

GPO Box 3123
Brisbane QLD 4001

Level 2
North Tower Green Square
515 St Pauls Terrace
Fortitude Valley QLD 4006

Tel.: 07 3360 6060
Toll-free: 1800 061 611
(in Queensland outside
Brisbane)

Fax: 07 3360 6333

mailbox@ccc.qld.gov.au
www.ccc.qld.gov.au

ABN 32 164 714 360



**Crime and Corruption
Commission**

QUEENSLAND

Our Reference: AD-18-0261 / 18/048423

22 March 2018

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

Dear Sir/Madam

**Re: Local Government Electoral (Implementing Stage 1 of Belcarra) and Other
Legislation Amendment Bill 2018**

The Crime and Corruption Commission (CCC) welcomes the opportunity to make this submission to the Economics and Governance Committee (the Committee) on the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 (the Bill).

The CCC previously had the opportunity to make a submission to the former Legal Affairs and Community Safety Committee (former LACSC) on the Local Government Electoral Implementing Belcarra) and Other Legislation Amendment Bill 2017 which lapsed last year (the lapsed Bill).

It is noted that Committee may have regard to any evidence provided to the former LACSC. While there are some drafting changes between the Bill and the lapsed Bill, the CCC considers that the Bill essentially reintroduces the provisions of the lapsed Bill.

Accordingly the CCC largely reiterates below its previous submission on the lapsed Bill. Some changes have been made to take into account the lapsed Bill and the recent state election.

Background

The Bill was introduced to parliament on 6 March 2018 and referred to the Committee to report by 23 April 2018. The Bill's policy objective is to implement certain recommendations contained in the CCC's report *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government* (the Belcarra Report).¹ The Committee has invited a submission from the CCC to inform its (the Committee's) consideration of the Bill.

The Belcarra Report is the result of an exhaustive consideration of evidence gathered by the CCC's Operation Belcarra Inquiry concerning particular local government

¹ Explanatory Notes, p. 1.

elections under specific terms of reference.² The CCC gave detailed consideration to policy issues and evidence raised by the Inquiry from September 2016 to the tabling of the report in October 2017. The Belcarra Report provides independent advice solely to inform the development of public policy regarding the matters identified by the Inquiry terms of reference. In short, the Belcarra Report recommendations represent the CCC's views concerning appropriate policy dealing with particular corruption risks for local government in Queensland.

Submission

Generally speaking, the Bill implements Recommendations 20, 23, 24, 25 and 26 of the Belcarra Report.³ However, the reform departs significantly from the intended function of recommendation 20. The Bill intends to ban donations from property developers for purposes associated not only with local government elections but also state elections. In doing so, the Bill intends that the prohibitions will, upon commencement, have retrospective operation on certain donations made from and including the day the lapsed Bill was introduced to parliament.

Reform of the *City of Brisbane Act 2010* and the *Local Government Act 2009*

The Bill generally represents sound policy regarding its proposed reforms to the *City of Brisbane Act 2010* and the *Local Government Act 2009*. These proposals are implemented in a manner consistent with the Belcarra Report recommendations 23 - 26. The reforms strengthen processes regarding the disclosure, management and enforcement of councillor obligations concerning conflicts of interests and material personal interests. The CCC considers that the Bill appropriately addresses recommendations 23 – 26. The CCC supports these reforms.

Reform of the *Electoral Act 1992* and the *Local Government Electoral Act 2011*

The Bill proposes several reforms to the *Electoral Act 1992* and the *Local Government Act Electoral Act 2011*. These proposed reforms ban donations from property developers for purposes associated not only with local government elections but also state elections. This involves a degree of departure from the Belcarra Report recommendations. The Bill's further proposal that the ban on developer donations will, upon commencement, operate from and including the day the lapsed Bill was introduced to parliament on 12 October 2017 — involves a substantial departure from the CCC's recommendations. The remainder of this submission intends to focus on these areas of departure from the Belcarra Report recommendations.

Banning developer donations for local government elections

The Bill's clauses 27 – 33 and 35 generally represent sound policy reforms to the *Local Government Electoral Act 2001* LGE Act. The proposals are implemented in a manner consistent with the Belcarra Report recommendation 20. The provisions follow the lead of New South Wales in banning donations from property developers for purposes related to local government elections. The reform will no doubt strengthen processes for managing risks of actual and perceived corruption associated with donations from property developers and includes appropriate anti-circumvention measures.⁴ The CCC supports this reform.

Banning developer donations for state elections

The Bill's clauses 9 – 19 also follow the lead of New South Wales in banning donations from property developers for purposes related to state elections. This may be sound policy. The CCC does not disagree with the general proposition contained in the Explanatory Notes to the Bill that given the State's significant role in Queensland's planning framework, the risk of corruption and undue influence

² CCC Report, October 2017, *Operation Belcarra A blueprint for integrity and addressing corruption risk in local government*, Appendix 1.

³ Recommendations 20, 23, 24, 25 and 26 of the Belcarra Report are set out in Appendix 1 to this submission.

⁴ CCC Report, October 2017, *Operation Belcarra A blueprint for integrity and addressing corruption risk in local government*, p. 78.

similarly apply in respect of donations by property developers at the state level.⁵ However, the Committee would be mindful that the Belcarra Report recommendations arise out of a detailed consideration of facts and matters relevant to the specific local government context and purpose of the Inquiry.

The recommendations were made to improve equity, transparency, integrity and accountability in Queensland local government elections and decision-making and were intended to apply to all Queensland councils.⁶ The Inquiry terms of reference did not include state elections. Consequently the Belcarra Report recommendations did not involve any detailed specific consideration of corruption risks in state elections and decision-making. Accordingly, the reforms depart from the scope of the Belcarra Report recommendations and the Report does not itself provide a basis for CCC comment on the reforms.

The Belcarra Report did acknowledge that a number of the recommendations would create a disparity in the obligations relevant to state and local government.⁷ The Belcarra Report observed that the Queensland Government may consider it appropriate to also adopt these recommendations at the state government level.⁸ However, in saying this, the CCC did not contemplate that the proposed reforms would be introduced without preliminary review to identify and mitigate corruption risks in state elections and decision-making. A proper public consultation process is highly desirable. It appears that the current timelines provide little opportunity for the Committee to engage in a comprehensive consideration of these matters properly informed by experts and other stakeholders.

If the Committee considers that the recommendations are appropriate for state elections, I point out that unlike the amendments proposed by clause 28 to the s. 3 purpose statement of the LGE Act, the Bill does not include a similar amendment to the *Electoral Act 1992*. Legislative statements of the relevant statutory purpose are important to help identify the extent of any burden upon the implied freedom of communication proposed by the legislation and to determine whether any burden is proportionate to the legitimate purpose of any provision of the Act in terms of the relevant tests stated in *Lange* and *Coleman v Power*.⁹ The Committee may wish to consider recommending that appropriate purpose statements be incorporated into the *Electoral Act 1992*.

Retrospective/prospective banning of developer donations for state and local government elections

The Bill's clauses 20 and 34 are drafted in similar terms. They have the aim of ensuring the return of developer donations for political purposes associated with state and local government elections respectively made on or after 12 October 2017 (the day of the lapsed Bill's introduction into the Legislative Assembly) and before commencement of the reforms. If a relevant donation is not returned to the developer within 30 days from the commencement, the recipient commits a criminal misdemeanour punishable by 400 penalty units or two years imprisonment.

These clauses do not technically ban developer donations made prior to commencement. Developers may make political donations to recipients who may use the developer donation for political purposes associated with relevant elections (and other political purposes) any time up to commencement. However, upon commencement any donations made from 12 October 2017 must be returned to the developer donor within 30 days. Upon commencement these clauses have the effect of converting a donation that originally involved a permanent disposition of property or the provision of a service (without market value consideration) into a loan or debt obligation to be repaid shortly after the commencement. This and the criminalisation of failure to repay the loan/debt on time raises several issues.

⁵ Explanatory Notes, p. 4.

⁶ CCC Report, October 2017, *Operation Belcarra A blueprint for integrity and addressing corruption risk in local government*, p. xii.

⁷ Ibid.

⁸ CCC Report, October 2017, *Operation Belcarra A blueprint for integrity and addressing corruption risk in local government*, p. xii.

⁹ *McCloy v New South Wales* (2015) 257 CLR 178; *Unions NSW v New South Wales* (2013) 252 CLR 530; *Coleman v Power* (2004) 220 CLR 1; and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520;

While the clauses have similar legal effects they may have had a substantially different practical operation and effect for the conduct of general state and local government elections. When the lapsed Bill was introduced the state election had to be held by 5 May 2018¹⁰. The next quadrennial local government election was not to be held until 28 March 2020.¹¹ Plainly there was then no obvious immediate electoral purpose driving donations for local government quadrennial elections.¹² In comparison the recent state election was held on 25 November 2017.

The matter is complicated by the fact that from the time of the introduction of the lapsed Bill, the polity may have been aware that its commencement might not happen before the state election and, if so, the lapsed Bill could not directly impact donations related to that election. No doubt the clauses would have had an immediate and practical effect upon property developers and potential recipients of donations from property developers up until the lapsing of the Bill. However, upon the lapsing of the Bill, no matter what the competing policies of those contesting the recent state election might have been, the lapsed Bill could not have a potential legal effect upon those donations and political communications funded by those donations. Only the current or a future parliament could enact such legislation.

The recent introduction of the Bill, some five months after the lapsed Bill, may raise additional complexity concerning property developer donations from 12 October 2017 until commencement (historical developer donations). Such donations, if any, may lawfully have been used (or may be used) for political communication occurring both before and after commencement. However, the proposed laws will adversely affect the recipients of historical developer donations lawfully used for political communication.

The Committee may wish to consider whether the relevant legislation contains sufficiently stated legislative purpose statements to help identify the extent of any burden upon the implied freedom of communication proposed by these clauses and to determine whether any burden is proportionate to the legitimate purpose of the provisions of the Acts in terms of the relevant tests stated in *Lange* and *Coleman v Power*.

The effective conversion of historical developer donations into loans or debts upon commencement does not necessarily meet the Explanatory Note's statement about the policy objective of minimising corruption risk that political donations from developers have potential to cause at both state and local government level.¹³ The Committee might consider that relevant corruption risks arise and continue upon the making of the donation or loan irrespective of whether the donation/loan is returned or repaid to the developer.

These considerations perhaps raise questions whether the clauses advance their anti-corruption purposes in a manner compatible with the maintenance of the constitutionally prescribed systems of representative and responsible government.

The CCC is not aware that the High Court has previously considered the constitutional validity of clauses of this kind. Indeed the recent matter of *Brown v Tasmania* [2017] HCA 43 has resulted in a reformulation of the analytical framework for determining whether legislation contravenes the implied freedom of political communication. This reformulation appears to involve a greater focus, than perhaps has been given in recent times, to whether the law is reasonably appropriate and adapted to advance a legitimate purpose in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

The clauses, both before and upon commencement, may have a real and practical effect upon political communications (political donations indirectly fall within that concept), including political communications which have already occurred and been paid for in a legally permissible manner at a

¹⁰ <https://www.parliament.qld.gov.au/work-of-assembly/sitting-dates/ElectionFAQ>

¹¹ Section 23, *Local Government Electoral Act 2011*.

¹² There have been 12 individual councillor or mayoral by-elections since 12 October 2017

¹³ Explanatory Note, p. 1.

relevant time before commencement. The Committee may consider this an issue to seek independent advice.

Conclusion

The CCC welcomes the opportunity to make this submission to the Committee on the Bill. The submission is necessarily brief having regard to present constraints on time and resources for both the CCC and the Committee. I would of course be happy to give evidence or provide further information as required. The CCC would be pleased to provide any further information as required. If you require further information or any other assistance please contact in the first instance, [REDACTED] by telephone [REDACTED] or by email [REDACTED]

Yours faithfully,



A J MacSporran QC
Chairperson

Appendix 1

Recommendation 20 (p. 78)

That the Local Government Electoral Act, the Local Government Act and the City of Brisbane Act be amended to prohibit candidates, groups of candidates, third parties, political parties, associated entities and councillors from receiving gifts from property developers. This prohibition should reflect the New South Wales provisions as far as possible, including in defining a property developer (s. 96GB, Election Funding, Expenditure and Disclosures Act 1981), making a range of donations unlawful, including a person making a donation on behalf of a prohibited donor and a prohibited donor soliciting another person to make a donation (s. 96GA), and making it an offence for a person to circumvent or attempt to circumvent the legislation (s. 96HB). Prosecutions for relevant offences should be able to be started at any time within four years after the offence was committed and suitable penalties should apply, including possible removal from office for councillors.

Recommendation 23 (p. 85)

That section 173 of the Local Government Act and section 175 of the City of Brisbane Act be amended so that, after a councillor declares a conflict of interest, or where another councillor has reported the councillor's conflict of interest as required by the implementation of Recommendation 24, other persons entitled to vote at the meeting are required to decide:

- a) whether the councillor has a real or perceived conflict of interest in the matter
- b) whether the councillor should leave the meeting room and stay out of the meeting room while the matter is being discussed and voted on, or whether the councillor should remain in the meeting room to discuss and vote on the matter. A councillor who stays in the room to discuss and vote on the matter in accordance with the decision does not commit an offence under the proposed Recommendation 26.

The views put forward by each other person and the final decision of the group should be recorded in the minutes of the meeting.

Recommendation 24 (p. 85)

That the Local Government Act and the City of Brisbane Act be amended to:

- (a) require any councillor who knows or reasonably suspects that another councillor has a conflict of interest or material personal interest in a matter before the council to report this to the person presiding over the meeting (for a conflict of interest or material personal interest arising at a meeting) or the Chief Executive Officer of the council
- (b) require the Chief Executive Officer, after receiving a report of a conflict of interest or a material personal interest relevant to a matter to be discussed at a council meeting, to report this to the person presiding over the meeting.

Recommendation 25 (p. 85)

That the Local Government Act and the City of Brisbane Act be amended to provide suitable penalties for councillors who fail to comply with their obligations regarding conflicts of interest, including possible removal from office.

Recommendation 26 (p. 85)

That the Local Government Act and the City of Brisbane Act be amended so that, where a councillor has a real or perceived conflict of interest in a matter, it is an offence for the councillor to influence or attempt to influence any decision by another councillor or a council employee in relation to that matter at any point after the matter appears on an agenda for a council meeting (except in the circumstances

described in Recommendation 23, part b). A suitable penalty should apply, including possible removal from office.