



Ethics Committee

Ethics Committee

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Mr Linus Power MP
Chair
Economics and Governance Committee
By email: egc@parliament.qld.gov.au

Dear Mr Power

Submission to the Economics and Governance Committee with respect to the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019

I refer to the email from the Economics and Governance Committee on 30 January 2020 requesting the Ethics Committee provide a submission on the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019.

Enclosed is a submission outlining some concerns the committee has with the CCC proposals that strict liability apply to Ministers and other Members of Parliament for failing to disclose conflicts of interests and comply with the Queensland Parliament's register of interests.

If you have any questions regarding the above, please contact the Ethics Committee Secretary, Ms Bernice Watson (phone: [REDACTED], or email ethics@parliament.qld.gov.au).

Yours sincerely

A handwritten signature in black ink that reads 'Joe Kelly'.

Mr Joe Kelly MP
Chair

SUBMISSION TO THE ECONOMICS AND GOVERNANCE COMMITTEE WITH RESPECT TO THE ELECTORAL AND OTHER LEGISLATION (ACCOUNTABILITY, INTEGRITY AND OTHER MATTERS) AMENDMENT BILL 2019

Introduction

1. The Ethics Committee (the committee) welcomes the opportunity to provide a submission on the Crime and Corruption Commission (CCC) proposals regarding the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 ('the Bill'). Specifically, we focus on the proposal that strict liability be imposed on Ministers and other Members of Parliament should they fail to declare their conflict of interests and update register of interests as required (presently under the *Parliament of Queensland Act 2001*, Standing Orders of the Legislative Assembly, and Ministerial and Cabinet guidelines).
2. The Bill is intended by the Government to give effect to the recommendations the CCC made in September 2019.
3. We understand that the Bill would, amongst other provisions, introduce a new offence of dishonest conduct by a Minister in both the *Parliament of Queensland Act 2001* and the *Integrity Act 2009*. The offence would apply where a Minister contravenes his or her obligations in relation to conflicts of interests and registers of interest, with an intent to dishonestly obtain a benefit for themselves or another person, or to dishonestly cause a detriment to another person.
4. The CCC has indicated that the Bill's proposal that an element of intent be required to establish the offence, is insufficient to implement its recommendations.
5. The CCC has instead proposed the establishment of strict liability offences, in the Criminal Code, for contraventions of conflict of interest or register of interest requirements by a Minister. The CCC's proposed 'serious conduct' offences would apply regardless of intent, if the person knew or ought to have known of the relevant interest – a measure the CCC considers necessary if the laws are to be effective in preventing corruption. Further, the CCC has proposed that the measures apply to all Members of Parliament, and not just Ministers.
6. As a general comment, the committee is concerned that firstly, there is a lack of evidence offered by the CCC as to the extent and nature of the corruption by the Executive or by Parliamentarians it proposes be addressed, and secondly, there is a lack of evidence that the proposal would address any such problem.
7. With respect to evidence, or lack of, Report No. 149¹ of a predecessor committee summarised the previous seven references (at that time) concerning an alleged failure to register an interest in the Register of Members' Interests.
8. In the register of interest matters the committee had considered to date, the committee found that there was not an interest that required disclosure in two matters (Newman and Springborg). In a further two matters it was found that although there was an interest that required disclosure, there was no intent to dishonestly fail to register this interest and it was an inadvertent act (Bligh and Emerson). The remaining three matters resulted in criminal convictions and custodial sentences

¹ Ethics Committee, *Matter or privilege referred by the Registrar on 16 June 2014 relating to an alleged failure to register an interest in the Register of Members' Interests*, [Report No. 149](#).

following the ethics committee investigations (two matters concerning Nuttall and one concerning Driscoll).

9. This summary of relevant matters shows that in each of the matters where there was evidence of wrongdoing, the end result was imprisonment.
10. The committee queries the assertion by the CCC as to the need to increase regulation of corruption of the Executive and the Parliament by criminalisation, when neither the quantity of referrals to the ethics committee, or the penalties imposed by the Parliament, appear to suggest shortcomings in the current requirement to establish an intent.
11. With respect to the proposals from the CCC, the committee would like to address two main concerns:
 - firstly, there is no evidence to support a need for, or the effectiveness of, strict liability. It would potentially see members of Parliament subject to criminal proceedings and penalties for what may be an inadvertent failure to disclose an interest when there was no intent to engage in, or evidence of, corrupt conduct; and
 - that applying the same obligations on all Members of Parliament that is to be applied to Ministers is not appropriate considering the significantly greater responsibility that Ministers have with respect to government decision-making and the potential to engage in corrupt conduct.
12. Provisions around declaring conflicts of interest exist in the standing orders of the Queensland Legislative Assembly, and in the Ministerial and Cabinet guidelines, the latter applying specifically to Cabinet. The CCC claims convention is not sufficient anymore with regard to executive decisions; that people feel freer to ignore conventions (while noting that this relates only to the small minority who disregard public interest).
13. It is the committee's view that current legislation, guidelines and convention have not been shown to be insufficient in dealing with failures to declare conflicts of interest: in fact, the opposite is true.
14. The fairly recent examples of former Minister Gordon Nuttall and former Member for Redcliffe Mr Scott Driscoll illustrate the effectiveness of the current regime. In both cases, the former Members were found to have acted with intent in failing to act in accordance with that regime. The committee recommended, and the House passed a motion, imposing fines totalling \$90,000 in the matter of Mr Driscoll, and recommended his expulsion from the Parliament (he resigned before that could occur). The committee recommended, and the House passed a motion, imposing fines totalling \$82,000 in the case of Mr Nuttall. Both former members also served custodial sentences relating to fraud (Driscoll) and perjury and corruption (Nuttall).
15. Mr Nuttall argued to the Parliament that he had 'never knowingly or wrongfully set out to do wrong'. However the Parliament found otherwise.
16. In both the Nuttall and Driscoll cases, the committee reported that it had recommended the maximum fines possible in order to reflect the gravity of the offences, and to send strong messages to members and to the public about the level of accountability expected of members of Parliament.
17. The committee notes the advice of Dr Nikola Stepanov, the Queensland Integrity Commissioner, that she had experienced a 600% increase in integrity advice sought and provided in past few years. The committee submits this is evidence that the current approach, including the ethics committee's work in setting and promoting the standards expected of Members of Parliament, including as in the Nuttall and Driscoll cases, is working. Members are seeking advice, and prioritising transparency and accountability.

18. The CCC considers that a strict liability offence, where intent does not have to be established, will make it easier to prove intent: where a Member failed to declare a conflict or register interests, it might be easier to prove there was a nefarious intent for not doing so. That is, it could be inferred that there was a reason for the failure to declare or register, because the Member must have known he or she had to do so. The CCC indicates this would be “as opposed to the current situation where there is no real consequence and there is a bit of a vague obligation set out to declare your conflict and update your interests” (Economics and Governance Committee hearing transcript 20 January, p 61). But in both of the cases outlined above, nefarious intent was readily established under current provisions, and importantly, without the risk of criminalising inadvertent non-disclosures.
19. When contemplating failures to register an interest, the committee makes it clear that there is a positive obligation on members to familiarise themselves with the requirements of the *Parliament of Queensland Act* and the Standing Orders. Feigning ignorance to disguise corrupt conduct has not prevented significant penalties, including imprisonment, as can be seen in the cases of Mr Nuttall and Mr Driscoll.
20. Having said that convention is not sufficient anymore with regard to conflicts of interest in executive decision-making, the CCC at the 20 January EGC hearing also proposed extending the strict liability beyond Ministers to all Members of Parliament. Again, it is our submission that there is no evidence to support the claim that convention (articulated in standing orders) is insufficient, or that there is a problem with backbenchers, who are not part of executive decision-making, failing to declare conflicts or register interests, that would require a legislative response beyond the existing *Parliament of Queensland Act* provisions (s 69B).
21. We turn now to the risk associated establishing a strict liability.

Strict liability

22. The committee firstly draws on evidence provided to Estimates Hearings on 23 July 2019 by the Clerk of the Parliament, Mr Neil Laurie to the Chair of the Economics and Governance Committee, Mr Linus Power MP:

CHAIR: I think the time period for non-government questions has expired. Mr Clerk, I wish to ask you some further questions on declarations. Have there been instances of late declarations in the past and, if so, how many? Is that something that has ever happened before?

Mr Laurie: Yes, of course. I could not even speculate on how many that would be. Depending upon the year we can get anywhere from 250 to 500 declarations per year. Obviously, we often get a higher number of declarations in the first year because everyone has to start out in the first year with a declaration. I know from my experience as registrar now for 17 years or more that oftentimes when we send out the midyear reminder to members—members are required by standing orders to update their register midyear every year with a form that says it is correct or they need to update. I know that there are updates that are made then that have probably occurred sometime before, but their memory is only jogged by our correspondence to them.

23. The committee anticipates that some may interpret Mr Laurie’s evidence of regular late declarations as evidence of a need for strict liability. The committee has found through constituent conversations that members of the public may be unaware of the scale of interests that require disclosure, and how easily these can be overlooked or submitted after the one month requirement.
24. The interests that require disclosure range from very simple matters that are easily overlooked and have a very low risk of creating any actual or perceived conflicts, such as updating the register when a member

of Parliament gets a new debit card from a bank, or joins a community association, through to complex matters involving interests in corporations and trusts with the potential to create actual or perceived conflicts.

25. Simple matters like the debit card example can be easily overlooked. However the CCC proposals would see a prospect of criminal proceedings brought against a Member for that offence.
26. More complex matters must be considered carefully by Members, and advice sought, to determine if it is an interest that requires disclosure. That this careful consideration occurs is evidenced by Dr Stepanov's advice about the level of advice sought.
27. The committee does not believe that failing to disclose a new debit card should be punished in the same way as failing to disclose directorship of a corporation that was awarded a significant government tender.
28. The committee considers that the current processes in place allow for simple matters to be dealt with pragmatically, rather than imposing strict liability for each and every breach of the Standing Orders or *Parliament of Queensland Act 2001*. These can be readily distinguished from those more complex matters, where the ethics committee has been able to investigate and recommend, and the Parliament able to find, an intent to act dishonestly, and take appropriate action.
29. When the committee currently considers a referral from the Registrar for a members' failure to register an interest, the committee is able to look to the person's knowledge and intent in accordance with subclause 18, schedule 2 of the Standing Orders, rather than imposing strict liability:

A member who—

(a) knowingly fails to give a statement of interests to the Register as required

(b) knowingly fails to notify the Registrar of a change of details contained in a statement of interest; or

(c) breaches s 69B(4) of the Parliament of Queensland Act 2001;²

is guilty of a contempt of the Parliament and may be dealt with accordingly [emphasis added].

30. Current Standing Orders are clear that strict liability is not intended to be imposed, with Members only required to disclose investments, beneficial interests or assets, of trusts,³ private superannuation funds,⁴ and partnerships⁵ of which the **member is aware**.
31. This is a pragmatic requirement, reflecting that where a member's interest may be very minor, they would not be expected to be aware of each and every investment, interest or asset. For example a beneficiary of a trust is not always privy to full details of the investments of the trust made by the trustees.
32. Further, the standing orders allow the committee discretion when making a determination on a matter.

² Section 69B(4) of the *Parliament of Queensland Act 2001* provides that a member must not give to the Registrar a statement of interests or information relating to a statement of interests the member knows is false or misleading in a material particular.

³ Schedule 2, subclause 7(5)(b)(iv) of Standing Orders.

⁴ Schedule 2, subclause 7(5)(c)(ii) of Standing Orders.

⁵ Schedule 2, subclause 7(5)(d)(iv) of Standing Orders.

33. The committee always applies the balance of probabilities as the standard of proof when determining if a contempt has been committed. This is a lower standard than the 'reasonable doubt' standard required for criminal matters. However, a very high order of proof on the balance of probabilities is required to find a contempt, consistent with the test applied in relation to misconduct charges at common law. In the leading High Court authority in the area, *Briginshaw v Briginshaw* (1938) 60 CLR 336, Latham CJ at 343-344 stated: 'The standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness and importance of the issue'.
34. To impose strict liability on members for failing to comply with the register of interest requirements fails to allow for this natural variance that Latham CJ referenced in *Briginshaw v Briginshaw*. It would see a Member who intentionally fails to disclose an interest for the sole purpose of engaging in corrupt conduct, being considered to be in the same class, and subject to the same criminal processes, as a member who unknowingly failed to register an interest because they were unaware that such an interest existed.
35. A past matter that a predecessor ethics committee considered, exemplifies how this may create an absurd result and injustice for a member.
36. Ethics Committee Report No. 104 concerned the former Member for Indooroopilly, Mr Emerson.⁶ An allegation was raised that Mr Emerson had failed to disclose that he was director and secretary of a company, Merson Investments Pty Ltd.
37. Mr Emerson had disclosed his interest in Merson Investments Pty Ltd in other areas of his statement of interests; the non-disclosure related only to his roles as director and secretary.
38. On being alerted to his non-disclosure by the committee, Mr Emerson took immediate action to update his statement of interests to reflect his interest as director and secretary of Merson Investments Pty Ltd. The committee accepted this was an inadvertent non-disclosure and no further action was taken.
39. Under the CCC proposals, if strict criminal liability was imposed on Mr Emerson, he would potentially be exposed to a custodial sentence.
40. The fact that his interest in the company was disclosed elsewhere on the register was a clear indication that there was no intent to conceal his interest. To impose strict liability in this instance would create an absurd result.
41. Another example is contained in Report No. 93.⁷ This matter contained the former Premier, Ms Anna Bligh. Ms Bligh had engaged in a house-sitting arrangement for a family friend in Sydney.
42. The committee found in that matter that although the house-sitting arrangement was a prima facie interest that required disclosure, she house-sat out of a genuine family friendship with the owner of the property and was unaware that it was an interest that required disclosure. Once made aware, Ms Bligh registered the interest.
43. Therefore, as with the Emerson matter, despite there being a failure to register an interest, the committee was able to use legitimate discretion, to ensure a pragmatic and reasonable approach,

⁶ Integrity, Ethics and Parliamentary Privileges Committee, *Matter of Privilege Referred by the Registrar on 25 February 2010 Relating to an Alleged Failure by a Member to Register an Interest in the Register of Members' Interests*, [Report No. 104](#).

⁷ Members' Ethics and Parliamentary Privileges Committee, *Matter of Privilege Referred by the Registrar on 21 July 2008 Relating to the Alleged Failure by the Premier to Register a Benefit Received in the Register of Members' Interests*, [Report No. 93](#).

taking into consideration all relevant factors. Strict liability would have seen the former Premier facing criminal charges for house-sitting for a friend.

44. The committee acknowledges that while criminal charges do not equate to a conviction under the Bill, and that the discretion of the DPP to prosecute cases would still be employed, the committee considers that the charge alone may be career-ending, and cause significant personal distress to members of Parliament for what is a potentially an honest mistake with no element of corruption.

Imposing obligations on members of Parliament and Ministers alike

45. The committee considers it appropriate that Ministers are held to a higher standard than members of Parliament.
46. Ministers have significant responsibility as members of the executive government. They are responsible for key policy decisions and expenditure of public funds. The potential for them to engage in corrupt conduct is significantly higher than that of a member of the backbench.
47. Should a Minister engage in corrupt conduct, potentially gaining a personal benefit as a result of their Ministerial position, the committee considers that s 40A of the Bill is appropriate to regulate this. That is, by failing to register a conflict or interest, there must be intent by the Member to dishonestly obtain a benefit for themselves or another person. The committee does not support the proposal by the CCC to subject Ministers to strict liability.
48. There are already standing orders in place that regulate pecuniary interests and conflict of interests, and create positive obligations on members to disclose these interests, either during debate in the House,⁸ committee proceedings,⁹ or in communications with other members, Ministers or public servants.¹⁰

Conclusion

49. The committee notes and appreciates the role of the CCC to continuously improve the integrity of, and reduce the incidence of corruption in, the public sector.
50. In the short time-frame permitted to provide this submission, the committee has been unable to find any evidence of any other Australian jurisdiction criminalising a failure of a Member of Parliament, or Minister, to comply with their conflict of interest requirements as per the CCC's recommendations. The committee notes that Griffith University academic and former state and federal Ministerial Advisor, Ms Jennifer Menzies, also stated she was unaware of any jurisdictions that criminalise such acts or omissions in her expert evidence to the Economics and Governance Committee.¹¹
51. The committee is aware of two international Westminster jurisdictions (Wales and Scotland) where it is a criminal offence for Members of Parliament to fail to register an interest. In those jurisdictions, it is a summary offence and the maximum penalty is a fine. While the offences in those jurisdictions do apply to all members, the penalty of a fine is significantly less than the potential for imprisonment as proposed by the CCC.
52. Relevantly, the Parliament currently has authority under the *Parliament of Queensland Act 2001* to impose fines similar to those prescribed by the Welsh and Scottish criminal offences.

⁸ Standing Order 260.

⁹ Standing Order 261.

¹⁰ Standing Order 262.

¹¹ Record of Proceedings, 20 January 2020, at [35-36](#).

53. The committee advocates for evidence-based law and policy making and is unable to identify any solid evidence base to support the CCCs proposal.
54. The committee also notes the reality that failures to declare potential conflicts of interest or to update the register of interests attract a high level of scrutiny at a political level. This is evidenced by the committee's current list of referrals, and the number of Speaker's Rulings relating to Register of Interest matters. The high potential for referral of any breaches of requirements ensures a high level of awareness among Members.
55. The committee considers that transparency and accountability are paramount to a functioning democracy. The committee believes that the current obligations imposed by the standing orders, and the proposed addition of s 40A in the Bill as it currently stands, are sufficient to ensure the high standards of transparency and accountability that the public is entitled to expect of Members of Parliament.