

Our ref: AD001417

Your ref:

18 July 2018

Ms Kathrine Morgan-Wicks
Secretary
Department of Justice
GPO Box 825
HOBART TAS 7001

By email – haveyoursay@justice.tas.gov.au

Dear Ms Morgan-Wicks,

Review of the *Electoral Act 2004*

Thank you for the opportunity to make a submission to this review. I note that its Terms of Reference are:

- modernising the current Tasmanian *Electoral Act 2004* with specific examination of sections including 191(1)(b); 196(1) and 198(1)(b);
- whether state-based disclosure rules should be introduced, and, if so, what they should include; and
- the level of regulation of third parties, including unions, during Election campaigns.

This submission addresses Term of Reference 2, in which the Integrity Commission has a particular interest.

Political donations and public confidence in government

Political donations can give rise to conflicts of interest, which if not properly disclosed and managed can diminish public confidence in government. In the report of the Queensland Crime and Corruption Commission (CCC) investigation into the 2016 local government elections in that State (Operation Belcarra),¹ the following extract appears:

¹ Crime and Corruption Commission Queensland, *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government* (December 2017)
<www.ccc.qld.gov.au/corruption/operation-belcarra> (Operation Belcarra report).

Some other councillors the CCC spoke to during Operation Belcarra were of the view that even direct donations do not necessarily give rise to conflicts of interest. This is contrary to the view of the former Queensland Integrity Commissioner that donations “certainly can” lead to real or perceived conflicts of interests for councillors:

It seems self-evident that a reasonable person would expect that electoral donations are made for a purpose, and that donors will expect that their donations achieve that purpose. Those personal or sectional interests can clearly conflict with the public interest which should be the basis for all public decision-making. (Submission from Richard Bingham, pp. 2–3)

The CCC concurs with this position. It seems to the CCC that some councillors are particularly failing to recognise perceived conflicts of interest arising from donations, having little or no regard for how the donations they receive may be seen by members of the public to compromise the performance of their duties.

I maintain the personal views expressed in that extract. Further, in the Commission's view, the passage encapsulates the reasons why state-based political donation disclosure rules should be introduced in Tasmania, at both State and local government level.

Tasmania – and in particular the Tasmanian House of Assembly – has the least regulated election funding and disclosure laws in Australia.² In discussing the Victorian situation, which is not dissimilar to Tasmania, the Victorian Ombudsman has aptly summarised why transparency should be increased:

There can be little doubt that the lack of transparency in political donations and the lack of limitations on who can make those donations in Victoria creates an environment in which allegations of improper conduct can flourish. Whether they are substantiated or not, whether such allegations are legitimately made or are made for political mischief-making as is often claimed, is not the point. Ultimately, they create a perception that politicians can be bought, which reduces public trust in government.

Equally, this lack of transparency can leave political candidates exposed to unfair allegations that they have received donations for improper purposes. Shielding the state election process from a mire of allegations and hearsay is in everyone's interests – voters, candidates and parties.³

² On the basis of comments made by a committee of the Victorian Parliament in 2009, this would appear to make Tasmania ‘amongst the least regulated jurisdictions in the western world in terms of political finance law’; see Electoral Matters Committee of the Victorian Parliament, *Inquiry into Political Donations and Disclosure* (2009) vii.

A useful comparison of disclosure laws across Australia can be found in Appendix A of Dr Damon Muller, *Election funding and disclosure in Australian states and territories: a quick guide* (9 November 2017)

<www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/ElectionFundingStates>.

³ Victorian Ombudsman, *Investigation of a protected disclosure complaint regarding allegations of improper conduct by councillors associated with political donations* (November 2015) 3.

Better practice electoral disclosure

In December 2014, the New South Wales Independent Commission Against Corruption (ICAC) published a report on electoral funding, expenditure and disclosure issues.⁴ It identified the following features of better practice electoral data disclosure regimes. Disclosures should be:

- timely;
- comprehensive;
- accessible and searchable; and
- intelligible.⁵

The NSW ICAC also proposed some recommendations, which in the Commission's view reflect the following additional important features of an effective political donations disclosure system:

- the principal disclosure obligation should rest with the recipient of the donation, not the donor;⁶
- the electoral oversight body (in Tasmania, the Tasmanian Electoral Commission (TEC)) should be adequately empowered and resourced to ensure compliance with any established disclosure regime.⁷ The Commission considers that it is important that the TEC should have adequate powers and resources to fulfil all of its functions, and believes that these would benefit from reassessment; and
- the disclosure regime should extend to third party participants in the electoral process⁸ i.e. any entity that incurs expenditure for a political activity relating to an election during the disclosure period for that election.⁹

The Queensland model

The Queensland Government has recently introduced real-time donation disclosure for State and local government elections. All entities conducting or supporting political activity in Queensland are required to submit a disclosure return to the Electoral Commission of Queensland (ECQ). These obligations include 'real time' reporting of gifts and loans, as well as periodic reporting of other dealings such as advertising and expenditure.¹⁰

The Electronic Disclosure System (EDS) allows candidates, third parties and others with disclosure obligations to enter their donations returns electronically. It also makes these returns readily available to the public, providing faster and easier access to political financial disclosure information.

⁴ New South Wales Independent Commission Against Corruption, *Election Funding, Expenditure and Disclosure In NSW: Strengthening Accountability and Transparency* (December 2014) <www.icac.nsw.gov.au/component/finder/search?q=election+funding&Search>.

⁵ Ibid 30-1.

⁶ Ibid, recommendation 2.

⁷ Ibid, recommendations 3, 7-11 and 14-15.

⁸ Ibid, recommendations 16 and 20-22.

⁹ *Electoral Act 1992* (Qld) ss 123 and 124.

¹⁰ The relevant legislative provisions are contained in the *Electoral Act 1992* (Qld) Part 11, and the *Local Government Electoral Act 2011* (Qld) Part 6.

EDS requires candidates and groups of candidates to disclose all donations and loans they receive above the disclosure threshold (now \$1,000 for State election candidates,¹¹ and \$500 for local government election candidates¹²) within seven business days.¹³ Third parties are likewise required to disclose all expenditure and donations above the threshold within seven business days.¹⁴

The Queensland CCC has commented that 'compared with the previous system of paper-based return forms, the EDS provides disclosure data that is more accessible to and searchable by members of the public and the media, enabling them to better understand the sources of candidates' campaign funds and candidates' relationships with donors'. It notes also that this was demonstrated in the Ipswich City Council Mayoral by-election in August 2017, where media outlets made significant use of disclosure data from the EDS in their election coverage.¹⁵

In the Commission's view, there would be considerable benefit in the introduction in Tasmania of a similar donations disclosure system to that which has been successfully implemented in Queensland. The maximum level of donations beyond which disclosure is required should be no higher than \$1,000.

The Commission notes that, in Victoria, the Electoral Legislation Amendment Bill 2018 (Vic) is currently before the Parliament.¹⁶ If passed, this legislation will reduce the disclosure limit from \$13,500 to \$1,000 per financial year, establishing a system similar to that used in Queensland. It will also introduce a cap on donations at \$4,000 over a four-year parliamentary term.

Possible improvements to the Queensland model

In its Operation Belcarra report, the Queensland CCC flagged some possible improvements to the EDS. These fall into three categories:

- ensuring that donations made in the last seven business days before polling are able to be made known to the voting public prior to the election;
- improving the technical capabilities of the EDS, to permit enhanced searching; and
- ensuring that some other relevant donations data is included in the EDS.

In relation to the first issue, the Queensland CCC commented:

The move to real-time donation disclosure is a significant step towards ensuring that members of the public have access to timely information about the sources of political funding to help inform their vote. However, the current legislative framework is such that there is the potential for some donations to still remain unknown to voters before polling day. That is, a donation could be made within the last seven business days before polling day, and this would not have to be disclosed until after the election. The CCC sees this as undermining the

¹¹ Electoral Act 1992 (Qld) s 201A.

¹² Local Government Electoral Act 2011 (Qld) s 117(1).

¹³ Electoral Regulation 2013 (Qld) reg 8A; Local Government Electoral Regulation 2012 (Qld) regs 5-7.

¹⁴ Electoral Regulation 2013 (Qld) regs 8B-8E; Local Government Electoral Regulation 2012 (Qld) regs 8-9.

¹⁵ Qld CCC Operation Belcarra report, 73.

¹⁶ Premier of Victoria, *Taking money out of politics* <www.premier.vic.gov.au/donationreform/>.

fundamental goal of timely donation disclosure — ensuring that voters can make informed decisions at the polling booth. To address this loophole and ensure there is complete transparency of donations before votes are cast, the CCC recommends that candidates and others be prohibited from receiving gifts or loans in respect of an election from within seven business days before polling day (Recommendation 16). In making this recommendation, the CCC notes that the Broadcasting Services Act 1992 (Cth) permits licensed broadcasting of election advertisements until Wednesday midnight before polling day (see s. 3A, Schedule 2). The CCC considers that any law reform proposals to constrain gifts and loans for the purpose of licensed broadcasting of election advertisements may need to take this into account.¹⁷

In relation to possible technical improvements in the EDS, the Queensland CCC commented:

While the EDS is undoubtedly a useful tool for increasing the transparency of donations, the CCC considers there is room for improvement. This is to be expected given the system is in its infancy. Particular aspects of the EDS that are currently limited include its:

- *search functions. The EDS's search functions work well for identifying donations received by an individual candidate, for example, but are difficult to use for more "complex" searches such as identifying donations received by all candidates for a particular election or group of elections (e.g. all of the 2016 local government elections).¹⁸*
- *available data. Although a wide range of data is entered into the EDS by disclosers, very little of this is made available to the public on the EDS website.¹⁹ Likewise, very few pieces of information are included in the data files generated by the EDS,²⁰ which makes it difficult to identify meaningful trends and patterns in donations. As an example, the data files downloaded from the EDS for the 2016 elections do not indicate what council or position (i.e. mayor or councillor) a person was a candidate for, nor do they distinguish between donations received by candidates and donations received by others (e.g. third parties).*
- *analytical tools. The EDS includes a mapping function, but this only maps donations according to the electorate of the donor (not, for example, for all candidates contesting a particular election). No other tools (e.g. interactive charts, graphs) are provided that may help users in exploring and understanding the data.*

In terms of the donations data which should be entered into the EDS, the Queensland CCC suggested the following enhancements, which it suggested would help to further align

¹⁷ Qld CCC Operation Belcarra report, 73.

¹⁸ It is possible to search for donations for a particular election (e.g. the 2017 Ipswich mayoral by-election), but this also retrieves irrelevant donations received during the same period (e.g. donations received by state MPs and political parties).

¹⁹ For example, donation recipients are required to give a description of the donation (e.g. whether it was a gift of money or in another form), donors are required to state whether or not they are passing the donation on for someone else, and third parties reporting expenditure are required to state the description and purpose of the expenditure and give the details of the supplier who was paid. However, none of this information is displayed to the public.

²⁰ Search results from the EDS can be downloaded in both PDF and CSV format. The only information included in these files is the donor's name, the recipient's name, the date the gift was made, the donor's electorate and address and the value of the donation.

Queensland's scheme with international best practice examples, including the New York City Campaign Finance Board and the United States Federal Election Commission:

- *For donations made by an individual, the individual's occupation and employer (if applicable; Recommendation 18, part a). This is consistent with disclosure requirements for federal elections in the United States and New York City elections, and would allow the public to better understand the types of interests, industries and companies associated with individual donations.*
- *For donations made by a company, the names and addresses of the company's directors and a description of the nature of the company's business (Recommendation 18, part b). This too would help the public to more readily identify the industries behind donations, as well as increase transparency in situations where the same individual is behind donations from different companies.*
- *For all donations, a statement as to whether or not the donor or a related entity currently has any business with, or matter or application under consideration by, the relevant council (Recommendation 18, part c). The CCC considers this important for making connections between donors and council decision-making more transparent (see further discussion in Chapter 13).*
- *For expenditure incurred by a third party (including donations), details about which candidate, party or agenda the expenditure was used to support or oppose, and information about who the expenditure was actually paid to (Recommendation 19). The CCC considers that this would lead to the disclosure of more useful data than the current requirement to disclose "the purpose" of an expenditure, which is vague and open to interpretation.²¹*

Whether donations from particular interests should be banned

In New South Wales, property developers and representatives of the tobacco, liquor and gambling industries are not permitted to make political donations.²² In Victoria, organisations that hold licenses related to casinos and gaming are banned from making donations to a political party exceeding \$50,000 in a financial year.²³ There are also foreign donation restrictions in both Queensland and New South Wales.²⁴

The Queensland CCC in its Operation Belcarra report recommended that property developer donations to local government candidates should be prohibited. Recommendation 20 of that report proposed the banning of donations from property developers for local government election candidates, third parties, political parties and councillors.²⁵

In response to Recommendation 20, in May 2018 the Queensland Parliament passed *the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018*. This Act implements the recommendation to ban donations from property developers for to local government election candidates, third parties, political parties

²¹ Qld CCC Operation Belcarra report, 75.

²² *Electoral Funding Act 2018* (NSW) ss 51–56.

²³ *Electoral Act 2002* (Vic) s 216.

²⁴ *Electoral Act 1992* (Qld) ss 267–270; *Electoral Funding Act 2018* (NSW) s 46.

²⁵ Qld CCC Operation Belcarra report, 78.

and councillors. However, the Act also extends the prohibition to political donations made by property developers to Members of State Parliament.

It is appropriate to consider whether similar restrictions should form a part of any political donations disclosure scheme introduced in Tasmania. While the Commission appreciates the benefits of such prohibitions in some situations, it considers at this stage that the operation of the NSW and Queensland provisions should be monitored. It believes that the introduction of transparency through a scheme modelled on the Queensland EDS is a reasonable first step, and that further measures should be introduced if that does not deliver the necessary public confidence.

Summary

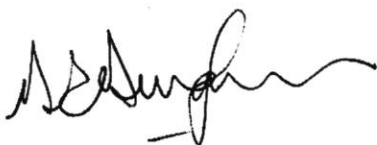
In my opinion, state-based disclosure rules should be introduced in Tasmania. They should:

- require reporting of all donations and in-kind contributions of over \$1,000 in value within seven business days;
- apply at both State and local government level;
- allow for electronic reporting;
- place disclosure obligations on the recipient of the donation and the donor, with the principal obligation being on the recipient;
- extend to third party participants in the electoral process;
- require ongoing reporting (i.e. not just require reporting during election periods);
- ensure that donations made in the last seven business days before polling are able to be made known to the voting public prior to the election; and
- ensure that data available to the public is sufficient and adequately searchable.

The electoral oversight body should be adequately empowered and resourced to ensure compliance with these laws.

I would be happy to expand on this submission if that would assist.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Richard Bingham', with a stylized, flowing script.

Richard Bingham

CHIEF EXECUTIVE OFFICER