Local Government Electoral and Other Legislation (Expenditure Caps) Amendment Bill 2022

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Office of the President

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Committee Secretary
State Development and Regional Industries Committee
Parliament House
George Street
Brisbane Qld 4000

By email: SDRIC@parliament.qld.gov.au

Dear Committee Secretary

Local Government Electoral and Other Legislation (Expenditure Caps) Amendment Bill 2022

Thank you for the opportunity to provide feedback on the Local Government Electoral and Other Legislation (Expenditure Caps) Amendment Bill 2022 (**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.

Due to the public consultation period partially falling within the well-established traditional holiday business closure, QLS has not undertaken a comprehensive review of the specific items in the Bill and the issues raised. The absence of comment on a particular matter should not be considered an endorsement by QLS.

QLS supports the introduction of expenditure caps for local government elections consistent with the approach taken in relation to State government electoral expenditure caps. Consistent regulation is vital to ensuring those entities affected by expenditure caps are easily able to understand and comply with their obligations.

However, QLS has previously raised a number of concerns regarding the impact on third parties. While we acknowledge and appreciate some of those concerns have been addressed in the Bill, such as not introducing donation caps and increasing the registration threshold for third parties, we reiterate some of our previous concerns in this submission.

Executive summary

QLS is concerned that the current Bill will have a chilling effect on public interest advocacy and the participation of not for profit (**NFP**) and charity organisations in the debate and development of social policy.

There are uncertainties in the drafting of key concepts in the Bill which will make it difficult for third parties to assess whether or not their participation in public debate will give rise to registration and compliance obligations under the Bill.

To mitigate these issues, QLS recommends:

- Clarifying the operation of the dominant purpose test in proposed sections 109A(5) and (6) of the *Local Government Electoral Act 2011* (**LGEA**), to add further examples and provide guidance for third parties about the operation of this test;
- Removing proposed section 109B(1)(c) from the Bill, given the extremely broad application of the phrase "to otherwise influence voting at an election." The purpose of the Bill is directed at regulating political campaigning for a particular party or candidate, which is achieved by proposed sections 109B(1)(a) and (b);
- Amending proposed section 109B(2)(c) of the LGEA to better achieve the intent of the Bill. We recommend this be achieved by introducing the requirement for a nexus between (a) a third party expressing a particular position on a policy issue and (b) that expression expressly or impliedly promoting or opposing a party or candidate in an election;
- Introducing exemptions from the third party registration framework for:
    - Charities registered with the Australian Charities and Not-for-Profits Commission (**ACNC**) due to existing regulation under the *Charities Act 2013* and their current reporting obligations to the ACNC;
    - NFPs and charities where electoral expenditure is an incidental aspect of their activities and/or where the NFP and charity is a small organisation;
    - Certain organisations already subject to robust disclosure obligations such as technical and professional bodies like QLS, where there is clear transparency and accountability about an entity's financial position and the purpose of any public interest advocacy;
    - Legal practitioners engaging in conduct within the scope of legal practice regulated by the *Legal Profession Act 2007* (Qld);
    - Expenditure incurred by third parties engaged in responding to parliamentary enquiries about Bills relevant to local government and for third parties consulted confidentially by government on issues affecting local government.

QLS also recommends:

- Removing proposed subsections 109A(2)(e) and 109A(4)(d) from the Bill, which currently permit amendments to the definition of *electoral expenditure* by regulation. These provisions do not have proper regard to the institution of Parliament. Allowing

the critical definition of electoral expenditure to be altered by regulation does not provide the same level of parliamentary scrutiny as in the primary legislation.

- The State develop and implement a wide-ranging education campaign about the effect of this legislation, if passed, for councillors, relevant staff, political parties, members of the public who intend to run as candidates and third parties such as charities and NFPs who may be caught by the new regulatory framework.

Third parties framework

Proposed sections 106AB, 109A and 109B of the LGEA set out the meaning of *participant* in an election, *electoral expenditure* and *campaign purpose*, respectively.

The effect of these 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 it spends more than $6000 on electoral expenditure.

Electoral expenditure is essentially defined as expenditure relating to publishing an advertisement or material for an election, or carrying out an opinion poll or research, incurred for a *campaign purpose*.

Expenditure is incurred for a ***campaign purpose*** if the expenditure is incurred to promote a political party, group of candidates or candidate in an election or "*to otherwise influence voting at an election*".

The element of "*otherwise influence*" is extremely broad, as discussed further below, because it suggests that expenditure will be considered to be for a *campaign purpose* even if there is no reference to a political party or candidate in the material produced.

A registered third party is then subject to a range of compliance obligations including those relating to a dedicated campaign account, and ensuring that activities do not breach the electoral expenditure cap.

Impact of third party framework on public interest advocacy and resulting compliance burden

The electoral caps framework was introduced for State elections in 2020 with the passage of the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Act 2020*.

QLS recognises that a number of drafting changes were made in response to public submissions on the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 (**Electoral Bill 2019**), including clarifications to the definition of *electoral expenditure* and to add a specific definition of *campaign purpose*.

These changes were made in recognition of the potential regulatory burden of the original form of the Electoral Bill 2019 on not for profit third party organisations[1] and the revised drafting has been reflected in this current bill.

However, QLS remains concerned that the current bill will have a chilling effect on the participation of not for profit and charity organisations in the debate and development of social policy, where that particular issue is connected with their mission and achieving their purpose.

The amended drafting reflected in this bill introduces a number of additional uncertainties about the scope of the third party registration framework, due to the following concepts:

- The dominant purpose test in proposed sections 109A(5) and (6) of the LGEA – how will the courts interpret this provision to determine when the *dominant purpose* of a third party's expenditure is indeed electoral expenditure?
- The phrase of "otherwise influence voting in an election" in proposed section 109B(1)(c) of the LGEA - the current drafting suggests that a third party's expenditure could be considered expenditure for a *campaign purpose* even if there is no mention of a particular political party or candidate in the material produced;
- A third party's material being held to be material for a *campaign purpose* because it 'expresses a particular position on a policy, issue or opinion' which happens to be the position publicly associated with a political party, candidate or group of candidates - even though the material does not mention a particular party, candidate or group. This is the effect of proposed section 109B(2)(c) of the LGEA.

As outlined below, we recommend removing or amending these provisions.

Otherwise, this legislation will inhibit the legitimate and valuable voice of charities and not for profit organisations in modern Australian political discourse and debate, because of an organisation's fear of inadvertently advocating in a way which is perceived "to otherwise influence voting at an election". This risk is heightened when under this bill, it does not matter if the material in question does not even mention a particular party, candidate or group when the position is expressed.

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" 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 not for profit 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 not for profits and charities to deliver their services, which then creates greater pressure on the public purse.

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[1] Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 – Explanatory Notes for Amendments to be moved during consideration in detail by the Honourable Yvette D'Ath MP (page 1)

Dominant purpose test - proposed sections 109A(5) and (6) of the LGEA

QLS welcomes the attempt to clarify that expenditure incurred by a third party for an election is electoral expenditure if the *dominant purpose* for which the expenditure is incurred is a campaign purpose.

QLS also supports the inclusion of subsection (6) to the effect that the expenditure will not be considered electoral expenditure if the dominant purpose is another purpose, such as educating or raising awareness of an issue of public policy, even if the expenditure might also achieve a campaign purpose.

However, these provisions raise further questions about the balancing of different purposes and what factors or criteria will be considered by a court when identifying the dominant purpose.

We suggest that for some third parties, the risks of incorrectly assessing a dominant purpose will mean that they will decide not to take the risk and will not engage in any debate on certain issues.

This section could be clarified by adding further examples to proposed subsection (6) to give guidance to third parties when assessing whether or not their material might be found to fall within or outside of the framework.

Meaning of *campaign purpose* - proposed section 109B(1)(c) – wide scope of phrase "to otherwise influence voting at an election"

QLS submits that the phrase "to otherwise influence" in proposed section 109B of the LGEA is extremely broad in its potential application and operation.

QLS considers that the intent of the legislation would be achieved by removing proposed section 109B(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 proposed sections 109B(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 due to its connection with the third party's purpose or mission, 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 impact of climate change at a local government level, 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. This circumstances is within the scope of subsections 109B(1)(a) and (b).

Removing proposed section 109B(1)(c) from the Bill would result in the drafting approach more closely reflecting that in the *Charities Act 2013* (Cth) in relation to a 'disqualifying purpose'. The *Charities Act 2013* specifically distinguishes between the 'purpose of *promoting or opposing a political party or a candidate* for political office' and the concept of distributing information or advancing debate about policies (see further discussion below).

However, if it is proposed to:

- retain section 109B(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 Victorian *Electoral Act 2002* uses the word "directing"; or
- retain the word "influence", QLS recommends limiting the risk of unintended consequences for third parties by removing the word "otherwise" from the operation of section 109B(1)(c).

Meaning of *campaign purpose* - proposed section 109B(2)(c) of the LGEA – lack of nexus between expressing a position and promoting or opposing a candidate

The effect of proposed section 109B(2)(c) of the LGEA is that a third party's material might be held to be material for a campaign purpose because it 'expresses a particular position on a policy, issue or opinion' which happens to be the position publicly associated with a political party, candidate or group of candidates - even though the material does not mention a particular party, candidate or group.

This subsection is so broadly drafted that a third party could publish a position on a particular issue quite independently of any political party and inadvertently be caught by the regulatory framework, even if the third party did not know that a political party or candidate had taken the same position on the issue.

There is no connection or nexus required between the expression of a position and the fact that an election is underway.

We recommend replacing proposed section 109B(2)(c)(ii) of the LGEA with drafting to the effect that the expression of a particular position must also "expressly or impliedly" promote or oppose a political party, candidate or group of candidates.

This then introduces an appropriate connection between the third party's expression of a position and a particular party or candidate.

Exemptions required

We acknowledge the exemption for third party electoral expenditure in proposed 109A(6) of the LGEA if the dominant purpose of the expenditure is for another purpose, even if the expenditure is also incurred for, or achieves, a campaign purpose. However, due to the breadth of the legislation as outlined above, there is still a risk that some expenditure by third parties may be inadvertently caught as electoral expenditure.

Therefore, 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), taken together with reporting to the ACNC that is already required.

   Charities must be established for a "charitable purpose" and a charity can undertake advocacy to further or aid a charitable purpose of the entity (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 not-for-profit entities have a valuable contribution to make to political debate in Australia and it would concerning if this legislation had the unintended effect of silencing these bodies due to fear of breaching the compliance obligations or the financial cost of meeting the compliance burdens of the framework.

   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 same as that set by the ACNC for small registered charities i.e. those with an annual revenue under $500,000.

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 bodies 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 relevant to local government 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 on issues that affect local government. 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.

Concerns with regulation-making power

QLS is also concerned with the breadth of regulation-making powers contained in the Bill, which are outlined on pages 39 to 42 of the Explanatory Notes, and the uncertainty this creates. In particular, QLS is concerned that:

- proposed subsection 109A(2)(e) of the LGEA allows other kinds of electoral expenditure to be prescribed by regulation; and
- proposed subsection 109A(4)(d) allows a regulation to prescribe other kinds of expenditure that is not electoral expenditure.

Given the significance of the definition of *electoral expenditure* to the operation of the electoral caps framework and its potential impact on third parties, QLS submits that it is not appropriate to delegate legislative power to determine what is and is not electoral expenditure.

It is critical that regulations are not used as a mechanism for circumventing the legislative process for passing Acts of parliament or for addressing matters which are appropriately dealt with in primary legislation.

As noted in the Office of Parliamentary Counsel's "Principles of Good Legislation: OQPC guide to FLPs – The institution of Parliament - subordinate legislation":

> "Section 4(5)(c) of the *Legislative Standards Act 1992* states that subordinate legislation should contain only matters appropriate to that level of legislation. Although an Act may legally empower the making of particular subordinate legislation, there remains the issue of whether the making of particular subordinate legislation under the power is appropriate. For example, an Act's empowering provision may be broadly expressed so that not every item of subordinate legislation that could be made under it is necessarily appropriate in every circumstance that arises."[2]

In our view, proposed subsections 109A(2)(e)and 109A(4)(d) do not have proper regard to the institution of Parliament. Allowing the critical definition of electoral expenditure to be altered by regulation does not provide the same level of parliamentary scrutiny as in the primary legislation.

QLS recommends removing proposed subsections 109A(2)(e) and 109A(4)(d) from the Bill.

Compliance education

If the Bill is passed, QLS recommends that the State undertakes a wide-ranging education campaign. Over several years, there has been a significant amount of legislative reform relating to local government. These reforms, while necessary to improve integrity at the local government level, can create a worrying degree of uncertainty. In particular, councillors face a complicated and burdensome regulatory framework that changes frequently.

In relation to previous reforms, QLS has noted that 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.

QLS is also concerned that small charities and NFPs, particularly community groups, may not understand their obligations under the legislation, which could result in inadvertent breaches of the law. As executive members of third parties may be held personally liability for a breach, it is important they are aware of their obligations and the consequences for failing to comply with those obligations.

[2] Accessed at https://www.oqpc.qld.gov.au/instructing-oqpc/flps on 23 January 2023, "

Therefore, QLS recommends that the Department and other relevant agencies provide ongoing education and training on compliance obligations under the amended legislation to charities and NFPs, councillors, relevant staff, political parties, and members of the public who intend to run as a candidate for councillor.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted].

Yours faithfully

[redacted]

Rebecca Fogerty
Vice President