



Department of Infrastructure,
Local Government and Planning

Our ref: OUT17/987

22 FEB 2017

Mr Jim Pearce MP
Chair
Infrastructure, Planning and Natural Resources Committee
ipnrc@parliament.qld.gov.au

Dear Mr Pearce

Thank you for providing the Department of Infrastructure, Local Government and Planning (the department) with the opportunity to brief the Infrastructure, Planning and Natural Resources Committee (the committee) on the Local Government Electoral (Transparency and Accountability in Local Government) and Other Legislation Amendment Bill 2016.

At the briefing held on 15 February 2017, I understand that officers from the department undertook to respond to questions taken on notice from the committee. Based on the transcript of the briefing provided to the department on 20 February 2017, the department understands that the questions taken on notice include:

Question 1: Please provide examples of 'another entity' as referred to in recommendation 6 of the Crime and Corruption Committee's December 2015 report 'Transparency and accountability in local government'.

Question 2: How is the main purpose of an incorporated association determined in relation to the *Associations Incorporation Act 1981* (AI Act)?

Question 3: In relation to clause 25 of the Bill and the implications of the proposed amendments for self-funded candidates:

- a) What constitutes a gift?
- b) Does the requirement to deposit gifts into a candidate's dedicated account apply to a self-funded candidate?
- c) Will the position change under the Bill if passed?

Question 4: The maximum penalty proposed for various development offences and enforcement is prescribed under the *Sustainable Planning Act 2009* (SPA). The committee requested a brief summary of penalties that have been imposed by the courts, giving a description of each offence, the maximum penalty that could have been imposed, and the actual penalty imposed.

Level 39
1 William Street Brisbane
PO Box 15009 City East
Queensland 4002 Australia
Telephone +61 7 3452 7009
Website www.dilgp.qld.gov.au
ABN 251 66 523 889

Question 5(a): Has anyone ever been charged or convicted for providing false and misleading information in a return (section 195 of the *Local Government Electoral Act 2011* refers)?

Further, the Electoral Commission of Queensland (ECQ) undertook to respond to the following questions on notice:

Question 5(b): In relation to clause 29 of the Bill and the direct and indirect costs of local government elections, are costs that are now sent to local governments for their elections itemised? Is an itemised account sent to each council? The ECQ also undertook to provide an example of correspondence sent to local governments about direct and indirect costs.

Question 5(c): Did many local government chief executive officers apply to be returning officers for the 2016 local government quadrennial elections?

At the briefing, the department referred Question 2 to the Department of Justice and Attorney-General (the DJAG) for response, as the AI Act is under the administrative unit of the DJAG. Subsequent to the briefing, the department referred Question 5(a) to the ECQ for response.

I have enclosed responses to the above questions including those prepared by the ECQ and DJAG. Should the department's understanding of the questions not be accurate, please advise the department accordingly.

I again thank the committee for its enquiries into the Bill and for the opportunity to respond to the questions. If you require any further information, please contact Ms Josie Hawthorne, Manager, Legal and Legislation Services in the department on 3452 6707 or by email at josie.hawthorne@dilgp.qld.gov.au.

Yours sincerely



Frankie Carroll
Director-General

Enc

Infrastructure, Planning and Natural Resources Committee

Inquiry into the Local Government Electoral (Transparency and Accountability in Local Government) and Other Legislation Amendment Bill 2016 (the Bill)

Answers to questions taken on notice during the Department of Infrastructure, Local Government and Planning's (the department) briefing to the Infrastructure, Planning and Natural Resources Committee (the committee) on 15 February 2017.

Question 1 on Notice

Please provide examples of 'another entity' as referred to in recommendation 6 of the Crime and Corruption Committee's December 2015 report 'Transparency and accountability in local government'.

Question 1 relates to the government's response not to support recommendation 6 of the Crime and Corruption Committee (CCC) report 'Transparency and accountability in local government' (the report). The government responded *'that requiring councillors, chief executive officers and senior executive employees to declare funds, gifts or benefits provided to **another entity** which could be perceived to provide them with a reputational benefit would be impracticable and difficult to enforce'*.

Answer to Question 1 on Notice

The *Acts Interpretation Act 1954* section 36 schedule 1 defines an entity to include a person and an unincorporated body. Schedule 1 defines a person to include an individual and a corporation.

In relation to recommendation 6, the CCC's report provides that *'the relationship between the entity and the elected official may not be so clear or distinguishable and could be perceived as providing a direct benefit to the elected official. For example, a situation may arise where an elected official establishes an incorporated entity for a community purpose and publicly raises funds to improve local schools, playgrounds, parks or other such activities. The elected official could use the entity as a means of self-promotion and direct activities to a particular division or area where they perceive that their political profile could be raised or improved'*.

The CCC's report further provides *'There is potential for an entity, be it a person or other legal personality, to attempt to influence the conduct of an elected official by providing that person, not with tangible property but rather with an intangible benefit such as a promotional opportunity which can be run at a significant cost. Whilst the elected official has not obtained physical property, money, or money in kind, there is clearly a benefit derived by the elected official'*.

Question 2 on Notice

How is the main purpose of an incorporated association determined in relation to the *Associations Incorporation Act 1981* (AI Act)?

Question 2 relates to the CCC's report recommendation 2 which provides *'that the Associations Incorporation Act 1981 be amended to make it clear that incorporated associations cannot be used to receive or hold electoral campaign funds which are intended to be applied for a member's benefit, either directly or indirectly'*.

Answer to Question 2 on Notice

As the AI Act is administered by the department of Justice and Attorney-General (DJAG), the following response has been provided by DJAG:

The Office of Fair Trading (OFT) assesses applications against the criteria provided under the AI Act, including section 5 which relates to ineligibility for incorporation (extract attached, refer **Appendix 1**).

The OFT makes an assessment as to the eligibility of an association for incorporation based on the information provided in the application for incorporation. Copies of the checklists used by the OFT in assessing an application for incorporation are attached (refer **Appendix 2**).

The main purpose of an incorporated association is determined by OFT on a case-by-case basis, taking into consideration the legislation and the information provided in the application for incorporation. Section 10 of the AI Act allows OFT (through delegation) to request an applicant provide further information and documents in order to assess the application.

An application for incorporation would be refused if the purpose or operations of the association were in conflict with the criteria listed in section 5.

The proposed amendment to section 5 of the AI Act provides clarification by way of an example to make clear beyond doubt that an incorporated association cannot be used for the purpose of receiving and holding campaign funds for use by an association member or person nominated by a member. This clarifying amendment will assist those applying for incorporation. It will not affect the operation and processes of the OFT.

Question 3 on Notice

In relation to clause 25 of the Bill and the implications of the proposed amendments for self-funded candidates:

- a) What constitutes a gift?
- b) Does the requirement to deposit gifts into a candidate's dedicated account apply to a self-funded candidate?
- c) Will the position change under the Bill if passed?

Question 3 concerns the CCC's recommendation 5 that *'the Government expand the regulation of donations to include the expenditure of donations and a requirement to account for unspent donations by either only using the funds for campaign purposes or transferring them to a registered charity'*.

The Government response *'endorsed that unspent campaign donations be either held for campaign purposes at a later point or that the donations are transferred to a registered charity, or are returned to the relevant political party'*.

The question also relates to clause 25 of the Bill which amends the *Local Government Electoral Act 2011* (LGEA) section 126 (Requirement for candidate to operate dedicated account) to provide that if an amount remains in the account at the end of the disclosure period, the amount or part of the amount may be kept in the account for the conduct of another election campaign by the candidate; or, if the candidate was a member of a political party during the disclosure period, be paid to the political party; or be paid to a charity nominated by the candidate.

Answer to Question 3 on Notice

- a) The LGEA section 107 (1) provides that a **gift** is—
- (a) the disposition of property or the provision of a service, without consideration or for a consideration that is less than the market value, but does not include—
 - (i) transmission of property under a will; or
 - (ii) provision of a service by volunteer labour; or
 - (b) payment for attendance at or participation in a fundraising activity.

Section 107 (2) provides, however, the disposition of property or provision of a service to a candidate is not a gift if it is made in a private capacity, for the candidate's personal use, and the candidate does not use, and does not intend to use, it solely or substantially for a purpose related to any election.

Section 107 (3) provides that in this section—

disposition of property means a conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property, including, for example—

- (a) the allotment of shares in a corporation; and
 - (b) the creation of a trust in property; and
 - (c) the grant or creation of a lease, mortgage, charge, servitude, licence, power, partnership or interest in property; and
 - (d) the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of a debt, contract or chose in action, or of an interest in property; and
 - (e) the exercise by a person of a general power of appointment of property in favour of someone else; and
 - (f) a transaction by a person with intent to diminish, directly or indirectly, the value of the person's own property and to increase the value of someone else's property.
- b) The LGEA section 126(4) provides that all amounts paid by the candidate, or a person on behalf of the candidate, during the candidate's disclosure period for the election for the conduct of the candidate's election campaign must be paid out of the candidate's dedicated account.

The department's view is that a candidate would be unable to comply with subsection (4) unless an amount was available in the dedicated account to be paid out under that subsection. Accordingly the department's view is that a fully self-funded candidate must place the funds in the candidate's dedicated account.

The LGEA section 126(3) provides that all amounts received by the candidate, or a person on behalf of the candidate, during the candidate's disclosure period for the election for the conduct of the candidate's election campaign, including all gifts received by the candidate for the election, and all amounts received as loans to the candidate, must be placed in the account.

A fully self-funded candidate has the flexibility to manage the dedicated account by depositing only those amounts necessary to enable amounts to be paid out of the dedicated account. Therefore, a fully self-funded candidate may have a nil balance in the dedicated account at the end of the candidate's disclosure period.

- c) The Bill does not change the existing requirements under section 126(2) for candidates, including a self-funded candidate, to operate an account with a financial institution if the candidate receives an amount mentioned in subsection (3) or pays an amount mentioned in subsection (4).

The explanatory notes to clause 25 of the Bill provide that section 126 is amended '*to provide that the candidate's dedicated account must not, during the candidate's disclosure period for the election, be used other than for receiving and paying amounts under section 126(3) and (4)*'.

Question 4 on Notice

The maximum penalty proposed for various development offences and enforcement is prescribed under the *Sustainable Planning Act 2009* (SPA). The committee requested a brief summary of penalties that have been imposed by the courts, giving a description of each offence, the maximum penalty that could have been imposed, and the actual penalty imposed.

Question 4 is in relation to the increase in the maximum penalty proposed for various development offences and enforcement under the *Sustainable Planning Act 2009* (SPA).

Answer to Question 4 on Notice

The department requested information on penalties imposed by the courts under the SPA from Queensland Courts, however the Courts Performance and Reporting Unit has advised the information cannot be provided before 16 March 2017. As this is past the date when the committee is required to give its report to the Queensland Parliament, the request has been withdrawn.

The department also contacted the Brisbane City Council (BCC), which has provided information about prosecutions in the Magistrates Court that it has been involved in since 2013 (**Appendix 3**).

For each proceeding, the information includes the number and type of offences involved in the proceeding, the maximum penalty for the relevant offence or offences, and the penalty actually imposed by the Court. The information does not include an estimate of the value of the development subject of the proceeding, however for each proceeding the council has provided a brief description of the development, from which an approximate value may be inferred.

The information provided by BCC indicates that the maximum penalty was not imposed in any of the proceedings, and the actual penalties imposed are relatively low, for example the first penalty listed, for carrying out development without an effective development permit, resulted in a penalty of \$5000.00 when the maximum penalty that could have been imposed was \$183,150.00.

It should be noted that many of the proceedings referred to in the information supplied by BCC involved multiple offences. Consequently, the aggregate maximum penalty for such proceedings is a multiple of the penalty provided for under the Act.

It should also be noted that the maximum penalty for companies is five times the maximum penalty applying to individuals, however even cases involving companies have resulted in relatively low penalties being imposed. Also, the current maximum penalty that can be imposed for carrying out assessable development on a Queensland heritage place or a local heritage place without an effective development permit is 17,000 penalty units, instead of 1665 penalty units that would otherwise apply. This 17,000 maximum penalty amount is not proposed to be changed under the Bill.

The highest penalty that has been imposed for the BCC cases involving building work on a Queensland heritage place, for carrying out assessable development without an effective development permit, and for not carrying out the development in accordance with approved plans. For these offences the maximum penalty was \$9,533,150.00, however the penalty imposed was only \$23,750.00.

The highest penalty that has been imposed by the court for the BCC cases is \$70,000.00, (where the maximum penalty that could have been imposed was \$2,497,500.00) involving a company unlawfully using a residential car park as a commercial car park, and failing to comply with an enforcement notice to cease using the premises as a commercial car park or to apply for a development permit for the commercial car park.

Development offences are integral for ensuring compliance with the development assessment regulatory system, and penalties must adequately deter potential offenders from causing significant and potentially irreparable damage to the state's economic, social and environmental values.

The department notes that penalties will continue to be imposed at the discretion of the court, and its consideration of the circumstances applying in each case. The maximum penalty units have not increased since the introduction of the *Integrated Planning Act 1997*.

Increasing the maximum penalty that may apply under the Bill takes into account increases in market demands, property values and inflation since that time, and also align them with penalties for similar offences across the Queensland Statute book.

Question 5 on Notice

- a) Has anyone ever been charged or convicted for providing false and misleading information in a return (section 195 of the LGEA refers)?
- b) In relation to clause 29 of the Bill and the direct and indirect costs of local government elections, are costs that are now sent to local governments for their elections itemised? Is an itemised account sent to each council? The ECQ also undertook to provide an example of correspondence sent to local governments about direct and indirect costs.
- c) Did many local government chief executive officers apply to be returning officers for the 2016 local government quadrennial elections?

Subsequent to the briefing, the department referred question 5a) to the Electoral Commission of Queensland (ECQ) for response. The ECQ undertook at the briefing to respond to questions 5b) and 5c).

Answer to Question 5 on Notice

The ECQ's responses are:

- a) No.
- b) A copy of 2015/16 correspondence (de-identified) regarding costs associated with the election and the Local Government Elections Branch is **Appendix 4**. The ECQ's definition of indirect and direct costs is also attached as **Appendix 5**.
- c) Please refer to **Appendix 6**.

5 Eligibility for incorporation

(1) An association is not eligible for incorporation under this Act if the association—

(a) has less than 7 members; or

(b) is—

(i) a corporation; or

(ii) a partnership under the Partnership Act 1891; or

(iii) an organisation under the Industrial Relations Act 1999 that is incorporated because of the application of section 423 of that Act; or

(iv) a school council or parents and citizens association under the *Education (General Provisions) Act 2006*; or

(c) is formed or carried on for the purpose of providing financial gain for its members; or

(d) is provided for in a special Act that—

(i) incorporates—

(A) the association's governing body; or

(B) the trustees holding property for the association; or

(ii) provides the association may sue or be sued, or hold property, in the name of the association or an officer of the association; or

(iii) specially regulates its affairs; or

(e) has as its main purpose the holding of property—

(i) in which its members have a disposable interest; or

(ii) that the members have a right to divide between all or some of them; or

(iii) for use by some or all of its members or among persons claiming through, or nominated by, some or all of its members; or

(iv) for distribution of the property, or income from the property, among some or all of its members or among persons claiming through, or nominated by, some or all of its members; or

(f) has an object of raising a fund by subscription of its members to make loans to them.

(2) However, subsection (1)(e)(iv) does not make an association ineligible for incorporation if the chief executive is satisfied the association has as its main purpose the holding of property for meeting the medical, hospital, nursing and rehabilitation costs (the **medical costs**), and similar and related costs, of an individual who is suffering from a serious medical condition or injury.

**INCORPORATED ASSOCIATION
NEW APPLICATION – REQUISITION CHECKLIST – FORM 1**

Check Items	Yes	No	Comments
Correct fee received?			
Proposed Name available?			
Name entered and spelt correctly?			
Inc or Incorporated on the end?			
Has person appointed to make application completed personal details?			
Name of unincorporated association completed?			
Number of members currently equal to 7 or greater?			
Approximate commencement date provided?			
Does the association provide financial gain to its members?			
Is the association a branch of another association?			
If yes, has the full name of the parent assn been provided?			
Does the association own or lease land or hold interest on land?			
Has special resolution been completed within 1 year of application date?			
Has applicant given preferences for name?			
Has applicant included Inc/Incorporated in name?			
Have the postal address details been completed?			
Is the Nominated address for service completed?			
Has existing/proposed name & branch of financial institution been completed?			
Are office holders details completed for Pres /Sec /Treas?			
Is Physical address where books of account are kept completed?			
Declaration is signed by the appointed person?			
Rules adopted – Model rules			
Does the Name on the Appendix B and the Form 1 match?			
- Appendix B completed			
- Rule 5 completed			
Rules adopted – Own rules			
Does the Name in the Constitution and the Form 1 match?			
- Appendix A completed			
- Statutory Declaration completed			
Do signatures match?			
Is the EOFY shown?			DATE:

NOTES

[illegible]

INCORPORATED ASSOCIATION

CRN.

NEW APPLICATION – ONLINE REQUISITION CHECKLIST – FORM 1 DOCUMENT No.

Check items	Yes	No	COMMENTS
AIT payment receipt attached			
Correct fee received			
Date Application Received			
AIT - Pay Later / Supply Documents Later Options Change status to Requisition in BACHCO			
ASIC search - Proposed Name available?			
BACHCO search – on CRN, record document number and check application details match			
Has person appointed to make application completed personal details (lodging / postal address)			
Proposed Name & Preferences provided?			
Has applicant included 'Inc.' or 'Incorporated' in name?			
Current unincorporated name of association provided?			
Approximately when was association formed			
Number of members in association			
Does association provide financial gain to its members?			
Is association incorporated under Industrial Relations Act 1999?			
Is association a parents and citizens association under the Education (general Provisions) Act 2006?			
Is the association a branch of another association?			
Does the association own or lease land or hold an interest in land?			
Has special resolution been completed within 1 year of application date?			
Existing / Proposed name of branch of financial institution been completed (must be in Qld)			
Nominated Address for Service			
Postal address & email			
Address for Association's Books			
Is the address for correspondence correct and not the lodging party's address? (can be the same address)			

