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9 January 2020

Committee Secretary  
Economics and Governance Committee  
Parliament House  
George Street  
Brisbane Qld 4000

By email: [egc@parliament.qld.gov.au](mailto:egc@parliament.qld.gov.au)

Dear Committee Secretary,

**Re: Electoral and Other (Accountability, Integrity and Other Matters) Amendment Bill 2019.**

Thank you for the opportunity to provide a submission in relation to the above Bill.

I respond in my capacity as the Queensland Integrity Commissioner and trust this submission is of assistance to the Committee in considering the Bill.

I will be able to address any matters contained in this submission further (if required) at any Inquiry held in relation to the Bill.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Nikola Stepanov'.

**Dr Nikola Stepanov PhD (Melb.)**  
**QUEENSLAND INTEGRITY COMMISSIONER**

**W.** <https://www.integrity.qld.gov.au>

**E.** [integrity.commissioner@integrity.qld.gov.au](mailto:integrity.commissioner@integrity.qld.gov.au)

**T.** 07 3003 2888

Level 13, 53 Albert Street Brisbane  
PO Box 15290, City East  
Queensland 4002 Australia  
**Phone** +61 (07) 3003 2888  
**Email** [integrity.commissioner@integrity.qld.gov.au](mailto:integrity.commissioner@integrity.qld.gov.au)  
**Website** [www.integrity.qld.gov.au](http://www.integrity.qld.gov.au)



# Queensland Integrity Commissioner

*Encouraging confidence in public office & public institutions*

Submission to the Economic and Governance Committee

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

9 January 2020



Level 13, 53 Albert Street  
Brisbane QLD 4000  
[www.integrity.qld.gov.au](http://www.integrity.qld.gov.au)



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

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

The office of the Queensland Integrity Commissioner (QIC) welcomes the opportunity to make this submission to the Parliamentary Economics and Governance Committee (the Committee) on the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019*.

The *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019* (the Bill) was introduced to Parliament on 28 November 2019 and was referred to the Committee for consideration and report.

The proposed amendments to the Bill that are relevant to the functions of the QIC are:

- the creation of a criminal offence in the *Integrity Act 2009* for Ministers who fail to disclose conflicts of interest with dishonest intent to obtain a benefit for themselves or another person, or cause detriment for another,<sup>1</sup>
- the inclusion of an exception to the existing confidentiality provisions<sup>2</sup> of the *Integrity Act 2009* to enable the use of information provided to the QIC, including via recordings, for investigation or prosecution by the Director of Public Prosecutions (DPP),<sup>3</sup> and
- the introduction of new provisions in the *City of Brisbane Act 2010* and the *Local Government Act 2009* relating to conflict of interest requirements and changes to processes for dealing with conflicts of interest.<sup>4</sup>

In preparing this submission the QIC has had the opportunity to review the Crime and Corruption Commission's (CCC) submission, and generally endorses the CCC's position on matters that relate to this office. Further, the QIC offers the following observations relevant to the discharge of the QIC's various functions under section 7 of the *Integrity Act 2009*.

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<sup>1</sup> *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019*, ch 3A part 1 ss40(A)-(F).

<sup>2</sup> *Integrity Act 2009*, s24.

<sup>3</sup> *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019*, Chapter 4 Amendments relating to the dishonest conduct of Ministers, Part 1 Amendment of the *Integrity Act 2009*, ch 3A part 1 s40C.

<sup>4</sup> *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019*, 'Chapter 5 Amendments relating to dishonest conduct of councillors and other local matters, Part 1 Amendment of *City of Brisbane Act 2010*', div 5A ss 177(D)-(P); and 'Part 2 Amendment of *Local Government Act 2009*', ch 5B ss 150(EG)-150(ES).

### Key points from this submission

#### **A. Amendments to the confidentiality provisions in the *Integrity Act 2009*:**

- Confidentiality is the cornerstone of the QIC's advisory functions.
- The current confidentiality provisions, as set out in section 24 of the *Integrity Act 2009* encourage public confidence in public institutions and public officials by helping public officials and those in public service deal appropriately with ethics or integrity issues, and resolve matters in favour of the public interest, before they become problematic and without fear of retribution.
- The stated purpose of the inclusion of new section 40C in the *Integrity Act 2009* is to provide for the use of information, given to the QIC, for an investigation or prosecution under the new offence at section 40A. Further, the stated purpose of sub-section 40C(3) is to authorise the use of information that would otherwise have been prohibited from disclosure.
- The existing confidentiality provisions are set out in section 24 of the *Integrity Act 2009* and prevent all but those performing the functions under the *Integrity Act 2009*, such as the Commissioner and her staff, from recording, using or disclosing information coming to their knowledge in the administration of the advice functions of the *Integrity Act 2009*. The existing provisions do not prevent the disclosure or use of information if authorised under the *Integrity Act 2009* or another Act (24(2)). Further, under section 24(3) of the *Integrity Act 2009*, those involved in the administration of the advice functions, such as the QIC, cannot be compelled in any proceedings.
- The existing confidentiality provisions are not an impediment to the disclosure of information by an advisee; an 'authorised disclosure' by the QIC under Division 2 of the *Integrity Act 2009*; or disclosure by any investigative or prosecution agency, Parliamentary Committee, tribunal or other relevant agency or body such as the CCC or DPP.
- Further, the existing confidentiality provisions are not an impediment to the use of recordings or information if the use or disclosure of such is authorised under another Act (s24(2)(b)). For example, the use of information gained through lawful surveillance of a subject person where that person is engaged in a conversation with the QIC, i.e. a telephone recording.
- Of particular concern to the QIC is that the amendment is not restricted merely to information provided by the subject Minister, but also applies to any information provided to the QIC by any designated person, for example, Directors-General, statutory office holders such as other commissioners, and any Member of the Legislative Assembly, if that information might be deemed to be relevant to the investigation or prosecution of a Minister.

- the QIC anticipates that the changes may strongly dissuade and deter some designated persons from seeking advice in times of concern and uncertainty, due to confidentiality concerns. This will make complex ethics and integrity issues less visible and potentially lead to decisions being made that are not in the public interest.
- Additionally, the unintended consequences of a specific expansion in powers might include:
  - highly speculative and intrusive surveillance on the random chance that a particular Minister, who is the subject of a complaint, assessment, investigation, or prosecution, might call or meet with the QIC to discuss the subject of that action, and
  - unknown access to information provided to the QIC by Members of the Legislative Assembly, or others such as witnesses before parliamentary committees, thereby running the risk of a breach of parliamentary privilege.
- As noted in the CCC submission, any anticipated investigatory or prosecutorial benefits provided by the abrogation of the confidentiality provisions need to be balanced against the collateral unintended effect of discouraging frank advice-seeking from the QIC.
- The QIC respectfully submits that the Committee carefully weigh the potential effects and consequences of new section 40C, noting that it is open to the Committee to recommend to Parliament that any changes to the confidentiality provisions of the *Integrity Act 2009* be delayed and considered during the next Strategic Review into the Functions of the QIC (with the appointment of a Reviewer due before February 2021 under subsection 86(3) of the *Integrity Act 2009*).
- Alternatively, if it is decided that it is in the public interest for the DPP to have access to information held by the QIC, section 24(3) of the *Integrity Act 2009* could be partially repealed in relation to criminal matters or investigations, such that the QIC would then be subject to the same obligations as a 'public official', 'unit of public administration', or 'public sector agency'. In this way, the effects and intent of the changes might be more easily understood.

### Key points from this submission

#### **B. Amendments to the conflicts of interest provisions in the *City of Brisbane Act 2010* and the *Local Government Act 2009*:**

- Consistent with views expressed by the CCC in their submission, it is a well-established premise that the person with a personal interest in a relevant matter is not best placed to determine whether or not they have a conflict of interest.
- Further, in the experience of the QIC, interest issues are becoming more complex, less visible, and even the views of experts often do not align.
- Given the risks and increasing complexity of interest issues, it logically follows that some personal interest issues are best assessed and considered independently of the interest-holder. This exists as an option under the current scheme.
- Under the proposed changes to the legislation, councillors will need to navigate complex and highly nuanced provisions, self-identify, and thereby also potentially self-manage their interests.
- As interest issues become more complex, there is an even greater need for the burden of negotiating interest issues to not reside with the interest-holder. This is because it is well-established that where decisions are made in isolation and privately, individuals are more likely to make poorer choices.
- Any deficiencies in the way that councillors identify and manage personal interest issues has the capacity to affect public confidence in decision-making at local government level.
- The current option for councillors to declare a personal interest in uncertain circumstances, thereby allowing unconflicted councillors to determine whether there is a conflict of interest, also leads to greater transparency and associated public confidence in the decision making of council.
- Consistent with the position of the CCC, the QIC respectfully submits that the Committee carefully weigh the effects and potential consequences of the amendments to the conflict of interest provisions in the Bill in light of this submission.
- Additionally, the role of the QIC, as councillors navigate the new provisions, will be necessarily limited as the application of the new provisions will essentially be a question of legal interpretation and the QIC is unable to provide legal advice.

## General Comments

### **The Queensland Integrity Commissioner**

In Queensland a multi-agency framework exists to promote and manage integrity. The Queensland Integrity Commissioner ('the QIC') is one component of this framework.

The QIC provides ethics and integrity advice, and advice on interest issues<sup>5</sup> to the more than 5000 persons<sup>6</sup> across the Queensland public sector, who fall under the definition of a 'designated person' in *Integrity Act 2009*. This includes Ministers, members of the Legislative Assembly, all statutory office holders and senior public servants, as well as all individuals appointed or elected to multi-member decision-making bodies, such as Queensland Government boards and councillors.

In providing advice, the QIC does not provide legal advice, but is statutorily obliged to consider any standards or codes that are relevant<sup>7</sup> and aims to promote and establish consistency. This serves to enhance trust in public institutions by ensuring that standards are applied universally, and reduces public perceptions of unfairness, discrimination, favoritism, nepotism, and bias.

The QIC also has a statutory obligation to raise public awareness of ethics and integrity issues by contributing to public discussion on these issues relevant to the QIC's functions.<sup>8</sup> Methods used to achieve this include developing and publishing resources for various sectors; providing programs of education and training; undertaking research; and responding to calls for submissions.<sup>9</sup>

As the primary ethics advisor across sectors and settings in Queensland, the QIC can provide a unique insight into the diverse array of issues arising for designated persons, including all Queensland mayors and councillors, as they seek to meet ethical obligations.

Of the advice requests received by the QIC, more than 80% were in relation to a conflict of interest, including conflicts between duties and conflicts arising due to pecuniary and non-pecuniary interests.

The number of requests for advice received by the QIC in the last financial year was at an historical high with formal advice sought by designated persons on more than 335 occasions (refer Table 1, page 7). Of these, 201 requests for advice were received from mayors and councillors, and 36 from members of the Legislative Assembly (including persons who fall within the category of 'Premier, Minister, or Assistant Minister'). Again, these were mainly concerned with conflict of interest matters.

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<sup>5</sup> *Integrity Act 2009*, s10.

<sup>6</sup> *Integrity Act 2009*, s12.

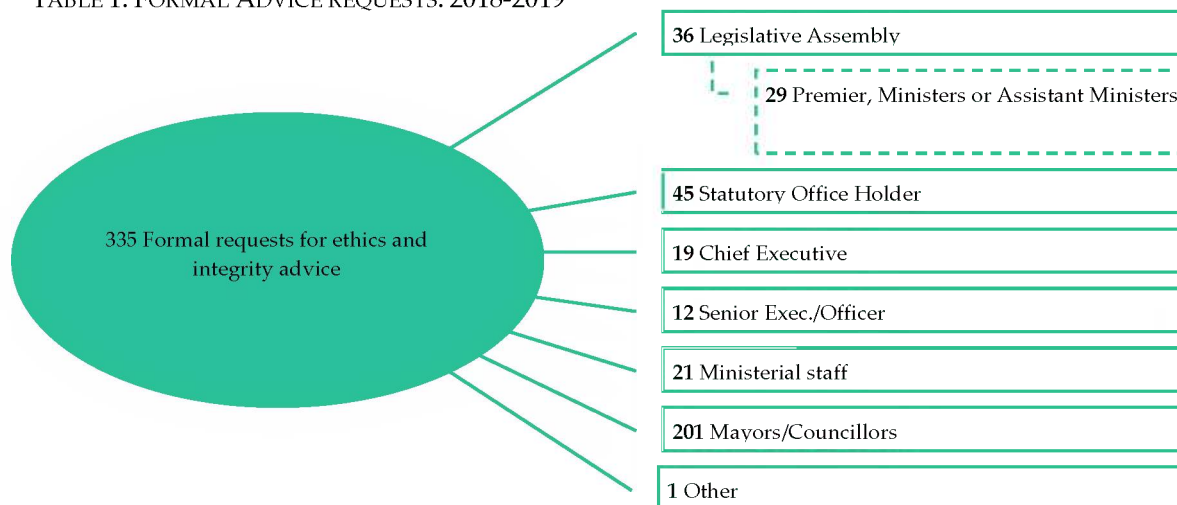
<sup>7</sup> *Integrity Act 2009*, ss21(3)(a)-(b), 23(3)(a)-(b).

<sup>8</sup> As well, the QIC is also responsible for keeping the Lobbyist Register and has responsibility for the registration of lobbyist.

<sup>9</sup> *Integrity Act 2009*, s7(1)(d).



TABLE 1: FORMAL ADVICE REQUESTS: 2018-2019



It is the view of the QIC that the heightened ongoing demand for the services of the QIC is indicative of an ongoing commitment to ethics and integrity by those with public responsibilities, including, relevantly for this Bill, Ministers, and mayors and councillors.

### Proposed amendments to the *Integrity Act 2009*

Regarding the provision of advice, the main areas where advice from the QIC is sought are those that relate to the three key areas of corruption:

- conflicts of interests
- acceptance of gifts and hospitality, and
- the impact of influence and personal favours.

The overwhelming majority of requests relate to either conflicts of interests, or conflicts arising because of dual role. These can then be broken down further into key sub-issues such as:

- conflicts of interest arising because of a public official or public servant's personal interests and their official duties
- conflicts of interest arising because of the personal interests of a public official or public servant's related parties or related entities
- post-separation employment quarantine rules and their application, and
- conflicts arising between duties because of dual responsibilities (for example, when a public servant holds two public offices, or when a public servant is also employed in the private sector).

The standard that applies to all advice provided by the QIC is that of the perception of a fair-minded observer, if they were informed about a scenario or set of facts. Irrespective of the situation, the QIC is compelled to resolve all issues in favour of the public interest.

In providing confidential advice, the intent of the QIC is one with a behavioral-cultural focus,<sup>10</sup> that aims to enhance a strong sense of public service ethics, and to encourage good governance by raising awareness of good practice standards and positive behaviour.<sup>11</sup> To that end the QIC also undertakes significant research into interest issues and their management, and regularly develops aids and guides for various sectors including for state government boards and bodies, local councillors, and more recently, for Ministers.<sup>12</sup>

Ideally, in providing good practice standards and strategies to resolve ethics and integrity issues, those standards and strategies will become a 'normative mechanism', that is, norms that are prevalent and observed.<sup>13</sup> Promoting positive behaviour, by providing clear examples of what good behaviour looks like, also has the favorable side-effect of making any departure from the 'norms' more easily visible. Therefore, the situation is more easily able to be managed and dealt with in the public interest.<sup>14</sup>

### *The confidentiality and disclosure provisions*

As noted in the 'Report on the Strategic Review of the functions of the Integrity Commissioner' (the Strategic Review Report), and agreed by the Parliamentary Finance and Administration Committee and the Government of the day:<sup>15</sup>

*'[c]onfidentiality is the cornerstone of the Integrity Commissioner's advisory function. Section 24(1) of the Act provides that "a person must not record, use or disclose information in relation to an ethics or integrity issue about another person that came to the person's knowledge because of the person's involvement in the administration of this chapter".<sup>16</sup>*

The current confidentiality provisions encourage public confidence in public institutions by helping public officials and those in public service deal appropriately with ethics or integrity issues. This enables issues to be resolved in favour of the public interest before they become problematic, and

<sup>10</sup> K. Chon-Kyun, 'Anti-Corruption Initiatives and E-Government: A Cross-National Study (2014) 14 *Public Organizations Review*, 385-396, 387.

<sup>11</sup> A. Graycar & A. Masters, 'Preventing malfeasance in low corruption environments: twenty public administration responses (2018) 25 *Journal of Financial Crime* 1, 170-186, 173-4; J. Estanislou (2014) *Good governance and anti-corruption*, Institute for Solidarity in Asia, Makati City.

<sup>12</sup> <https://www.integrity.qld.gov.au/publications/education-resources.aspx>

<sup>13</sup> K. Chon-Kyun, 'Anti-Corruption Initiatives and E-Government: A Cross-National Study (2014) 14 *Public Organizations Review*, 385-396, 387.

<sup>14</sup> A. Graycar & A. Masters, 'Preventing malfeasance in low corruption environments: twenty public administration responses (2018) 25 *Journal of Financial Crime* 1, 170-186, 173-4; J. Estanislou (2014) *Good governance and anti-corruption*, Institute for Solidarity in Asia, Makati City.

<sup>15</sup> Finance and Administration Committee, Parliament of Queensland, *Finance and Administration Committee Report No. 19, Inquiry into the Report on the Strategic Review of the functions of the Integrity Commissioner* (2015); Government Response to Finance and Administration Committee Report No. 19.

<sup>16</sup> P. Coaldrake, 'Report on the Strategic Review of the functions of the Integrity Commissioner', The State of Queensland (2015).

without fear of retribution. This is particularly the case for advice on matters that relate to the three key areas of corruption (as outlined above).

### *Existing provisions*

Confidentiality for those contacting the QIC for advice is a key element of success for the office, and any changes to the confidentiality provisions risk the confidence of designated persons, and the way the functions of the *Integrity Act 2009* are discharged.

The stated purpose of the inclusion of new section 40C in the *Integrity Act 2009* is to provide for the use of information, including any information given to the QIC, for an investigation or prosecution of the new offence under section 40A. Further, the stated purpose of sub-section 40C(3) is to authorise the use of information that would otherwise have been prohibited from disclosure.

The existing confidentiality provisions are set out in section 24 the *Integrity Act 2009*<sup>17</sup> and are as follows:

#### **24 Secrecy**

- (1) A person must not record, use or disclose information in relation to an ethics or integrity issue about another person that came to the person's knowledge because of the person's involvement in the administration of this chapter.  
Maximum penalty—85 penalty units or 1 year's imprisonment.
- (2) Subsection (1) does not apply to a person's recording, use or disclosure of information if the recording, use or disclosure is—
  - (a) in the performance of his or her functions under this chapter; or
  - (b) authorised under this or another Act.
- (3) A person who is or has been involved in the administration of this chapter is not, in any proceeding, compellable to disclose information in relation to an ethics or integrity issue about another person that came to the person's knowledge because of the person's involvement in the administration of this chapter.

[Emphasis added]

The existing confidentiality provisions prevent all but those performing the functions under the *Integrity Act 2009*, such as the Commissioner and her staff, from recording, using or disclosing information coming to their knowledge in the administration of the advice functions of the *Integrity Act 2009*.

Further, the existing confidentiality provisions do not prevent:

- the disclosure of information by an advisee to another

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<sup>17</sup> s24.

- the disclosure of information provided, by the QIC, under the ‘authorised disclosure’ provisions (24(2)), or
- the use of such materials or information by any investigative or prosecution agency, Parliamentary Committee, tribunal or other relevant agency or body such as the CCC or DPP.

The existing provisions also do not appear to prevent the use of information gained through lawful surveillance of a subject person where that person is engaged in a meeting or conversation with the QIC, for example, a telephone recording.

*New provision: section 40C*

Of particular concern to the QIC is that new section 40C is not restricted merely to information provided by the subject Minister. The section will also apply to any information provided to the QIC by any designated person.

For example, it would include information provided to the QIC by Members of the Legislative Assembly, if that information might be deemed to be relevant to the investigation or prosecution of a Minister:

**40C Use of information for investigation or prosecution**

- (1) This section applies to information about a person given to the integrity commissioner under this Act, including, for example—
  - (a) information given in a request for advice under chapter 3, part 2; and (b) information given in a meeting under chapter 3, part 3.
- (2) The information may be—
  - (a) recorded, used and disclosed for the purpose of the investigation or prosecution of an offence against section 40A; and
  - (b) given in a proceeding against a person for an offence against section 40A to the extent necessary to prosecute the person for the offence.
- (3) Subsection (2) applies despite—
  - (a) section 24; and
  - (b) any other law, rule or practice to the contrary

[Emphasis added]

The unintended consequences of a specific expansion might include:

- highly speculative and intrusive surveillance on the random chance that a particular Minister, who is the subject of a complaint, assessment, investigation, or prosecution, might call or meet with the QIC to discuss the subject of that action, and
- unknown access to information provided to the QIC by Members of the Legislative Assembly, or others such as witnesses before parliamentary committees, running the risk of a breach of parliamentary privilege.

Further, the QIC anticipates that the changes may strongly dissuade and deter some designated persons from seeking advice in times of concern and uncertainty, due to confidentiality concerns. This will make complex ethics and integrity issues less visible and potentially lead to decisions being made that are not in the public interest.

Whilst the QIC understands that there is a natural level of curiosity about the activities of the office, there may be a general misconception about the level and nature of disclosures made to the QIC. There are many sources of information that would be more informative and useful, for example, information held within departments and ministerial offices, and there are legal mechanisms already in place to seek access to this information.

Any potential benefits of the amendments are further reduced by the general policy of the QIC to not provide advice on a matter if a complaint, assessment, official referral, or investigation of the relevant issues has been declared.

Additionally, elected officials and senior public servants who are intentionally dishonest, or inclined toward criminality and misadventure, are inherently less likely to seek advice from the QIC.

As noted in the CCC submission, any anticipated investigatory or prosecutorial benefits provided by the abrogation of the confidentiality provisions need to be balanced against the collateral unintended effect of discouraging frank advice-seeking from the QIC.

The QIC respectfully submits that the Committee carefully weigh the potential effects and consequences of new section 40C, noting that it is open to the Committee to recommend to Parliament that any changes to the confidentiality provisions of the *Integrity Act 2009* be delayed and considered during the next Strategic Review into the Functions of the QIC (with the appointment of a Reviewer due before February 2021 under subsection 86(3) of the *Integrity Act 2009*).

Alternatively, if it is decided that it is in the public interest for the DPP to have access to information held by the QIC, section 24(3) of the *Integrity Act 2009* could be partially repealed in relation to criminal matters or investigations, such that the QIC would then be subject to the same obligations as a 'public official', 'unit of public administration', or 'public sector agency'. In this way, the effects and intent of the changes might be more easily understood.

### **Proposed amendments to the *City of Brisbane Act 2010* and the *Local Government Act 2009***

In February 2018, as part of the Government's response to the Belcarra Report, the Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs, nominated mayors and councillors as 'designated persons' able to seek advice from the QIC under the *Integrity Act 2009*.

Since that time, the QIC has provided 376 formal written advices to mayors or councillors. Further, the QIC, in conjunction with the Office of the Independent Assessor, has delivered numerous 'conflict-of-

interest' training sessions to councillors, and developed a range of practical guides to assist councillors' deal with personal interest issues.<sup>18</sup>

Any advice provided to councillors, and any materials developed, by the QIC, reflect the fundamental principle of impartiality and the appearance of impartiality, in that an individual with a personal interest in a matter should not decide what ought to be done about it. This is because of the obvious interest that person has.

### *Public confidence in decision-making*

There is a strong public focus on the potential for personal interests to give rise to bias in public officials. This focus is well-founded, with research revealing that the most common element in cases of corruption and misconduct, is a personal interest involving a decision-maker.<sup>19</sup>

Adding to concerns, interest issues generally are increasing in complexity as well as becoming 'more varied and less visible'.<sup>20</sup> These perspectives are consistent with issues identified in the local government sector by the CCC in the Belcarra Report, including that undisclosed or poorly managed conflicts of interest are key corruption risks. Further, according to the report, councillors are least likely to have expertise in the area of conflicts of interest.<sup>21</sup> This is particularly the case for matters that relate to undisclosed or poorly managed conflicts of interest, the acceptance of inappropriate gifts and hospitality, and personal favours.

Given the risks and increasing complexity of interest issues, it logically follows, that personal interest issues may need to be assessed and considered independently of the interest-holder.

Consistent with this, the Belcarra Report identified that councillors may fail to declare conflicts of interest as, 'they can at times be genuinely difficult for councillors or indeed anyone to identify.'<sup>22</sup> As well, the report observed the problems that arise when individual councillors are placed in a position where they self-identify and self-manage, conflict of interest issues:

*'The LG Act requires councillors to deal with all conflicts of interest "in a transparent and accountable way". This includes identifying and declaring the conflict of interest in the meeting, and advising how*

<sup>18</sup> See <https://www.integrity.qld.gov.au/publications/education-resources.aspx>

<sup>19</sup> Deloitte, 'One step ahead- Obtaining and maintaining the edge' (Deloitte, 2017); Independent Commission Against Corruption, 'Corruption and Integrity in the NSW Public Sector: an assessment of current trends and events' (December 2018) Independent Commission Against Corruption, New South Wales Government, 1-84.

<sup>20</sup> S. Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* (advance).

<sup>21</sup> Crime and Corruption Commission Queensland, 'Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government' (October 2017): <http://www.ccc.qld.gov.au/corruption/operation-belcarra/operation-belcarra-reforming-local-government-in-queensland>

<sup>22</sup> Crime and Corruption Commission Queensland, 'Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government' (October 2017): <http://www.ccc.qld.gov.au/corruption/operation-belcarra/operation-belcarra-reforming-local-government-in-queensland> page 80.

*they intend to deal with the conflict... This approach of self-identification and self-management can lead to allegations that councillors are not dealing with conflicts of interest in the most appropriate and transparent ways.'*<sup>23</sup>

Generally, the best-practice approach requires a decision-maker with a personal interest in relation to a matter before them, to declare, subject to relevant legislation, either: a 'personal interest', a 'material personal interest', or a potential 'conflict of interest'. The affected decision-maker is then required to provide the requisite level of information so that non-conflicted members of the relevant body can make an informed decision about:

1. whether the personal interest gives rise to a conflict of interest or a material personal interest, and
2. what ought to be done to satisfactorily manage the conflict in the public interest.

The CCC supported such a position in the Belcarra Report, noting that:

*'Requiring other councillors to decide whether a councillor has a conflict of interest and whether they should stay in the room to vote on a matter ensures that alternative and more independent perspectives are taken into consideration... other councillors can give voice to other perspectives, and may be better able to reflect on the perception of a conflict than the councillor in question.'*<sup>24</sup>

However, the proposed amendments will seemingly restore the burden of assessing and deciding whether a personal interest constitutes a 'conflict of interest' (either 'prescribed' or 'disclosable') to the individual with a vested interest in the (their) decision.

An alternative approach is to maintain the current scheme which enables non-conflicted councillors to remain empowered to collectively and transparently decide, whether a conflict of interest exists, why, and how it should be managed. As well as building capacity in councillors in terms of their understanding of interest issues, a significant flow on effect from the current scheme is that councils are able to set standards that are transparent, and then be publicly held to these standards.

Further, in its submission, the CCC has recommended that, with respect to conflicts of interest and material personal interests, the legislation should not be amended as the current scheme is aligned with the Belcarra recommendations. As the primary ethics advisor to mayors and councillors, the QIC shares the views of the CCC.

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<sup>23</sup> Crime and Corruption Commission Queensland, *'Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government'* (October 2017): <http://www.ccc.qld.gov.au/corruption/operation-belcarra/operation-belcarra-reforming-local-government-in-queensland> page 79.

<sup>24</sup> Crime and Corruption Commission Queensland, *'Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government'* (October 2017): <http://www.ccc.qld.gov.au/corruption/operation-belcarra/operation-belcarra-reforming-local-government-in-queensland> page 84.

### *Additional observations*

Under the proposed amendments it seems inherently more likely that a councillor who has self-declared the existence of a conflict of interest (as opposed to a personal interest) will then be automatically disqualified from participating in a meeting. However, other management options, such as allowing the conflicted councillor to participate in the meeting but not vote, may be in the public interest. In the Belcarra Report, the CCC made reference to a submission on this issue by the former Queensland Integrity Commissioner, noting that:

*'[e]liminating councillor's discretion [to vote on a matter where they have a conflict of interest] would have undesirable consequences... councillors are elected to represent the interests of their community, and they cannot do this effectively if they are not participating in Council decision-making... What is required are more checks on councillor's discretion and more guidance for councillors about how they should exercise it.'*<sup>25</sup>

Most councillors have diverse backgrounds and discharge their roles on a part-time basis. Significantly in this regard, the Bill removes the current option under the *City of Brisbane Act 2010* and the *Local Government Act 2009* for councillors to declare a 'personal interest' and to remain in the meeting until non-conflicted councillors decide if their 'personal interest' amounts to a 'conflict of interest' and, if so, how any conflict of interest should be managed.<sup>26</sup>

Removing this option will require councillors to potentially make decisions regarding complex issues: with limited notice, on their own, where they could have a 'conflict of interest', and where the decision may give rise to an offence.

In contrast, the current processes under the *City of Brisbane Act 2010* and the *Local Government Act 2009* appear to be effective for dealing with marginal issues and uncertainties. It also enables the facts and issues to be dealt with in a transparent manner. This is not to say that the current provisions would not benefit from amendments and I support the recommendations made by the CCC in this regard.

Therefore, the QIC respectfully submits that the Committee carefully weigh the effects and potential consequences of the amendments to the conflict of interest provisions in the Bill in light of this submission.

The Queensland Integrity Commissioner, Dr Nikola Stepanov, will be able to address any matters contained in this submission further (if required) at any Inquiry held in relation to the Bill.

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<sup>25</sup> Crime and Corruption Commission Queensland, 'Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government' (October 2017): <http://www.ccc.qld.gov.au/corruption/operation-belcarra/operation-belcarra-reforming-local-government-in-queensland> page 83.

<sup>26</sup> LGA, ss 175E(3)-(4).





Our reference: GF67334-004

31 January 2020

Committee Secretary  
Economics and Governance Committee  
Parliament House  
George Street  
Brisbane Qld 4000

By email: [egc@parliament.qld.gov.au](mailto:egc@parliament.qld.gov.au)

Dear Committee Secretary,

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

Thank you for the opportunity to provide further information in relation to the above Bill.

I respond in my capacity as the Queensland Integrity Commissioner and trust this submission is of assistance to the Committee.

I am able to address any matters contained in this further submission.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Nikola Stepanov".

**Dr Nikola Stepanov PhD (Melb.)**  
**QUEENSLAND INTEGRITY COMMISSIONER**

W. <https://www.integrity.qld.gov.au>

E. [integrity.commissioner@integrity.qld.gov.au](mailto:integrity.commissioner@integrity.qld.gov.au)

T. 07 3003 2888

Level 13, 53 Albert Street Brisbane  
PO Box 15290, City East  
Queensland 4002 Australia  
Phone +61 (07) 3003 2888  
Email [integrity.commissioner@integrity.qld.gov.au](mailto:integrity.commissioner@integrity.qld.gov.au)  
Website [www.integrity.qld.gov.au](http://www.integrity.qld.gov.au)

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

The Queensland Integrity Commissioner (QIC) welcomes the opportunity to make this further submission to the Parliamentary Economics and Governance Committee (the Committee) regarding two recommendations made by the Crime and Corruption Commission in relation to the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019*.

The QIC notes that the Committee has specifically invited further submissions regarding:

### **Recommendation 3:**

*Parliament create a criminal offence for occasions when a member of Cabinet does not declare a conflict that does, or may conflict, with their ability to discharge their responsibilities.*

*Creating a criminal offence will strengthen the framework and obligations on Ministers to ensure disclosure and management of actual, potential or perceived conflicts of interest occurs. Failure to do so could, in certain circumstances, be considered corrupt conduct, as defined in the Crime and Corruption Act 2001.*

### **Recommendation 4:**

*That Parliament create a criminal offence to apply when a member of Cabinet fails to comply with the requirements of the Register of Members' Interests, and the Register of Members' Related Persons Interests by not informing the Clerk of Parliament, in the approved form, of the particulars of an interest or the change to an interest within one month after the interest arises or the change happens. A suitable penalty should apply, including possible removal from office, if it is found that the Member's lack of compliance was intentional.*

### **And:**

*A proposal to extend the strict liability offences to all State Members of Parliament, in addition to Ministers and councillors (and councillor advisors).*

### **Key observations of this submission**

- Public perception of the effectiveness of the Queensland integrity system and the regulatory framework should be the critical factors in determining any framework which seeks to enhance public confidence in decision-making.
- Decisions about whether to introduce strict liability (criminal) offences, therefore, primarily ought to be guided by whether the public would be reasonably satisfied with the effectiveness of any other approach, and whether public confidence would be diminished by other approaches.



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

- The Crime and Corruption Commission has expertise based on the insights gained from its complaint handling, investigation, and corruption prevention functions, and has made recommendations on that basis.
- In advancing the recommendation that the new provisions be strict liability offences, in their submission the Crime and Corruption Commission advised that the elements of the proposed offence, 40A of the *Integrity Act 2009* (Recommendation 3) overlapped with more serious, existing offences of 92A and section 408C of the *Criminal Code 1899*. As such, a breach of section 40A of the *Integrity Act 2009* would be a misdemeanour offence, applied only to Ministers, and with a substantially lower penalty than the existing offences.
- Whether such an offence would be perceived by a reasonable member of the public as being an effective deterrent at preventing corruption, is an important consideration.
- Further, several existing interest-related offences at local government level are strict liability offences. The Bill as drafted, will add an intent element in each offence creating consistency in State and Local Government, however, this may raise important questions about public perception of the effectiveness of the new interest-related offences, generally.
- The QIC acknowledges the importance of maintaining public confidence in the effectiveness of the integrity system and regulatory framework, and the particular expertise of the Crime and Corruption Commission to make recommendations in that regard.

### General Comments

#### *Conventions versus creation of criminal offences*

The introduction of criminal offences in relation to the declaration of interests issues by Ministers, and potentially, other members of the Legislative Assembly, raises important questions about the tension between a reliance on political practices such as conventions to resolve integrity issues, and public perception of the effectiveness of the conventions and the mechanisms in place when such conventions do not appear, to the reasonable member of the public, to be sufficient to deal with any issues that might arise.

As noted by Ms Jennifer Menzies in her submission and evidence,<sup>1</sup> integrity issues that arise in relation to the conduct of politicians have historically been resolved, in Westminster style democracies, by a reliance on conventions. Typically, the consequences were of a political nature.

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<sup>1</sup> Economics and Governance Committee, Queensland Parliament, Brisbane, 20 January 2020 (J. Menzies).

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Conventions, as described by Menzies, are designed to be a form of restraint on the abuse of power and provided there is a commitment by individuals to follow the 'rules of behaviour', they allow politicians to 'self-police' their own behaviour.

The application of conventions, such as Cabinet conventions or care-taker conventions, relies on:

*'...judgement, knowledge of precedents and a desire to see the continuation and upholding of the convention. It is this exercise of prudence that creates uncertainty for many politicians and bureaucrats, since interpretation is inevitably subjective, situational and context-dependent.'*<sup>2</sup>

However, it is generally accepted that modern politics is an increasingly competitive environment and 'intensely partisan', and correspondingly, there has been a decline in public trust on the reliance on conventions to effectively resolve integrity issues.<sup>3</sup>

### *Public perception and public confidence*

Understanding and enhancing how the public perceives politicians and ensuring robust and effective integrity systems, are issues that are at the forefront of discussion amongst democratically elected governments internationally.<sup>4</sup>

This is due to widely held public concerns that the quality of public management is deteriorating, and the oversight mechanisms to manage corruption and ethical breaches are insufficient.<sup>5</sup>

Further, as raised in the earlier submission of the QIC,<sup>6</sup> research reveals that undisclosed or poorly managed conflicts of interest are the most common elements in cases of corruption and misconduct. Therefore, there is a strong public focus on the potential for personal interests to give rise to bias in public officials.

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<sup>2</sup> J. Menzies & A. Tiernan, *Caretaker Conventions in Australasia: Minding the shop for government* (The Australian National University, Canberra, 2014), p11.

<sup>3</sup> Economics and Governance Committee, Queensland Parliament, Brisbane, 20 January 2020 (J. Menzies); J. Menzies & A. Tiernan, *Caretaker Conventions in Australasia: Minding the shop for government* (The Australian National University, Canberra, 2014).

<sup>4</sup> B. Filipiak & M. Dylewski (2017) 'Similarities and differences in the phenomenon of integrity in OECD countries', *The IEB International Journal of Finance*, 15, 100-23.

<sup>5</sup> B. Filipiak & M. Dylewski (2017) 'Similarities and differences in the phenomenon of integrity in OECD countries', *The IEB International Journal of Finance*, 15, 100-23; A. Whealy, A. Graycar & A.J. Brown (2017) 'A Federal Anti-Corruption Agency for Australia?' (Paper presented at the Transparency International National Integrity 2017 conference, 16-17 March, 2017, Brisbane, Queensland.)

<sup>6</sup> Economics and Governance Committee, Queensland Parliament, Brisbane, 20 January 2020 (Queensland Integrity Commissioner).

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

### *Queensland data*

Relatively recent data, which includes responses from members of the public in Queensland, show that levels of trust and confidence in government has been in decline since 2008,<sup>7</sup> and there appears to be a strong correlation between (public) trust and action against corruption.<sup>8</sup>

Therefore, it follows that public perception of the effectiveness of the Queensland integrity system and the regulatory framework should be the critical factors in determining any framework which seeks to enhance public confidence in decision-making.

### *The recommendations*

The Crime and Corruption Commission made a series of recommendations in response to their findings into an assessment in relation to a State Government Member.

Whilst the QIC makes no comment regarding the assessment, or the subsequent public perception of such matters, the QIC acknowledges the expertise of the Crime and Corruption Commission to make recommendations based on the insights gained from its complaint handling, investigation, and corruption prevention, functions.

In advancing the recommendation that the new provisions be strict liability offences, in their submission the Crime and Corruption Commission advised that the elements of the proposed offence, 40A of the *Integrity Act 2009*, as drafted, overlapped with more serious, existing offences of 92A and section 408C of the *Criminal Code 1899*.

As such, a breach of section 40A of the *Integrity Act 2009* would be a misdemeanour offence, applied only to Ministers, and with a substantially lower penalty than the existing offences:

*'An unintended consequence of the proposed provision may be to 'water down' the seriousness of conduct which may already amount to serious criminal offending, rather than strengthening the framework and obligations on ministers to avoid conflicts of interest proposed offence to be inserted into the Integrity*

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<sup>7</sup> Noting the outcomes of a small and recent comparative study between public perception of State versus Local government undertaken by the Local Government Association of Queensland which generally indicates that public confidence in Local Government is higher than public confidence in State Government; Economics and Governance Committee, Queensland Parliament, Brisbane, 20 January 2020 (G. Hallam).

<sup>8</sup> <https://www.ccc.qld.gov.au/sites/default/files/2019-08/Corruption-in-Queensland-Corruption-Barometer-2018.pdf>

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*Act 2009 (s40A), overlapped with two existing dishonest intent offences in the Criminal Code 1899. However, the new offence would be specific to Ministers but would have a substantially lower penalty.*<sup>9</sup>

The stated intent of the proposed offence, 40A of the *Integrity Act 2009* is to 'ensure there is public confidence in government'.<sup>10</sup> However, the QIC observes that a reasonable member of the community might not be satisfied that the creation of an offence that is similar to existing offences, specific to Ministers, and with a lower penalty, will achieve its intent. Further, as a deterrent to corrupt conduct, introducing an offence with a lower penalty than existing offences appears to run counter-intuitive to commonly held views on effective corruption prevention strategies.

Regarding the introduction of strict liability offences at local government level, the QIC notes that there are several strict liability interest-related offences at local government level, and these were introduced in 2018.

Under the proposed changes in the Bill, an intent element will be introduced in all interest-related offences at local government level. If the provisions at both state and local level are adopted as they stand, all interest-related offences will have an intent element. This will provide consistency across the state and local sectors.

However, if the Crime and Corruption Commission is correct in that the introduction of dishonest conduct offences at State level will not satisfy public concerns of the effectiveness of interest-related laws, by extension, this perception might flow through to affect public perception of the effectiveness of interest-related laws at local government level as well.

Overall, the QIC generally affirms, given its expertise, the Crime and Corruption Commission's position, and acknowledges that it is important that laws are, and are perceived to be, effective at preventing corruption to ensure that public perception and trust in government is not diminished.

The Queensland Integrity Commissioner, Dr Nikola Stepanov, will be able to address any matters contained in this further submission if required.

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<sup>9</sup> Economics and Governance Committee, Queensland Parliament, Brisbane, 20 January 2020 (Crime and Corruption Commission) p7.

<sup>10</sup> Queensland, Parliamentary Debates, Legislative Assembly, 28 November 2019, 3945-49, 3947 (Yvette D'Ath, Attorney-General).