



Our reference: BNE 3416958

8 January 2020

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 and Inquiry into the feasibility of introducing expenditure caps for Queensland local government elections

Thank you for the opportunity to make a submission to the above inquiry.

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.

While the requirement for Bills to be assessed for compatibility under the HRA commenced after the introduction of the Bill (1 January 2020), this submission will provide the Committee with an analysis of proportionality for the aspects of the Bill, and related Inquiry, most relevant to human rights.

The Commission supports the important purpose of the Bill — to improve democratic processes in Queensland, and this submission highlights areas that the Committee may wish to seek further information, especially whether the proposed provisions are the least restrictive means of achieving this purpose. This is particularly so in relation to the broad definition of ‘third parties’ captured by the new obligations in the Bill, which may have a disproportionate and unintended consequence on smaller non-government organisations and charities.

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

Yours sincerely

A handwritten signature in black ink, appearing to read "Scott McDougall".

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Queensland
**Human Rights
Commission**

Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 and related Inquiry

**Submission
to
Economics and Governance Committee,
Queensland Parliament**

8 January 2020

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Summary of submission

1. This submission outlines the most relevant rights under the *Human Rights Act 2019* (HRA) that are likely to be engaged in any expenditure cap scheme, in response to the Committee's Inquiry into the feasibility of introducing expenditure caps for Queensland local government elections.
2. Human Rights under the HRA may be limited by legislation, provided that the limitation is justified as the most proportionate way to achieve an important purpose (including whether that purpose is consistent with a free and democratic society based on human dignity, equality, and freedom).
3. Rights engaged in an expenditure cap model include freedom of expression and the right to take part in public life. Both are related to the implied freedom of political communication in the *Commonwealth Constitution*, and were recently considered by the High Court in relation to several different donation and expenditure schemes in other jurisdictions.
4. The proportionality assessment outlined by the High Court with respect to limits on the implied freedom is analogous to the proportionality assessment under the HRA. This assessment includes demonstrating how any proposed changes to expenditure caps are the least restrictive way of achieving their purpose.
5. This submission also applies the proportionality test to the proposed changes to donations, expenditure, and related matters in the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 (the Bill). The Commission supports the Bill's objective of enhancing the democratic rights of all Queenslanders. Nonetheless, in applying a human rights analysis, the Commission suggests the Bill may benefit from further evidence to justify limiting rights.
6. The only area the Commission suggests amendment to the Bill is to address the disproportionate and potentially unintended consequences for smaller non-government organisations and charities, due to the broad definition of 'third parties'. While only individuals in Queensland have human rights, the requirement for registered third parties to appoint a person as an agent (and related registration requirements) impact on individuals. There may also be an indirect impact on individuals assisted by charities due to the changes. We suggest this issue may be addressed by either narrowing the scope of the organisations captured as third parties, or changing the definition of 'electoral expenditure' to be more in line with that used in Victorian legislation.

7. To assist in assessing if human rights are proportionately limited by the Bill, the following areas would also benefit from further information demonstrating why the measures chosen are the least restrictive way to achieve the important purposes:
- the differing donation caps placed on various electoral participants;
 - the proposed new 'dishonest conduct' offences placing an evidential burden on a defendant; and
 - the existing (but proposed to be amended) power of the Minister to recommend dissolving a local council and appointing a person to act as interim administrator.

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

8. According to the Explanatory Note, the policy objectives of the Bill are to:
- improve the actual and perceived integrity and public accountability of State elections and ensure public confidence in State electoral and political processes;
 - reduce signage concentrated around the entrances to pre-poll voting offices, and to ensure that areas around pre-poll voting offices and ordinary polling booths are more neutral environments for voters, and prevent damage or interference to the ordinary use of those premises;
 - implement recommendations of the Crime and Corruption Commission;
 - continue the Government's rolling local government reform agenda guided by four key principles of integrity, transparency, diversity, and consistency.
9. Of most relevance to human rights, the Bill aims to achieve this by:
- capping the giving and acceptance of political donations to registered political parties and associated parties;
 - capping electoral expenditure for registered political parties and their associated entities, candidates and third parties involved in electoral campaigning;
 - requiring registered political parties, candidates and registered third parties to maintain dedicated State campaign accounts to support the integrity of, and compliance with, the donations and expenditure gaps;
 - increasing public funding and policy development funding;
 - creating new offences regarding unpermitted signage, and for Ministers who knowingly fail to disclose a conflict of interest with the intent to dishonestly gain a benefit to themselves or another person, or cause detriment to another person. A new offence is also added where a Minister internationally fails to comply with their obligations to register their interest; and

- adding new dishonest conduct of councillor offences that apply if a councillor fails to comply with particular conflict of interest or register of interests requirements ('relevant integrity provisions') with the intent to dishonestly gain a benefit for the councillor or someone else, or to dishonestly cause a detriment to someone. The Bill also includes a new process for how conflicts of interest are to be managed for councillors.
10. As the Attorney-General noted in introducing the Bill, these reforms will enhance the actual and perceived integrity and public accountability of state elections, and support public confidence in state electoral processes and public institutions. Some of the suggested reforms arise from the Belcarra report into local government corruption.¹
11. The human rights protected in the HRA engaged by the Bill are the:
- right to equality (s 15);
 - freedom of expression (s 21);
 - taking part in public life (s 23);
 - right to privacy (s 25); and
 - right to presumption of innocence (s 32).
12. In addition to these rights under Queensland legislation, the proposals may be inconsistent with the implied freedom of political communication in the *Commonwealth Constitution*.
13. The HRA draws upon rights in the *International Covenant on Civil and Political Rights* (ICCPR). The three main requirements for limitations on ICCPR rights are: legality, necessity, and proportionality. The substantive requirements of necessity and proportionality are interrelated, which is reflected in the provision for the limitation of human rights in the HRA.²
14. Section 13(2) of the HRA sets out factors for deciding whether a limit on a right is reasonable and justified including:
- (a) the nature of the human right;
 - (b) 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;
 - (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;

¹ Queensland Crime and Corruption Commission, *Operation Belcarra – A blueprint for integrity and addressing corruption risk in local government* (Report, October 2017).

² *Human Rights Act 2019*, section 13.

- (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
 - (e) the importance of the purpose of the limitation;
 - (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
 - (g) the balance between the matters mentioned in paragraphs (e) and (f).
15. The justification in the Explanatory Note does not refer to these factors, but includes details relevant to them. While not exploring all human rights aspects of the Bill, this submission highlights areas where further justification for restricting human rights could be explored by the Committee in relation to:
- limits on third party expenditure;
 - increases to public expenditure for certain participants;
 - reverse onus provisions;
 - subsequent disciplinary action against councillors; and
 - power of the Minister to recommend dissolving and appointing a person to act as interim administrator.
16. The Commission notes that other proposed changes also limit the right to freedom of expression, including the restriction on political signage within 100 metres of a polling booth. The justification for this proposal is included in the Explanatory Note and is consistent with similar changes in other human rights jurisdictions and is therefore not discussed further in this submission.

Restriction on electoral donations and expenditure caps generally

17. Restrictions on electoral donations, gifts, and expenditure caps will engage human rights. The most relevant are freedom of expression and the right to take part in public life.

Freedom of expression

18. Freedom of expression in the HRA is drawn from Article 19 of the ICCPR, which provides:
1. Everyone shall have the right to hold opinions without interference.
 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart

information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;

- (b) For the protection of national security or of public order, or of public health or morals.

19. Political speech enjoys particular protection as a form of expression. It encourages public debate central to the functioning of Queensland's democratic system of government, and has been recognised as an implied freedom in the *Commonwealth Constitution*.³ The Explanatory Note to the Bill refers to the High Court decision in *McCloy v NSW*,⁴ which considered a prohibition in the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) on property developers making political donations. The Court held that the capping of political donations is a measure that preserves and enhances the system of representative government. The scheme in the NSW Act has been adopted with modification in Queensland and was found to be a valid by the High Court in *Spence v Queensland*.⁵
20. There are differences between the implied right of freedom of political communication in the *Constitution* and the freedom of expression in s 21 of the HRA. The Constitutional implied freedom is not a personal right that can be claimed. Rather this right acts as a restraint on the ability of Parliament to limit political communication, meaning that individuals can challenge laws that purport to restrict political communication. In contrast, the right to freedom of expression in the HRA is a personal right which extends to all forms of expression and includes receiving or imparting ideas or information.
21. Nonetheless, the proportionality assessment outlined by the High Court with respect to limits on the implied freedom is analogous to the proportionality assessment under the HRA. The Victorian Parliamentary Scrutiny of Acts and Regulations Committee (SARC) summarised the test

³ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.

⁴ *McCloy v New South Wales* [2015] HCA 34.

⁵ [2019] HCA 15. That challenge largely concerned the interaction between the Queensland provisions and changes made subsequently to Commonwealth electoral legislation, although the High Court also considered the implied freedom.

for a valid limitation of the implied freedom based on the High Court authority as:

...are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as "compatibility testing".

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.

If the answer to the question is "no", then the law exceeds the implied limitation and the enquiry as to validity ends.

If "yes" is the answer, then is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to in these reasons as "proportionality testing" to determine whether the restriction which the provision imposes on the freedom is justified.⁶

Right to take part in public life

22. Section 23 of the HRA provides that every person in Queensland has the right, and is to have the opportunity, without discrimination to participate in the conduct of public affairs, directly or through freely chosen representatives. It is based on article 25 of the ICCPR.
23. In considering this article, the United Nations Human Rights Committee has stated that the free communication of information and ideas about public and political issues between citizens, candidates, and elected representatives is essential. This implies freedom to engage in political activity individually or through political parties and other organisations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticise and oppose, to publish political material, to campaign for election, and to advertise political ideas.⁷ In that same General Comment, the Committee also observed that reasonable limitations on campaign expenditure may be justified where this is necessary to ensure

⁶ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* No. 7 of 2018, 4: quoting 3-step test outlined in *McCloy* derived from *Lange v Australian Broadcasting Corporation* and *Coleman v Power*.

⁷ UN Human Rights Committee, *General Comment No. 25 'The right to participate in public affairs, voting rights and the right of equal access to the public service'*, 57th session, UN Doc CCPR/C/21/Rev.1/Add.7 [8, 25] (12 July 1996).

that the free choice of voters is not undermined, or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party.

Restrictions and caps conclusion

24. These general principles are relevant to the Committee's consideration of expenditure caps for Queensland local government elections as part of its related Inquiry. In a democratic society, such caps must be a proportionate response to evidence of issues based on the test in s 13(2) of the HRA, including demonstrating that there are no other less restrictive and reasonably available ways to achieve the purpose.

Application of human rights considerations to third party participants

25. Clause 8 of the Bill inserts a new s 197A which defines participants in an election as including candidates, registered political parties, registered third parties, and a third party that is not registered for the election that incurs electoral expenditure for that election or receives a political donation during the donation cap period for an election.
26. A person must not, during a donation cap period, make a political donation to a participant if it would exceed the relevant cap. The donation cap is different for each category of participant in an election:
- for a registered political party—\$4,000; or
 - for a candidate in the election—\$6,000; or
 - for a third party for the election—\$4,000.
27. The expenditure caps are also different for each participant, with unregistered third parties' expenditure capped at \$1,000 (after which they must register) and \$1 million for a registered third party.
28. The European Court of Human Rights has noted that a limitation on election expenditure is compatible with freedom of expression under the *European Convention on Human Rights*.⁸ In considering this jurisprudence, the Victorian Parliamentary Scrutiny of Acts and Regulations Committee noted the difference between donation caps and expenditure caps:

...an expenditure cap ensures that candidates that have a monetary advantage (not necessarily because they have voter support but

⁸ *Pierre-Bloch v France* [1997] ECHR 84, [54]; *Bowman v United Kingdom* (1998) 26 EHRR 1, [42] as cited in Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* No. 7 of 2018, 4.

because they are personally well off or have wealthy benefactors) will not have an unfair advantage in regard to other candidates with lesser financial resources. A cap on political donations operates differently in that it does not level the playing field in terms of expenditure *per se* but rather limits the amount of donations.⁹

29. In *Unions NSW v New South Wales*,¹⁰ the High Court considered provisions of the *Electoral Funding Act 2018* (NSW), which reduced the amount of electoral expenditure that could be incurred by third party campaigners from \$1,050,000 to \$500,000. Third-party campaigners were also prohibited from acting with others to exceed the cap. Such third parties were defined as individuals and organisations that incur expenditure for the dominant purpose of promoting or opposing candidates or political parties, but who were not themselves formally associated with a political party or candidate. The Court unanimously found that the provisions impermissibly burdened the implied freedom of political communication.
30. Chief Justice Kiefel, and Justices Bell and Keane found this was due to the lack of justification for why the cap on third parties needed to be reduced, and whether this was due to what amount would be necessary to allow third-party campaigners to reasonably communicate their message.¹¹ Other Justices too found there was a lack of justification from the government as to why the cap should be halved.¹²
31. Nonetheless, Chief Justice Kiefel, and Justices Bell and Keane assumed that the purposes of the capping provisions — which were to ensure that wealthy voices could not drown out the voices of others, and to level the playing field — were legitimate.¹³ Justice Gageler similarly found that the purpose of privileging some voices in the political process may be permissible, if it is fair to restrict those that may otherwise dominate the debate and drown out others.

...the functional distinction between a political party which aims to form government and a third party campaigner justifies a substantial variation between the amount of the cap imposed on the electoral expenditure of that political party and the amount of the cap imposed on the electoral expenditure of a third party campaigner.¹⁴

⁹ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* No. 7 of 2018, 4.

¹⁰ [2019] HCA 1.

¹¹ *Ibid* [53].

¹² For example Nettle J at [116], Gordon J at [153].

¹³ *Unions NSW v New South Wales* [2019] HCA 1 [31].

¹⁴ *Ibid* [90].

32. This decision, and other relevant authorities, suggest that having particular restrictions on third parties to elections will not be a disproportionate limitation on rights per se. To avoid breaching the implied freedom of political communication, decisions about how particular prohibitions have been determined (such as monetary caps) must be justified.
33. In 2018, the Victorian Government introduced the Electoral Legislation Amendment Bill 2018, which differed from the NSW approach by applying more universal donation and expenditure caps including:
- a cap of \$4,000 on political donations made to a candidate, elected member, group, registered political party, nominated entity, associated entity, or third party campaigner; and
 - limitations on the number of third party campaigners to whom a donor can donate.
34. The changes proposed in the Queensland Bill are more aligned to the Victorian model than that considered by the High Court in *Unions NSW*. Nonetheless, in its consideration of the Victorian changes, the SARC sought further information from the Minister as to why the changes sought were the least restrictive means of achieving the purpose, and how the chosen cap was suitable and adequate in its balance. The Explanatory Note to the Bill currently before the Committee similarly does not provide this detail, other than noting that regard has been had to donation caps in interstate jurisdictions and comparative international jurisdictions.
35. Further, the broad definition of electoral expenditure in the Bill, coupled with the new requirements for both unregistered and registered third parties, is likely to have a disproportionate (and perhaps unintended) impact on a large number of organisations. These requirements include:
- keeping a separate state campaign bank account which can only hold certain funds including donations;
 - ensuring that no more than \$1,000 is spent on electoral expenditure;
 - assessing which donations will be used to incur electoral expenditure, even for those received prior to an election year, and arranging for donors to complete a statement to accompany each donation; and
 - depositing such donations in the state campaign account. All electoral expenditure must be drawn from this account.
36. In addition, if a third party spends more than \$1,000 on electoral expenditure, they are required to:
- appoint an agent; and
 - register details with the Electoral Commission that may be made available online (as other jurisdictions have done).

Note: This may include the recording and publishing of personal information, particularly in relation to their registered agent, and so engages the right to privacy under s 25 of the HRA. The need for this limitation is not discussed in the Explanatory Note.

Registered third parties can also not accept more than \$4,000 from any single donor aggregated across a four-year term.¹⁵

37. Under the *Electoral Act 2002* (Vic), a political donation is defined more narrowly to include a gift to a third-party campaigner, if the whole or part of the gift was used, or intended to be used, by that campaigner to incur or reimburse political expenditure. Political expenditure means any expenditure for the dominant purpose of directing how a person should vote at an election, by promoting or opposing candidates, elected members, and registered political parties.
38. In contrast, the current Bill (clause 9, proposed s 199) defines electoral expenditure as expenditure incurred:
- to promote or oppose (directly or indirectly) a political party in relation to an election;
 - to promote or oppose (directly or indirectly) the election of a candidate;
 - to otherwise influence (directly or indirectly) voting at an election.
39. The kind of expenditure includes that incurred for printing, broadcasting, publishing flyers, how-to-vote cards, polling, and letters. This is a broad definition that may capture expenditure beyond that which names individual candidates, parties, or how a person should vote, to advocacy from third parties that indirectly influences voting, such as issues-based advocacy in an election year. Any organisation that expends funds in undertaking issues-based advocacy may be caught by both the expenditure and donation restrictions. A 'political donation' includes any gift made to enable a third party to incur electoral expenditure.¹⁶
40. The Explanatory Note to the Bill at page 11 suggests that the Queensland Bill aims to achieve a similar purpose to the Victorian legislation, stating that:
- those whose communications are restricted through the expenditure caps are limited to those who are directly involved with the electoral process in the form of seeking election, endorsing candidates for election or communicating with a dominant purpose of influencing voting at an election.

¹⁵ Clause 22, proposed s 259.

¹⁶ Clause 22, proposed s 250.

However, the changes proposed taken together may create a significant burden on a broader range of organisations than those covered under the equivalent Victorian provisions, including those who may not be directly involved in the electoral process such as charities and non-government organisations. This issue is exacerbated by the lack of certainty about which organisations may be subject to these new requirements.

41. Further, smaller organisations will also be required to meet the same requirements as larger third parties. This includes creating a new bank account, and additional obligations if they choose to register to access the higher expenditure thresholds. The alternative is to not register, or significantly change their activities in ways not apparently intended by the Bill, which emphasises the potentially significant limitation on freedom of expression and right to public participation for these organisations.
42. Charitable organisations and others that rely on gifts will also be disproportionately impacted as they have limited funding sources, the bulk of which may be captured by the changes (eg gifts and donations). In contrast, organisations that rely on other funding streams (eg profit-making entities or organisations with membership dues) will have greater flexibility in how they organise their finances.
43. While some form of donation and expenditure caps on third parties are necessary to achieve the purpose of these changes, the Explanatory Note does not discuss less restrictive options. These could include exempting charities from the changes, as they are already prevented from promoting or opposing political parties by federal charity laws.¹⁷ A related option may be to apply a narrower definition of electoral expenditure for small organisations and/or charities, drawing upon the Victorian definition of political expenditure. The Committee may wish to seek more information on how threshold caps were chosen, and how they reflect the least restrictive limitation on rights.

Application of human rights considerations to provision of public funding

44. The Bill increases public funding available for eligible political parties and candidates. While the increase in public funding to reduce reliance on private influence is welcome, this change exacerbates the disproportionate impact on third parties who will not receive such funding, particularly

¹⁷ Under the *Charities Act 2013* (Cth), charities must act for the public benefit and are prohibited from having a 'disqualifying purpose', which under s 11 includes promoting or opposing a candidate or political party.

smaller non-government organisations and charities who rely on gifts and donations.

45. While the Explanatory Note does not discuss these limitations, the Compatibility Statement for similar changes in Victoria noted that:

The effect of the Bill in limiting the source of funding available to candidates and parties may engage the right to freedom of expression, by only making instalment payments available to those parties or candidates who satisfy the eligibility criteria. In particular, this may favour the established political parties and their candidates.

The right to freedom of expression includes the ability for individual citizens to express an opinion through their vote in support of a party or candidate. Restricting resources to exclude those who cannot satisfy the eligibility criteria, may decrease the capacity of members and supporters of smaller parties to introduce ideas and opinions into the political debate.¹⁸

46. The Victorian Compatibility Statement justified any such limitations on the basis that the public funding changes were necessary to support the political donation reforms in the Bill as a whole, which were (similar to the Queensland Bill) for the legitimate purpose of securing and promoting the actual and perceived integrity of the Parliament.¹⁹
47. The Commission supports these values, but suggests the impact on smaller organisations and charities should be further considered.

Application of human rights considerations to reverse onus provisions

48. The Bill provides for exceptions and reasonable excuse provisions for various new offence provisions. The effect of these provisions is to reverse the onus of proof to the defendant. Such provisions engage the right to be presumed innocent under s 32(1) of the HRA, as usually the prosecution bears both the legal and evidential burden of proof. The legal burden generally means the burden of proving the existence of the matter while the evidential burden means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.²⁰ The Commonwealth Parliamentary Joint Committee on Human Rights has observed:

¹⁸ Victoria, *Parliamentary Debates*, Legislative Assembly 10 May 2018, 1346.

¹⁹ *Ibid.*

²⁰ See for example *Criminal Code Act 1995* (Cth) Division 13.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.²¹

49. The Explanatory Note states that the burden on the defendant is an evidential one, and argues that these matters are peculiarly within the knowledge of the defendant, and so the defendant would be better positioned than the prosecution to meet the evidential burden. This goes some way to meeting the requirements suggested by the Joint Committee.
50. While the placing of an evidential burden on a defendant is lesser than a legal burden, the Committee may wish to seek further information to satisfy the requirements set out by the Commonwealth Parliamentary Committee on Human Rights.

Application of human rights considerations to subsequent disciplinary action

51. As the Explanatory Note states, the penalties for new offences of dishonest conduct of councillor or councillor advisers are substantial, but are justified on the basis they reflect the serious nature of intentional dishonest conduct. In addition, failure to comply with the relevant integrity provisions will also amount to misconduct for a councillor and a councillor advisor, and therefore the matter may be dealt with as an internal local government disciplinary matter which may result in disciplinary action being taken against the councillor advisor, as provided for in the advisor's contract of employment.
52. Section 34 of the *Human Rights Act* protects a person being punished more than once for an offence in relation to which the person has already been finally convicted or acquitted. Subsequent disciplinary proceedings arising from an offence could potentially engage this right. However, disciplinary proceedings are generally not concerned with punishment, but rather protection of the public and the reputation of the profession in question. For example, the Victorian Civil and Administrative Tribunal has found that a Psychology Board of Australia finding of unprofessional conduct by a registered psychologist arising from his conviction of fraud

²¹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guidance Note 2: Offence provisions, civil penalties and human rights*, (December 2014), 2.

offences did not violate the right.²² The Tribunal cited the High Court authority of *Clyne v NSW Bar Association* in reaching this conclusion.²³

Application of human rights considerations to local government matters

53. The Bill proposes amendments to the *Local Government Electoral Act 2011* to alter powers of the State to intervene in local government matters, including suspending local councillors and appointing an interim administrator to act in place of councillors, or dissolving a local government. While these proposed amendments relate to existing provisions, such powers could potentially engage the right to take part in public life protected in s 23 of the HRA. That right provides that every person in Queensland has the right, and is to have the opportunity, to participate in the conduct of public affairs, directly or through freely chosen representatives. This includes the opportunity to vote and be elected at periodic state and local government elections that guarantee the free expression of the will of the electors.
54. The Explanatory Note says the intention of the changes are to avoid the cost of holding a fresh election if a quadrennial election is to be held within a reasonable period of time after a dissolution. It does not explicitly state the underlying necessity to have the State intervene. However, the amendments do not change existing s 123(1) of the *Local Government Act 2009* which applies if:
- a conduct tribunal recommends that every councillor be suspended or dismissed;
 - the Minister reasonably believes that a local government has seriously or continuously breached the local government principles; or
 - the Minister reasonably believes that a local government is incapable of performing its responsibilities; or
 - the Minister reasonably believes it is otherwise in the public interest that every councillor be suspended or dismissed.
55. The Committee may nonetheless wish to seek more information on how this is a reasonable limitation on the right to take part in public life.

Conclusion

56. The Commission supports the objectives of the Bill, which are aimed at enhancing the democratic rights of all Queenslanders. While the Bill was

²² *Psychology Board of Australia v Ildiri* (Occupational and Business Regulation) [2011] VCAT 1036.

²³ [1960] HCA 40; (1960) 104 CLR 186.

introduced prior to the obligation under the HRA for members to include a statement of compatibility for new legislation, this submission has provided a framework for assessment of human rights compatibility.

57. In applying the human rights principles discussed above, the Commission suggests amendments should be considered regarding the disproportionate and potentially unintended consequences for smaller non-government organisations and charities, due to the broad definition of 'third parties'.
58. The Committee may consider seeking further information regarding the following proposals to demonstrate why these measures are the least restrictive means of achieving the important purposes of the Bill:
- the differing donation caps placed on various electoral participants;
 - the proposed new dishonest conduct offences placing an evidential burden on a defendant;
 - the existing (but proposed to be amended) power of the Minister to recommend dissolving a local council and appointing a person to act as interim administrator.
59. Thank you for the opportunity to participate in the committee process.



Our reference: BNE 3416958

3 February 2020

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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

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

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.

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.

² Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guidance Note 2: Offence provisions, civil penalties and human rights*, (December 2014), 2

- 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

The Guide suggests that minor offences regulatory in nature include those dealing with 'failing to comply with reporting obligations'.⁴

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:

- (a) the nature of the human right;
- (b) 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;
- (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
- (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
- (e) the importance of the purpose of the limitation;
- (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
- (g) 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;

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.

⁴ *Ibid*, 57.

- 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

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 minister '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.

⁵ *Criminal Code Act 1995* (Cth), s 5.4

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



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Queensland Human Rights Commissioner