

Submission to the Criminal Code and Other Legislation (Criminal Accountability) Amendment Bill 2019

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Part 2 Amendment of Criminal Code

This submission relates to proposed amendments to Part 2 Amendment of Criminal Code on Ministers' conflicts of interest. The amendment responds to the Queensland's Crime and Corruption Commission (CCC) report into Deputy Premier Jackie Trad's ownership of a house in the catchment area of the proposed Cross River Rail, for which she was the responsible Minister. The CCC's assessment was that there was no evidence a criminal offence had been committed. However, the CCC did outline its role in preventing corruption and recommended Parliament create a criminal offence if a Cabinet Member does not declare a conflict of interest 'that does, or may conflict, with their ability to discharge their responsibilities'.

Though I understand the political imperative for members of Parliament to uncritically adopt the recommendation, I believe the recommendation by the CCC was flawed and the adoption of the recommendation will unnecessarily criminalise a convention.

The nature of conventions

As Westminster-style Parliaments, all Australian state and territory governments, as well as the Commonwealth, have adopted a range of conventions to manage the process of Cabinet. Conflict of interest provisions is a sub-set of the Cabinet conventions.

Conventions are an integral part of Westminster style democracies and have evolved to add detail to political practice, particularly around Parliament and Cabinet.

They are designed to form a restraint on the abuse of power by the government through 'rules of behaviour' in areas where the Constitution is silent. Two main characteristics of conventions is that they are not legally binding and since they are not subject to judicial interpretation are flexible to evolve in response to changing circumstances and political values.

Conventions impose a series of obligations on political actors to conduct themselves in specific ways. They are based on a principle of reciprocity and mutuality where each party, as it gains government, observes the constraints imposed by conventions.

Conflict of interest disclosure

All Australian jurisdictions contain information on and the process for conflict of interest disclosure with their Cabinet Handbooks and the practice is consistent across the country. A conflict exists when a Minister is influenced or appears to be influenced by private interests. If a potential conflict exists, the Minister will advise the Premier or Prime Minister and as the South Australian Ministerial Code of Conduct points out, the Premier then has a number of courses of action, for example:

- Approving the conduct and allowing the Minister to continue his or her involvement in the matter
- Requiring the Minister to divest him or herself of the relevant private interest
- Requiring that the Minister not take part in the determination relating to the conflict. This may involve requiring the Minister to leave the Cabinet room or to delegate certain powers and duties to another Minister.

(<https://www.dcsa.gov.au/responsibilities/cabinet-and-executive-council/executivegovernment/ministerial-code-of-conduct>).

If a breach occurs and a conflict is not disclosed, the sanctions are political and include:

- Requiring the Minister to apologise publicly
- Requiring the Minister to divest him or herself of their interests
- Requiring the Minister to stand aside or resign
- Or referring the matter to an external authority for investigation.

This system of disclosure and sanction is uniform across Australian jurisdictions and has ensured a high level of probity in Cabinet deliberations.

CCC recommendation

The Queensland Crime and Corruption Commission made several recommendations about strengthening the administrative processes of declaring a conflict of interest within a Cabinet meeting. It suggested establishing a standing agenda item for the declaration of any actual or perceived conflict of interest. This tweak to the Cabinet process will ensure such declarations are front of mind during any Cabinet deliberation.

However, in a further recommendation, the CCC recommended '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'.

If the amendments to the Criminal Code and Other Legislation (Criminal Accountability) Amendment Bill 2019 are adopted claims of breaches can now be tested in the Courts. This collision of Cabinet with the criminal justice system may have some unintended consequences, both to the management of Cabinet and the system of conventions as a whole. The retrospective nature of such criminal prosecutions could call into question Cabinet decisions that have already been acted upon or delay such decisions as a judge tries to work out whether it was a breach or not. In an already febrile and hyper-partisan political system, it increases the capacity for political opponents to lodge complaints to disrupt the government. As well, assessing whether there has been a failure to declare a conflict is not always straightforward and often veers into areas of oversight, misunderstanding or poor judgment, rather than criminal intent.

Interpretation of a breach can be subjective, situational and context dependent. Sect 97B of the Amendment Bill attempts to identify when there is or is not a conflict. This demonstrates the difficulty in trying to write into legislation a comprehensive coverage of the ethical judgments which are made about what is and what is not a conflict of interest.

The major implication of this legislation is for the impact on the system of conventions as a whole.

Conventions allow politicians to 'self-police' their behaviour. This is not a popular concept in an era of distrust of politicians but the majority of politicians, the majority of times, respect the conventions that manage their behaviour within our Parliamentary system of government. Making conventions legally binding has the potential to diminish the mutual and reciprocal nature of conventions. It also reduces the flexibility that characterise conventions and which allows them to adapt to changing practice over time.

The application of conventions is governed by precedent and judgment and is an exercise in prudence. By legislating conventions, it reduces political actors' responsibility to adhere to restraints and to contribute to shared norms on political behaviour.

In its determination on the Jackie Trad allegations, the CCC highlighted its function to prevent corruption and the recommendation to create a criminal offence for non-disclosure of a conflict is made of a result of that role. If the Parliament accepts the recommendation there will be two systems of conduct and sanctions bumping into each other, in what could be, unexpected ways.

Conclusion

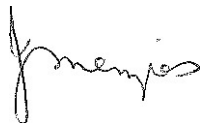
The CCC recommendation to criminalise conflict of interest was based on one case in which they found no evidence a criminal offence had been committed. They did not identify a pattern of behaviour which would indicate that legal sanctions were necessary.

Freezing the convention into law takes away its capacity to respond to changing community sentiment and mores. As community values change, so do conventions adapt to these changed values. Maintaining the Westminster conventions which underpin our Parliament

and Cabinet are often an under-appreciated part of the political process. Legislating for something that might happen in the future undermines the mutual obligation to adhere to the Westminster principles of responsible government.

Before the Parliament legislates to criminalise the conflict of interest provisions, I believe the case needs to be made for why this is now necessary. This would include further investigation which includes:

- Is there evidence that the convention of declaring a conflict of interest is being breached and that the convention is no longer holding?
- An analysis of the types and frequency of declarations and whether there has been any change in the pattern of declaration
- A comparison with other Australian jurisdictions and Westminster-style Parliaments on how they manage the conflict of interest disclosure and whether any are considering legislating it.
- A review of other conventions which have been legalised and the impact of that change on the convention. A brief review of the constitutional law literature found 'a concrete example of a convention crystallised into law and enforced as such remains as elusive as ever'.

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