultation by Government, at the request of Government, with stakeholder bodies such as QLS and other industry representatives. An organisation should not be penalised because their views are sought confidentially on matters within the organisation's expertise.

   QLS is a practical example of organisations who participate in such consultation processes.

<u>Compliance obligations need to be clarified for charities and NFPs</u>

If no exemptions are made available, the compliance obligations proposed are significant and need to be adjusted to reflect the reality for NFPs who might engage in advocacy which is ancillary to their mission and therefore do not typically receive specific donations for advocacy work.

If a general donation is made that is not specifically identified as a ***political donation***, are those funds available for a NFP to use in advocacy (consistent with its purpose) without enlivening the obligation to set up a dedicated campaign account and require a donor statement? It is unclear how this should be managed by the third party.

B. Chapters 4 and 5 - Amendments relating to dishonest conduct of Ministers and Amendments relating to dishonest conduct of councillors and other local government matters

Due to the short timeframe in which to review this complex legislation, we have not been able to conduct a full review of existing legislation to ensure that new provisions are not a duplicate of processes and obligations already imposed on ministers, local government councillors and relevant staff. The Committee should seek clarification from the Departments and drafters to ensure this is not the case.

Equality of application of the law

The reforms outlined in these chapters concern the conduct of ministers and local government councillors and staff. The reforms have not been extended to members of the state parliament.

If these reforms are to proceed, QLS considers that they should extend to the elected representatives, and where appropriate their staff, in each branch of government that the State has jurisdiction to legislate in respect of.

The background to this Bill, outlined in the introductory speech and explanatory notes, includes the investigation of the Crime and Corruption Commission (**CCC**) into the Deputy Premier and the recommendations from this investigation which were to, *inter alia*:

- create a new offence when a member of Cabinet does not declare a conflict that does, or may conflict, with their ability to discharge their responsibilities;
- create a criminal offence to apply when a member of Cabinet fails to comply with the requirements of the Register of Members' Interests, and the Register of Members' Related Persons Interests.

This CCC investigation did not extend to local government councillors and whilst the CCC has investigated councillors in the past and in ongoing matters, the supporting material to this bill does not point to a specific call for the offence provisions in the above recommendations to be extended to councillors.

We do not object to these particular offence provisions being inserted into the *City of Brisbane Act 2010* (**COBA**) and the *Local Government Act 2009* (**LGA**), however, we believe it is fair and just, as well as prudent that such offences be included in the laws governing members of parliament as well.

This Bill aims to improve integrity of political processes and of government. We consider that conduct that meets the elements of the offence provisions undermines this integrity whether it is the conduct of a minister who performs executive functions or conduct of a councillor or the conduct of a member of parliament who votes on legislation, performing committee and other work and contributes to policy development.

The two proposed offence provisions that apply to ministers do so when a minister fails to disclose a conflict of interest, with the dishonest intent of gaining a benefit for themselves or another person, or causing a detriment to another person. We submit that should a member of parliament fail to disclose a conflict of interest, with the dishonest intent of gaining a benefit for

themselves or another person, or causing a detriment to another person, then this conduct is of such a serious nature as to warrant similar action being taken against this person.

Local government councillors

This Bill is the fourth piece of legislation in the last two years to make amendments to provisions in the COBA and LGA relating to conduct of local government councillors.

These amendments are said to be part of the government's "rolling reform agenda" in this space, however, we hold concerns that the continual amendment of laws relating to an individual's rights and obligations creates a worrying degree of uncertainty. Laws should be certain and capable of being understood by those to whom they apply.

In our view, the Government should confirm, publicly, any outstanding reform and provide a clear timeframe for this.

We are also concerned about the scope of these reforms. Following on from the Belcarra report[2] the Government stated that it would take steps to address misconduct and corrupt conduct by local government councils and councillors. Our members who act in this area are finding that councillors are now facing a complicated and burdensome regulatory framework which, as stated above, changes frequently. The reforms were not intended to create strict liability provisions for administrative oversight, however, a significant number of investigations and prosecutions that are being pursued have related to these types of matters.[3]

Councillors do not seem to have been given the proper support in terms of education and administrative support to understand and comply with all of the new obligations placed upon them. The result is that some councillors have been identified by the Office of the Independent Assessor and prosecuted for one-off administrative oversights when, in our view, the goal of these reforms should be to ensure compliance with the requirements relating to registers and disclosures, at first instance, so that councils can operate with integrity.

QLS unequivocally deplores corrupt conduct in our government, at all levels and is supportive of reasonable steps to address and erode such conduct. However, it is important to remember that breaches of the legislation result in penalties, including criminal penalties and regulatory penalties, and also have impacts on the councillors' careers and livelihoods.

In our submission, the Committee should recommend that:

- Ministerial guidelines be published which outline what is considered to be an "interest" for the purposes of the COBA and LGA and how registers of interests are to be completed and reviewed. This term is not currently defined in the legislation and creates uncertainty for local government councillors, their administrative staff and their advisors; and
- the Department and other relevant agencies provide ongoing education and training to councils, councillors and relevant staff on the issues of recording and disclosing

[2] Operation Belcarra, A blueprint for integrity and addressing corruption risk in local government, Crime and Corruption Commission Queensland, October 2017 Accessed via: https://www.ccc.qld.gov.au/sites/default/files/2019-08/Operation-Belcarra-Report-2017.pdf

[3] See decisions of the Councillor Conduct Tribunal - https://www.dlgrma.qld.gov.au/resources/cct/2019/councillor-glenn-tozer-gold-coast-city-council-14-12-2019.pdf

interests, what is an "interest" and other obligations imposed by the COBA or LGA, particularly regarding recent amendments.

Comments relating to specific provisions of the COBA and LGA amendments

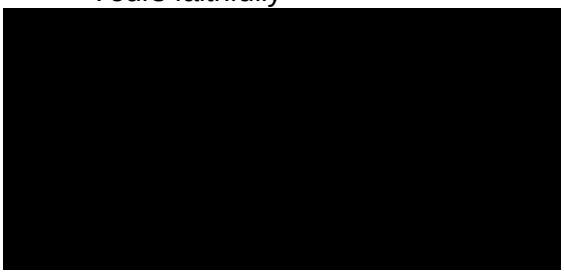
Clause 89 (proposed section 198D of COBA) and clause 119 (proposed section 201D of LGA) replicate the offence provision discussed above in relation to ministers. The Explanatory Notes do not indicate how these new offences interact with section 92A of the *Criminal Code Act 1899*, which contains a similar offence for "public officers". Given that the definition of "public officer" in the *Criminal Code Act 1899* (paragraph (f)) refers to a "member … of a … local government", the Explanatory Notes should address why a new offence is required.

Proposed section 177V in clause 81 and proposed section 150EY in clause 104 make it an offence for a councillor to take retaliatory action against another councillor who reported that they (the first councillor) had a conflict of interest. We hold concerns as to the way these provisions have been drafted especially given that the penalty includes a term of imprisonment.

We note also that offences relating to serious conduct or behaviour of this nature already exist in the criminal law. We do not consider that it is reasonable that behaviour and conduct of a lesser severity, such as what is provided for in subsection (c) – a person must not "*take any action that is, or is likely to be, detrimental to the councillor or another person*" – ought to attract a criminal penalty. We instead recommend that such action should simply be prohibited in the sections.

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

Yours faithfully



Luke Murphy
President