HON. ROD WELFORD

28 January 2020

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

Dear Secretary

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

I refer to the invitation for public comment on the above Bill and the submission of the CCC dated 9 January 2020, particularly in relation to the Clause 62 (Section 40A).

I wish to provide the following comments for the Committee's consideration:

1. There are two factors to be considered in determining the nature of the offence to be created:
a) the level of offence involved (criminal offences justify higher penalties)
b) the certainty of harm and the seriousness of harm caused by the breach;

2. Criminal offences under the Criminal Code (crimes and misdemeanors) should be reserved for the most serious offences, with simple offences applying to the rest.

3. For the most serious offences, it is appropriate that mens rea - the intention to commit the crime - be an element of the offence. Only in exceptional circumstances should intent be precluded by strict liability.

4. Strict liability is applied to traffic offences but these are largely simple offences, not crimes. It also applies to criminal offences like physical assault or child sexual assault. Here the mere act delivers the gravity of its consequence. The certainty of harm and its gravity provide the exceptional circumstances that justify strict liability.

5. Strict liability does not apply to offences of dishonesty because the essence of the offence is the dishonest intent of the act rather than the act itself or its consequences which are usually far less certain. When there is no way of knowing that the act will be likely to cause harm which is inherently serious, then as a matter of public policy, the

use of strict liability to criminalise a potentially harmless act or accidental omission is inappropriate.

6. The CCC's media statement of 6 September 2018, said in its third recommendation: "That 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."

The nature of conflicts of interest are acknowledged here not to be certain in their commission or their consequences. This is even more so when the offence relates to an omission rather than a positive act that can create a conflict of interest. A positive act cannot be said to be accidental.

7. Here, whether there is a 'conflict of interest' depends on the nature of the private interest that could conflict with one's public duty. That there "may" be a conflict is an acknowledgement that the likelihood of a conflict of interest is itself not always certain, let alone the gravity of the consequences, if any, of omitting to declare it. .

8. In this case, failing to declare something (a conflict of interest) which itself is not certain, causing consequences that are even less certain, cannot support its being defined by strict liability.

As with sentencing in criminal matters, if the offence is to be defined as a crime, there must be discretion for the courts to consider the nature of the intention to conceal a real conflict and the consequences of that behaviour.

9. It is understandable, and in its interest, for the CCC to be seen to advocate setting the highest possible bar when it comes to the conduct of public officials. That is not to criticise the intent underlying its submission. However, the Parliament must take into account proper and broader questions of public policy in the drafting and legislating of its laws to avoid creating unintended and perverse consequences.

Yours sincerely

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