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Committee Secretary

Economics and Governance Committee

Parliament House

BRISBANE QLD 4000

***By email:*** egc@parliament.qld.gov.au

Dear Committee

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

Thank you for the opportunity to make a further submission to the above inquiry regarding the proposal to add strict liability offences to the Bill.

As we stated in our earlier submission of 8 January 2020, the Queensland Human Rights Commission (the Commission) has functions under the *Anti-Discrimination Act 1991* and the *Human Rights Act 2019* (HRA) to promote an understanding and discussion of human rights in Queensland, and to provide information and educative services about human rights.

On 28 January 2020, the Committee sought further submissions regarding the proposed dishonest conduct of minister offences and dishonest conduct of councillor offences, which were intended to give effect to recommendations made by the Crime and Corruption Commission (CCC) in September 2019. In its evidence to the Committee, the CCC indicated it did not believe the offences as drafted achieve the purpose of these recommendations. It suggested that ‘the offence should also prescribe the failure to disclose relevant interests when the person knew or ought to have known of the relevant interest. A strict liability offence is required because otherwise the laws are ineffective in preventing corruption and would negatively contribute to perceptions in democratic decision-making processes’.

The CCC has also advised that it considers that offences relating to the contravention of conflict of interest and register of interest requirements should apply to all members of the Queensland Parliament.

Our submission is informed not only by the investigations and recommendations of the CCC, but the need for Queensland law and agencies to hold public officials to the highest level of probity in light of the history of corruption in Queensland, and particularly the findings and recommendations of the Fitzgerald Inquiry report. The Office of the High Commissioner for Human Rights has noted that corruption is a structural obstacle to the enjoyment of human rights. Disadvantaged groups and persons suffer disproportionately from corruption and it can undermine the rule of law and the state itself.[[1]](#footnote-2)

We accept that the introduction of strict liability offences in this context may be demonstrably justified, but suggest some less restrictive options must at least be considered, to ensure the provisions are compatible with human rights.

**Strict Liability**

One of the challenges in providing feedback on the proposal is being clear about how the provisions may be redrafted to adopt ‘strict liability’. Criminal offences generally require the prosecution to prove beyond reasonable doubt a fault element of the offence which may include intent, knowledge, recklessness or negligence. Our understanding is that strict (and absolute) liability offences alter this by not requiring that a fault element is proved. The key difference between absolute and strict liability offences is that absolute liability offences do not provide for a mistake of fact excuse or defence.

We therefore base our initial comments on this definition of strict liability. The Australian Joint Parliamentary Committee on Human Rights has observed that the right to be presumed innocent is limited when offences allow ‘for the imposition of criminal liability without the need to prove fault’ and that:

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.[[2]](#footnote-3)

The Committee has expanded on this test to suggest that strict liability offences are more likely to be proportionate if the offence is regulatory in nature and the penalty is at the lower end of the scale. The Committee has also cited with approval the Commonwealth Attorney-General’s Departments’ Guide to Framing Commonwealth Offences, Infringements Notice and Enforcement Provisions. That guide provides the following principles for assessing strict liability:

* Strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime, such as public health, the environment, or financial or corporate regulation. However, as with other criteria, this should be applied subject to other relevant principles.
* Strict liability should not be justified by reference to broad uncertain criteria, such as offences being intuitively against community interests or for the public good. Criteria should be more specific.
* Strict liability may be justified where its application is necessary to protect the general revenue.
* Strict liability should not be justified on the sole ground of minimising resource requirements; cost saving alone would normally not be sufficient, although it may be relevant together with other criteria.[[3]](#footnote-4)

The Guide suggests that minor offences regulatory in nature include those dealing with ‘failing to comply with reporting obligations’.[[4]](#footnote-5)

**Is Strict Liability Proportionate?**

As we discussed in our earlier submission, s 13(2) of the HRA sets out factors for deciding whether a limit on a right is reasonable and justified. Section 13 is consistent with the principles set out above in requiring that when deciding if a limit on a human rights is reasonable the following must be considered:

1. the nature of the human right;
2. the nature and purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
3. the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
4. whether there are any less restrictive and reasonably available ways to achieve the purpose;
5. the importance of the purpose of the limitation;
6. the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
7. the balance between the matters mentioned in paragraphs (e)   
   and (f).

In applying these principles to the proposal, in particular s 13 of the HRA, we make the following observations, noting that it is ultimately for the Government to justify the limitation on rights of proposed legislation:

* The presumption of innocence, protected under s 32 of the HRA, is a fundamental protection of the criminal law;
* The proposed limitation is important and consistent with a free and democratic society in that it seeks to prevent conflicts of interest and corruption in the democratic process;
* Based on the assessment and findings of the CCC it would achieve this purpose;
* Reform is necessary based on the recommendations of the CCC that indicate that the current legislative regime is not effective;
* The offence is arguably regulatory in nature;
* Nonetheless, it is unclear if strict liability is the least restrictive way of achieving the purpose; and
* The penalty imposed of 200 penalty units or 2 years imprisonment is significant.

**Is Recklessness a less restrictive option?**

The definition of corrupt conduct in s 15 of the *Crime and Corruption Act 2001* includes the concept of recklessness. It is defined as including conduct that adversely affects the performance of functions of a person holding an appointment and results in the performance of these functions in way that involves a breach of the trust placed in a person holding an appointment, either knowingly or **recklessly**, and if proved would be a criminal offence.

A person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and having regard to the circumstances known to him or her, it is unjustifiable to take the risk.[[5]](#footnote-6)

In its September 2019 Report, the CCC observed that the behaviour of Deputy Premier in failing to update her statements of interest as required under s 69B of the *Parliament of Queensland Act 2001* was not corrupt conduct as this section was not a criminal offence. In its evidence to this Inquiry, the CCC indicated that it sought further amendments as:

Enforcement of these obligations requires offence provisions which sanction the failure to disclose relevant interests when the person knew or ought to have known of the relevant interest.

It may be that a less restrictive way of achieving the CCC’s recommendation would be to include recklessness as a fault element that must be proved by the prosecution, rather than removing the fault element entirely. For example, section 97D of the Criminal Code and Other Legislation (Ministerial Accountability) Amendment Bill 2019*,* tabled by the Honourable Ms Deborah Frecklington MP, states that the provision applies when a minster ‘is aware or ought reasonably to have been aware’ of the conflict of interest in the matter. In its submission, the CCC said of this provision:

The CCC notes that this broader approach is more consistent with the CCC's recommendations than the proposed new section 40A. The strict liability introduced by this provision is adequately mitigated by the requirement to prove knowledge or objectively reasonable knowledge.

This provision appears to require the prosecution to prove that the minister ought to have reasonably been aware of the declarable conflict of interest. Whether this is defined as ‘strict liability’ may be a matter of semantics. If this is the ‘strict liability’ change proposed, then in relation to the presumption of innocence, it would seem a more proportionate and justified limitation than an offence that did not require the prosecution to prove a fault element beyond reasonable doubt.

**Other Less Restrictive Options**

There may be other ways in which the offences could potentially be redrafted to be a less restrictive limitation on rights but still achieve their purpose:

* Apply strict liability but reduce the maximum penalty of the offences. For example, s 97D of the Criminal Code and Other Legislation (Ministerial Accountability) Amendment Bill applies a maximum penalty of 100 penalty units or 1 year’s imprisonment. We note that the CCC supported the higher penalty in the Government’s Bill.
* Confine the offences regarding councils to councillors only (eg not extend strict liability to advisers)

**Extension to all Members of Parliament**

The CCC also recommended that the proposed offences dealing with contravention of conflict of interest and register of interest requirements apply to all State Members of Parliament. Restricting these offences to ministers only would arguably be a less restrictive limitation on rights. Further, given the penalties proposed, the right to security and liberty of individual Members under s 29 of the HRA is limited by the potential for them to be imprisoned as a result of such a contravention. While noting that any such limitation would have to be justified by the Government, the Commission is conscious of the recommendations of the CCC in this area and the impact corruption and perceived corruption has on the Queensland community. In light of this, the Commission accepts that there is likely to be a strong justification for extending the offences as suggested by the CCC.

**Conclusion**

In the time available we have offered some alternative less restrictive limitations on human rights that the Committee and Government might consider to address the CCC’s concerns. However, we accept that the imposition of strict liability in this situation could be demonstrably justified given the findings of the CCC, particularly if these options are considered and demonstrated to be unworkable.

Thank you for the opportunity to participate in the committee process.

Yours sincerely

**SCOTT MCDOUGALL**

**Queensland Human Rights Commissioner**

1. UN Office of the High Commissioner for Human Rights, *Corruption and Human Rights*, <<https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx>>. See also s 15 of the HRA which enshrines protection for equality before the law. [↑](#footnote-ref-2)
2. Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guidance Note 2: Offence provisions, civil penalties and human rights,* (December 2014), 2 [↑](#footnote-ref-3)
3. Attorney General’s Department (Cth), *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition, <<https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>>, 24. [↑](#footnote-ref-4)
4. Ibid, 57. [↑](#footnote-ref-5)
5. *Criminal Code Act 1995* (Cth), s 5.4 [↑](#footnote-ref-6)