Parliamentary Committees



Criminal Code and Other Legislation (Ministerial Accountability) Amendment Bill 2019

Report No. 40, 56th Parliament
Economics and Governance Committee
April 2020

Economics and Governance Committee

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Acknowledgements

The committee acknowledges the assistance provided by the Leader of the Opposition and Shadow Minister for Trade, Mrs Deb Frecklington MP, and by the Shadow Attorney-General and Shadow Minister for Justice, Mr David Janetzki MP.

Contents

Abbreviations

AJPCHR	Australian Joint Parliamentary Committee on Human Rights (Commonwealth Parliament)
Belcarra Report	Crime and Corruption Commission, *Operation Belcarra: A blueprint for integrity and addressing corruption in local government,* October 2017
Bill	Criminal Code and Other Legislation (Ministerial Accountability) Amendment Bill 2019
CCC	Crime and Corruption Commission
Clerk	The Clerk of the Parliament (Queensland Parliament)
committee	Economics and Governance Committee (Queensland Parliament)
Crime and Corruption Act	*Crime and Corruption Act 2001*
Criminal Code	*Criminal Code Act 1899*
DPP	Director of Public Prosecutions
FLP	Fundamental legislative principle
Government Bill	Electoral and Other Legislation (Accountability, Integrity and Other Matters Amendment Bill 2019)
LGAQ	Local Government Association of Queensland
LNP	Liberal National Party (Queensland)
LSA	*Legislative Standards Act 1992*
Member/MP	Member of Parliament
OQPC	Office of the Queensland Parliamentary Counsel
POQA	*Parliament of Queensland Act 2001*
QHRC	Queensland Human Rights Commission
QIC	Queensland Integrity Commission
QLS	Queensland Law Society
Registrar	Registrar of Members' Interests (also the Clerk of the Parliament)
Standing Orders	Standing Rules and Orders of the Legislative Assembly (Queensland)

All Acts are Queensland Acts unless otherwise specified.

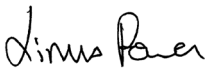
Chair's foreword

This report presents a summary of the Economics and Governance Committee's examination of the Criminal Code and Other Legislation (Ministerial Accountability) Amendment Bill 2019.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff, the Leader of the Opposition and Shadow Minister for Trade, and the Shadow Attorney-General and Shadow Minister for Justice for their assistance with the committee's examination of the Bill.

I commend this report to the House.



Linus Power MP

Chair

Recommendations

The committee recommends the Criminal Code and Other Legislation (Ministerial Accountability) Amendment Bill 2019 not be passed.

1 Introduction

1.1 Role of the committee

The Economics and Governance Committee (committee) is a portfolio committee of the Queensland Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* (POQA) and the Standing Rules and Orders of the Legislative Assembly (Standing Orders).[1]

The committee's primary areas of responsibility include:

- Premier and Cabinet, and Trade
- Treasury
- Aboriginal and Torres Strait Islander Partnerships, and
- Local Government, Racing and Multicultural Affairs.[2]

The committee is responsible for examining each bill in its portfolio areas to consider the policy to be given effect by the legislation and the application of fundamental legislative principles.[3]

1.2 Inquiry process

On 23 October 2019, the Criminal Code and Other Legislation (Ministerial Accountability) Amendment Bill 2019 (Bill) was introduced into the Legislative Assembly by Mrs Deb Frecklington MP, Leader of the Opposition and Shadow Minister for Trade, and referred to the committee for consideration. The committee was required to report to the Legislative Assembly on the Bill by 23 April 2020.

During its examination of the Bill, the committee:

- invited written submissions from the public, identified stakeholders and email subscribers,[4] and received five submissions[5] (a list of submitters is provided at **Appendix A**)
- received a written briefing on the Bill from Mr David Janetzki MP, Shadow Attorney-General and Shadow Minister for Justice, ahead of a public briefing from Mr Janetzki MP on 3 February 2020 (see briefing witness list at **Appendix B**), and
- received further written advice from Mr Janetzki MP in response to issues raised in submissions on the Bill.

Copies of the material published in relation to the committee's inquiry, including the submissions, transcript, and written advice, are available on the committee's inquiry webpage.[6]

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1 *Parliament of Queensland Act 2001* (POQA), s 88 and Standing Orders of the Legislative Assembly (Standing Orders), SO 194.

2 POQA, s 88; Standing Orders, SO 194; Schedule 6.

3 POQA, s 93(1). Section 93(3) of the POQA also requires the committee to consider the compatibility with the *Human Rights Act 2019* of each bill within its portfolio area introduced from 1 January 2020 onwards. As the Bill was introduced prior to this time, the committee has not examined such matters in detail in this report.

4 The committee contacted over 30 identified stakeholder groups and individuals and over 980 email subscribers to invite submissions on the Bill.

5 When considering the proposed legislation, in addition to considering the five submissions on the Bill, the committee also considered a submission from the Ethics Committee of the Queensland Parliament and a supplementary submission from the Queensland Human Rights Commission in relation to similar provisions contained in the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 (Government Bill). The submissions, and the committee's report on that bill, are available on the inquiry webpage (see: https://www.parliament.qld.gov.au/work-of-committees/committees/EGC/inquiries/past-inquiries/Electoralexpenditurecaps). All web references in this report were accurate as at 30 March 2020.

6 https://www.parliament.qld.gov.au/work-of-committees/committees/EGC/inquiries/current-inquiries/CrimCodeMinAcc2019

1.3 Policy objectives of the Bill

The stated objectives of the Bill are to:

- improve Ministerial accountability by strengthening the framework and obligations on Ministers to ensure the disclosure of actual, potential and perceived conflicts of interests occurs
- provide for a means by which a failure to declare a conflict of interest can be considered corrupt conduct, and
- align the obligations of elected officials in state government with the obligations of elected officials in local government arising out of legislative changes resulting from Operation Belcarra.[7,8]

The explanatory notes advise that the Bill seeks to achieve these objectives by:

- creating a criminal offence for occasions when a member of Cabinet (Minister) is aware, or ought reasonably to be aware, that they have a declarable conflict of interest in a matter to be discussed at a meeting of Cabinet or a Cabinet committee, but the Minister fails to declare the conflict
- providing for a means by which a failure to make such a declaration could, in certain circumstances, be considered corrupt conduct, as defined in the *Crime and Corruption Act 2001*[9] (Crime and Corruption Act), and
- creating a criminal offence to apply to a Minister who fails to comply with the requirements of the statement of interests by not informing the Clerk of the Parliament of the particulars of an interest, or of a change to an interest, within one month after becoming aware of the interest or change to the interest.[10]

1.4 Consultation on the Bill

The explanatory notes state that the Bill is consistent with recommendations made by the Crime and Corruption Commission (CCC) in a media statement issued on 6 September 2019, which identified 'several areas for improvement to ensure conflicts of interest are declared and managed more effectively to reduce the risk of corruption'.[11]

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7 Operation Belcarra was a special operation commenced by the CCC in September 2016 after receiving complaints about the conduct of candidates for several councils during the 2016 Queensland local government elections. The objectives of Operation Belcarra were to determine whether candidates had committed offences under the *Local Government Electoral Act 2011* that could constitute corrupt conduct, and to examine practices that may give rise to actual or perceived corruption or otherwise undermine public confidence in the integrity of local government, with a view to identifying strategies or reforms to help prevent or decrease corruption risks and increase public confidence. In undertaking the operation, the CCC found 'widespread non-compliance with legislative obligations relating to local government elections and political donations … largely caused by a deficient legislative and regulatory framework'. The CCC's report on Operation Belcarra, released in October 2017, issued 31 recommendations 'to improve equity, transparency, integrity and accountability in Queensland local government elections and decision-making'. See: CCC, *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government* (Belcarra Report), October 2017.

8 Explanatory notes, p 2.

9 'Corrupt conduct' is defined in s 15 of the Crime and Corruption Act.

10 Explanatory notes, p 1.

11 Explanatory notes, p 2.

The explanatory notes also advise that the Opposition met with the Queensland Law Society (QLS) to discuss the proposed amendments prior to the Bill's finalisation.[12]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

After examination of the Bill, including the policy objectives it is intended to achieve, and consideration of the information provided by submitters and in written advice from Mr Janetzki MP, the committee recommends that the Bill not be passed.

Recommendation 1

The committee recommends the Criminal Code and Other Legislation (Ministerial Accountability) Amendment Bill 2019 not be passed.

[12] Explanatory notes, p 2.

2 Background to the Bill

On 6 September 2019, the CCC issued a media release outlining its findings following the completion of its assessment of a matter involving certain allegations of corrupt conduct.[13]

The CCC reported that it had not identified evidence or information suggesting a criminal offence had been committed in that instance, and therefore would not be commencing a corruption investigation. However, the CCC advised that during the assessment process it had:

> *… identified several areas to improve Cabinet's decision-making processes and areas for legislative reform to reduce corruption risks.*[14]

The CCC made five recommendations to address these identified issues, with the relevant legislative reforms set out in recommendations 3 and 4, as follows:

> *Recommendation 3:*
>
> [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.*
>
> *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.*
>
> *This would align the obligations of elected officials in state government with the obligations of elected officials in local government. This recommendation is consistent with the recommendations for local government made by the CCC arising out of Operation Belcarra.*[15]

As noted in recommendation 4, the CCC made similar recommendations for local government in its report *Operation Belcarra – A blueprint for integrity and addressing corruption risk in local government* (Belcarra Report), which was published in October 2017.

Specifically, the CCC recommended:

> ***Recommendation 25***
>
> *That the Local Government Act and the City of Brisbane Act be amended to provide suitable penalties for councillors who fail to comply with their obligations regarding conflicts of interest, including possible removal from office. …*
>
> ***Recommendation 26***
>
> *That the Local Government Act and the City of Brisbane Act be amended so that, where a councillor has a real or perceived conflict of interest in a matter, it is an offence for the councillor*

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13 CCC, 'CCC determines not to investigate the Deputy Premier but calls for improvements to Cabinet processes and legislative reform', media release (CCC media release), 6 September 2019, https://www.ccc.qld.gov.au/news/ccc-determines-not-investigate-deputy-premier-calls-improvements-cabinet-processes-and

14 CCC, CCC media release, 6 September 2019.

15 CCC, CCC media release, 6 September 2019.

> *to influence or attempt to influence any decision by another councillor or a council employee in relation to that matter at any point after the matter appears on an agenda for a council meeting* [unless the council has approved that councillor's participation in the circumstances]. *A suitable penalty should apply, including possible removal from office.*[16]

The *Local Government Act 2009* was subsequently amended in 2018[17] to:

- provide for a number of strengthened maximum penalties for a councillor who fails to comply with their obligations regarding conflicts of interest (eg 100 penalty units ($13,345[18]) or one year's imprisonment for a councillor who fails to declare a conflict of interest to a meeting, or fails to comply with a decision of other councillors in relation to the councillor's participation after having declared the conflict of interest)
- establish a new offence (with a maximum penalty of 200 penalty units ($26,690) or two years' imprisonment) for a councillor who has a material personal interest, a real conflict of interest, or a perceived conflict of interest in a matter other than an ordinary business matter, to:
    - influence or attempt to influence another councillor to vote on the matter in a particular way at a meeting of the local government or any of its committees, or
    - influence or attempt to influence a council employee or contractor of the council who is authorised to decide or otherwise deal with the matter to do so in a particular way, and
- prescribe the conflict of interest offences in the Bill as 'integrity offences' and provide that a person who is charged with an integrity offence is automatically suspended from being a councillor, and a person who is convicted of an integrity offence cannot be a councillor for four years after the person is convicted of the integrity offence.[19]

The Bill, introduced on 23 October 2019, represents the Liberal National Party's (LNP's) response to the CCC's recommendations 3 and 4 of 6 September 2019.[20] In introducing the Bill, the Leader of the Opposition and Shadow Minister for Trade stated that the LNP was determined 'to move quickly and decisively' to implement the recommendations and address the corruption risks the CCC had identified.[21]

In addition, the Shadow Attorney-General and Shadow Minister for Justice Mr David Janetzki MP stated of the proposed amendments:

> *The CCC made it clear that elected officials in state government should be subject to the same scrutiny as elected officials in local government, which is what this Bill recognises.*[22]

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16 CCC, Belcarra Report*,* October 2017, p 85.

17 By the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018*.

18 The Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2019 set the value of a penalty unit at $133.45 as at 1 July 2019.

19 Local Government Electoral (Implementing State 1 of Belcarra) and Other Legislation Amendment Bill 2018, explanatory notes, pp 10-13. The resulting Act also established a new offence applicable to a person who takes retaliatory action against a councillor or another person because the councillor complied with the requirement to inform the person presiding at a local government meeting of another councillor's material personal interest or conflict of interest in a matter other than an ordinary business matter to be discussed at the meeting (maximum penalty of 167 penalty units or two years' imprisonment).

20 Mrs Deb Frecklington MP, Leader of the Opposition and Shadow Minister for Trade, Introductory Speech, Record of Proceedings, Queensland Parliament, 23 October 2019, pp 3550-3551.

21 Mrs Deb Frecklington MP, Leader of the Opposition and Shadow Minister for Trade, Introductory Speech, Record of Proceedings, Queensland Parliament, 23 October 2019, p 3550.

22 Mr David Janetzki MP, written briefing, 19 December 2019, p 2.

The Government's response to the CCC's recommendations 3 and 4 of 6 September 2019 was contained in the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 (Government Bill), which was introduced in the Legislative Assembly the following month, on 28 November 2019. The committee reported on its consideration of that bill, including the equivalent legislative reforms, on 7 February 2020.[23]

[23] Economics and Governance Committee, *Report No. 37, 56th Parliament – Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019,* February 2020, https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2020/5620T226

3 Examination of the Bill

The Bill proposes to achieve the Bill's policy objectives and implement the CCC's recommendations 3 and 4 by inserting new offences in the *Criminal Code Act 1899* (Criminal Code) and POQA respectively that would apply in relation to a member of Cabinet's (Minister's) failure to:

- declare a conflict of interest in a matter to be discussed at a meeting of Cabinet or a Cabinet committee, or
- update their statements of interests with the required particulars within one month after becoming aware of an interest or a change to an interest.[24]

3.1 Proposed offence for failing to disclose conflicts of interest (*Criminal Code Act 1899*)

The Bill proposes to establish a new offence in the Criminal Code with a maximum penalty of 100 penalty units ($13,345) or one year's imprisonment, which would apply to a Minister who fails to declare a conflict of interest in a matter to be discussed at a meeting of Cabinet or a Cabinet committee.[25]

To support the operation of the offence provision, the Bill clarifies the circumstances in which a Minister is required to declare a conflict of interest, and the nature of the information that should be declared. Specifically, the Bill provides that if a matter is to be discussed at a meeting of Cabinet or a Cabinet committee and a Minister is aware, or ought reasonably to be aware, that the Minister has a 'declarable conflict of interest in the matter', the Minister is required to inform the meeting of the declarable conflict of interest, including:

- the nature of the declarable conflict of interest
- if the declarable conflict of interest arises because of the interest of a related party of the Minister:
    - the name of the related party
    - the nature of the Minister's relationship with the related party, and
    - the nature of the related party's interest in the matter, and
- if the declarable conflict of interest arises because of the receipt of a gift or loan from another person:
    - the name of the other person
    - if the declarable conflict of interest involves an interest of the Minister – the nature of the other person's relationship with the Minister
    - if the declarable conflict of interest involves an interest of a related party of the Minister – the nature of the other person's relationship with the related party
    - the nature of the other person's interest in the matter, and
    - the value of the gift or loan, and the date the gift was given or the loan was made.[26]

[24] Explanatory notes, p 1.

[25] Bill, cl 4, s 97D.

[26] Bill, cl 4, s 97D.

3.1.1 Definition of a declarable conflict of interest

The Bill provides that a Minister has a 'declarable conflict of interest' in a matter if:

- the Minister or a related party of the Minister has, or could reasonably be presumed to have, a conflict between their personal interest in a matter (eg a financial interest or other interest[27]) and the public interest, and
- due to the conflict, the Minister's participation in a decision about the matter might lead to a decision that is contrary to the public interest.[28]

The Bill clarifies that a Minister does not have a declarable conflict of interest in a matter if the conflict of interest arises solely because:

- the Minister undertakes an engagement in their capacity as Minister for a community group, sporting club or similar organisation, and is not appointed as an executive officer[29] of the organisation
- the Minister, or a related party of the Minister, is a member of a community group, sporting club or similar organisation, and is not appointed as an executive officer of the organisation
- the Minister, or a related party of the Minister, is a member of a political party, or
- the Minister, or a related party of the Minister, has an interest in an educational facility or provider of a child care service as a student or former student, or a parent or grandparent of a student of the facility or service.[30]

Additionally, the Bill stipulates that a Minister does not have a declarable conflict of interest in a matter if:

- the conflict of interest arises solely because of the religious beliefs of the Minister or a related party of the Minister
- the Minister, or a related party of the Minister, stands to gain a benefit or suffer a loss because of the conflict of interest that is no greater than the benefit or loss that a significant proportion of persons in Queensland stand to gain or lose, or
- the conflict of interest arises solely because the Minister, or a related party of the Minister, receives gifts from an entity totalling $150 or less during the relevant term for the Minister.[31]

Mr Janetzki MP advised that $150 was chosen as the declarable threshold for gifts because the provisions 'were drafted following the recommendations of Belcarra' and reflect 'what was in the Belcarra related legislation' contained in a government bill at that time.[32]

3.1.2 Definition of a related party

For the purposes of the proposed amendments, the Bill provides that each of the following is a 'related party' of a Minister:

- the Minister's spouse
- a parent, child or sibling of the Minister

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27 Bill, cl 4, s 97A.

28 Bill, cl 4, s 97B.

29 Clause 4, s 97A of the Bill defines an executive officer of an entity as a person who is concerned with, or takes part in, the entity's management, whether or not the person's position is given the name of executive officer.

30 Bill, cl 4, s 97B(2)

31 Bill, cl 4, s 97B(2).

32 Public briefing transcript, Brisbane, 3 February 2020, p 5.

- a parent, child or sibling of the Minister's spouse
- a partner in a partnership in which the Minister is a partner
- an employer of the Minister, other than a government entity
- an entity, other than a government entity, for which the Minister is an executive officer or board member, and
- another person who has a close personal relationship with the Minister.[33]

At the committee's public hearing on the Bill, Mr Janetzki MP expanded on what the term 'close personal relationship' might cover:

> *It will often be in the case of a caring environment, if somebody has a disability, someone is aged or something of that nature. Yes, there is no doubt 'close personal relationship' is — I do not want to say it is the catch-all, but it captures other close personal relationships that may not be defined as a spouse or a de facto*.[34]

The explanatory notes also state that in establishing a criminal offence for failing to make a declaration as outlined above, the Bill would enable such conduct, in certain circumstances, to be considered 'corrupt conduct' as defined in the Crime and Corruption Act.[35] The Leader of the Opposition and Shadow Minister for Trade, on introducing the Bill, stated that 'this will satisfy recommendation 3 of the CCC's assessment' in its media release of 6 September 2019.[36]

3.2 Proposed offence for failing to update statements of interests (*Parliament of Queensland Act 2001*)

The Bill also proposes to amend the POQA to establish a criminal offence to apply to a Minister who fails to comply with the requirements set out in the POQA for Members to update their statements of interests within the required timeframe.[37]

Under the POQA, after Members are elected to Parliament, they are required to provide a statement of interests for themselves and for any related persons[38] within one month of taking their seat.[39] Members must provide these statements to the Clerk of the Parliament in the Clerk's role as Registrar of Members' Interests (Registrar). Information to be included in a statement of interests includes information on matters that may raise, appear to raise, or could foreseeably raise, a conflict between

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33 Bill, cl 4, s 97C.

34 Public briefing transcript, Brisbane, 3 February 2020, p 5.

35 Explanatory notes, p 1. See also Mr David Janetzki MP, Shadow Attorney-General and Shadow Minister for Justice, public briefing transcript, Brisbane, 3 February 2020, p 2. 'Corrupt conduct' is defined in s 15 of the Crime and Corruption Act.

36 Mrs Deb Frecklington MP, Leader of the Opposition and Shadow Minister for Trade, Introductory Speech, Record of Proceedings, Queensland Parliament, 23 October 2019, p 3551. The CCC, in its media release of 6 September 2019, noted that the CCC's jurisdiction relates to corrupt conduct as defined in the Crime and Corruption Act, and that in the absence of any relevant criminal offence, 'Not adhering to the Ministerial Handbook and Cabinet Handbook or other guidance material does not automatically constitute corrupt conduct'. See: CCC, CCC media release, 6 September 2019.

37 Bill, cl 6, s 69B(2A).

38 Section 69A of the POQA defines a 'related person' as: a Member's spouse, or a person who is totally or substantially dependent on the Member and i) the person is the Member's child, or ii) the person's affairs are so closely connected with the Member's affairs that a benefit derived by the person, or a substantial part of it, could pass to the Member.

39 POQA, s 69B.

a Member's private interest and their duty as a Member, such as information on bank accounts held, interests in real estate, and any shares held.[40]

Additionally, s 69B(2) of the POQA provides that a Member must, within one month after becoming aware of a change in the particulars contained in the last statement of interests given by the Member, notify the Registrar in writing of the change.

Currently under the POQA, there is no specific offence provision that applies if a Member fails to comply with these statement of interests requirements, though a contravention of the requirements, or the provision of a statement of interests that is 'false or misleading in a material particular',[41] amounts to a 'contempt of Assembly' for which the Legislative Assembly is empowered to impose on the Member:

- a fine, and
- if the Member defaults on the payment of the fine, a sentence of imprisonment.[42]

The Bill proposes to establish a separate, specific criminal offence that would apply if a member of Cabinet fails to update their statements of interests as required by s 69B(2), with an applicable maximum penalty of 100 penalty units ($13,345).[43]

3.3 Imposing strict liability

The two offences proposed in the Bill are strict liability offences, meaning the offences would apply regardless of whether the contravening conduct was intentional.

In acknowledging the removal of the requirement to establish intent 'that is generally associated with the most serious offences',[44] Mr Janetzki MP advised that this approach had been adopted as it is consistent with the CCC's recommendations,[45] and was considered necessary to restore community 'confidence in the decision-making of the state's executive arm of government'.[46] Mr Janetzki MP explained:

> *… the opposition believes that potential, perceived or actual conflicts of interest should be at the forefront of every minister's mind when they make a decision or, as articulated by the CCC chair, Mr MacSporran, if you introduce the strict liability offence in relation to declarations of conflict plus prescribed interest, updating a register of interest, you set the bar higher for the need to be aware of the obligation to disclose and to update your register and there are serious consequences if you do not do that.*[47]

When asked about the appropriateness of imposing strict liability given the possibility that honest mistakes may be captured under the proposed offences,[48] Mr Janetzki MP acknowledged that imposition of strict liability 'is a serious state of affairs'.[49] Mr Janetzki MP advised that he had considered whether to include a dishonest intent requirement as part of the offences, but observed

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40 Standing Orders, Schedule 2.

41 POQA, s 69B(4).

42 POQA, ss 37-39, 69B.

43 Bill, cl 6, s 69B(2A).

44 Public briefing transcript, Brisbane, 3 February 2020, p 3.

45 Public briefing transcript, Brisbane, 3 February 2020, pp 3, 6.

46 Public briefing transcript, Brisbane, 3 February 2020, p 2.

47 Public briefing transcript, Brisbane, 3 February 2020, p 2.

48 Public briefing transcript, Brisbane, 3 February 2020, pp 4-5.

49 Public briefing transcript, Brisbane, 3 February 2020, p 3.

that the Criminal Code already includes offences for which dishonest intent is required.[50] The Bill, he stated, effectively provides for a tiered system of penalties, in that:

- the proposed strict liability offences with lower penalties would apply in relation to a Minister's failure to disclose a declarable conflict of interest or to update their statements of interests within the required timeframe, and
- the more serious Criminal Code offences (Misconduct in relation to public office and fraud), with applicable maximum penalties involving multiple years of imprisonment, would continue to apply if the requirements were contravened with dishonest intent.[51]

In addition, Mr Janetzki MP stated:

> *In Queensland there are other strict liability offences, whether it be workplace health and safety laws or speeding offences, for instance. The prudential and regulatory environment is the environment most known to me, and the question in a regulatory environment in that regard is about the quality of the information available to the public.*
>
> *… for me our bill, which talks about making sure that interests are declared in cabinet or a cabinet meeting, being a strict liability provision, is in fact analogous to that kind of environment where the best information must be given in a timely way to the people who need to know it. Of course, in that sort of sense it is more a market sense so that the investment community or the finance community can make the best sorts of decisions, but here it is similar in that if you walk into a cabinet room then those members of cabinet should have all the information on the table about what may or may not be a conflict.*
>
> *… I think there is an argument that strict liability is appropriate in these circumstances, and that is what was put forward in this bill.*[52]

Mr Janetzki MP also cited some limited protections available to a Minister under the strict liability offence provisions, to help prevent their being unfairly penalised for a minor and unintentional transgression. Specifically, Mr Janetzki MP noted that:

- if a Minister was suspected to have breached either offence in the Bill, the Director of Public Prosecutions (DPP) would have the discretion to determine whether to charge the Minister, and to decide on an appropriate penalty in the circumstances:

  > *You have a two-step process, really, where the DPP has to make a judgement on the evidence before him or her as to whether a charge would proceed. Then at the second level there would be a question of, 'Well, what is the penalty to be applied here?,' bearing in mind that 100 penalty units is the maximum and zero is the minimum.*[53]

- the Bill includes 'a test that does say 'or ought reasonably to be aware'' (Mr Janetzki MP noted that while there 'will be some circumstances that are just beyond the reasonable belief', there may equally be some circumstances in which a Minister might reasonably have been unaware of the interest and which therefore may not meet this test),[54] and
- the Criminal Code also includes 'the defence of honest and reasonable mistake'.[55]

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50 Public briefing transcript, Brisbane, 3 February 2020, p 7. See s 92A of the Criminal Code, which relates to Misconduct in relation to public office, and s 408C of the Criminal Code, which relates to fraud.

51 Public briefing transcript, Brisbane, 3 February 2020, p 7.

52 Public briefing transcript, Brisbane, 3 February 2020, pp 3-4.

53 Public briefing transcript, Brisbane, 3 February 2020, p 4.

54 Public briefing transcript, Brisbane, 3 February 2020, p 5.

55 Public briefing transcript, Brisbane, 3 February 2020, p 4.

3.4 Stakeholder views

The CCC expressed support for parts of the Bill, while the Queensland Integrity Commissioner (QIC) stated that she 'generally agrees' with the CCC's position.[56] Both of these stakeholders supported the application of strict liability to the proposed offences, with the CCC also commending certain attributes of the Bill as appropriately reflecting the intentions of the CCC recommendations.[57] However, the two integrity entities also identified some technical 'improvements' to the proposed offence provisions.[58]

Other stakeholders, including the QLS, Clerk of the Parliament, Ethics Committee, and Ms Jennifer Menzies (Principal Research Fellow, Griffith University) expressed strong opposition to the amendments. These stakeholders sought to highlight the established system of conventions, regulatory mechanisms and existing offence provisions available to deal with the types of conduct that would be captured by the proposed offences. In addition to arguing that there is a lack of evidence to support the CCC recommendations underpinning the Bill's provisions, these stakeholders warned that the proposed strict liability offences would unfairly penalise honest mistakes, as well as leading to other perverse outcomes.

The positions of these stakeholders are outlined in further detail below.

3.4.1 Crime and Corruption Commission and Queensland Integrity Commission positions

The CCC expressed its support for a number of aspects of the Bill that it considered to be 'more consistent' with its recommendations than equivalent offence provisions contained in the Government Bill.[59]

In addition to commending the strict liability approach engaged for the Bill's two proposed offences (see further discussion of stakeholder views on strict liability at section 3.4.3 of this report), the CCC supported the location of the proposed failure to declare conflict of interest offence provisions in the Criminal Code (rather than in the *Integrity Act 2009*, as was proposed for the equivalent provisions in the Government Bill). The CCC submitted that the inclusion of the provisions in the Criminal Code is 'more reflective of the seriousness of the conduct with which they deal',[60] and further:

> *… would enable all offences involving corruption and abuse of office, including misconduct in relation to public office (s. 92A of the Code) and fraud (s. 408C of the Code), to be grouped in the one place.*[61]

The CCC also commended the 'absence of any requirement for the specific consent of the Director of Public Prosecutions prior to commencing a proceeding for the offences' (as was included in the Government's Bill);[62] and expressed its support for the broad definition of a 'related party' employed in the Bill, which includes, in proposed s 97C(g) of the POQA, 'another person who has a close personal relationship with the Minister'.[63] The CCC stated that proposed s 97c(g) has the advantage of acting as a 'catch-all' for relevant relationships that are not explicitly recognised.[64]

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56 CCC, submission 2, p 7; QIC, submission 3, p 3.

57 Submission 2, p 7.

58 Submission 2, p 7; submission 3, pp 3-4.

59 Submission 2, p 4.

60 Submission 2, p 5.

61 Submission 2, p 5.

62 Submission 2, p 4.

63 Submission 2, p 4.

64 Submission 2, p 4. The CCC noted that the scope of the term 'would be a matter for jurisprudential development'.

However, the CCC also identified that:

- the offence of failing to declare a conflict of interest would be classified as a 'simple offence' under the Bill, and as such would have a one-year time limit from the time the complaint arose. The CCC stated that it supported classifying the offence as a misdemeanour (rather than a crime), because doing so would:
    - recognise the potential lesser culpability in the absence of the requirement to prove dishonest intent, and
    - prevent the prosecution of offences becoming statute-barred where the investigation process takes longer than one year[65]
- the proposed maximum penalties for a failure to declare a conflict of interest (100 penalty units or one year's imprisonment) and failure to update a statement of interests (100 penalty units) are both lower than the penalties proposed in the Government Bill. The CCC stated that it prefers the maximum penalty of 200 penalty units or two years' imprisonment proposed for both of the equivalent offence provisions in the Government Bill, and suggested the Bill would be improved by increasing the penalties to this level[66]
- the Bill's requirement for members of Cabinet to declare conflicts of interest at cabinet meetings is restricted in its application to agenda items at such meetings. The CCC suggested that this is an 'unnecessary' definitional restriction which may mean that the obligation to declare a conflict may not apply to conflicts that become apparent during a meeting.[67] The CCC therefore recommended that the obligation be extended to require Ministers to declare conflicts that become apparent during a meeting of Cabinet or a Cabinet committee,[68] and
- the proposed offence for failing to update a statement of interests applies only to Ministers and not to other Members of Parliament for whom the same register of interest requirements apply. The CCC submitted that it:

    > *… supports the broadening of the proposed section 69B so that the penalty for failing to change or update statements of interests applies to all members of Parliament. This would be in keeping with recommendation 4, would be in the public interest, and would increase confidence in the system of government.*[69]

The QIC, in confirming its general support for the CCC's position, acknowledged the CCC's 'particular expertise based on insights gained from its complaints handling, investigation and corruption prevention functions'.[70] However, the QIC considered that the definition of 'related party' proposed in the Bill could be expanded to include significant non-personal associations, such as if a Minister has an association as:

- the beneficiary of a trust
- a significant shareholder of an entity, and
- a patron of an entity, 'given the unique public perception of patronages'.[71]

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65 Submission 2, p 5.

66 Submission 2, pp 6-7.

67 Submission 2, p 5.

68 Submission 2, p 7.

69 Submission 2, p 6.

70 Submission 2, p 3.

71 Submission 3, pp 3-4.

While noting that the CCC was satisfied with the breadth of meaning that may be given to 'close personal relationship' in proposed s 97C(g), the QIC considered that 'this section may be interpreted as being limited to individual relationships'.[72]

3.4.2 Adequacy of the existing regulatory framework

The CCC's findings of 6 September 2019 highlighted its view that the current system of conventions and regulatory provisions governing the declaration of Ministerial conflicts of interests and the registration of a Minister's interests, are not sufficient to adequately mitigate corruption risks or effectively ensure the maintenance of the standards of ethical leadership that the community expects.[73] In addressing the equivalent offence provisions contained in the Government Bill, CCC Chairperson Alan MacSporran QC particularly identified shortfalls in the enforcement of the Cabinet and parliamentary conventions which apply to these matters, stating that:

> *… with respect, they do not necessarily work. People feel freer, it seems, to ignore the convention and the consequences might be minor, if any. That cannot be in the public interest...*[74]

The CCC's findings of 6 September 2019 emphasised that its jurisdiction relates to corrupt conduct as defined in the Crime and Corruption Act, and that in the absence of any criminal offences applicable to a Minister's failure to declare a conflict of interest or to register their interests, the CCC is not empowered to investigate such transgressions or assist in the enforcement of the expected standards of ethical conduct.[75]

The CCC submitted that its recommendations of 6 September 2019 focussed on:

> *… strengthening the framework and obligations on ministers to declare actual, potential or perceived conflicts of interest, which then allows for the efficient and effective management of these conflicts.*[76]

While acknowledging the flexible nature of the current framework and conventions and their ability to evolve over time, the CCC also maintained that 'legislative processes allow for the evolution of criminal law as all law is continually updated to meet the needs of society'.[77]

A number of other stakeholders took a significantly different view to the CCC, suggesting that there is no evidence to suggest the current regulatory framework is failing to deliver appropriate outcomes, and that the CCC's recommendations for the establishment of criminal offences, and therefore, the offences proposed in the Bill, are unnecessary.

Jennifer Menzies, a Principal Research Fellow at Griffith University, submitted that conventions, including those articulated in a ministerial code of conduct with respect to conflicts of interest, can and often do lead to a Minister disclosing such a potential conflict, with their leader then deciding an appropriate outcome. Ms Menzies noted that if a Minister fails to declare any potential conflict, there are a range of sanctions they may face, and submitted that this process has delivered 'a high level of probity in Cabinet deliberations'.[78] According to Ms Menzies, 'the majority of politicians the majority of times respect the conventions that manage their behaviour'.[79]

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72 Submission 3, p 4.

73 CCC, CCC media release, 6 September 2019.

74 Mr Alan MacSporran QC, Chairperson, CCC, public hearing transcript, Inquiry into the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019, Brisbane, 20 January 2020, p 60.

75 CCC, CCC media release, 6 September 2019.

76 Submission 2, p 5.

77 Submission 2, p 5.

78 Submission 4, p 2.

79 Submission 4, p 3.

If the Bill is passed, Ms Menzies considered that claims that Ministers have breached it could be tested in the courts, and that:

> *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*.[80]

Ms Menzies was also concerned that placing conflict of interest provisions in an Act 'reduces the flexibility that characterise conventions and which allows them to adapt to changing practice over time'.[81]

The QLS, while emphasising that it 'abhors corruption' and 'supports reasonable steps to address and erode corrupt conduct', also considered the two new offence provisions contained in the Bill to be 'unnecessary'.[82] The QLS submitted:

> *There are already two offences in the Criminal Code 1899 which will capture the serious conduct contemplated by these provisions. They are section 92A - Misconduct in relation to public office and section 408C - Fraud. In addition, the broad definition of "corrupt conduct" in section 15 of the* Crime and Corruption Act 2001 *allows the Crime and Corruption Commission to investigate and prosecute practically any matter involving a public official. For less serious behaviour, there again are existing frameworks which can be utilised.*[83]

The QLS also sought to highlight the arguments of the Ethics Committee in the latter's submission on the Government Bill, in which it expressed concerns about a 'lack of evidence offered by the CCC as to the extent and nature of the corruption by the Executive or by Parliamentarians', and secondly, a lack of evidence that its recommendations 'would address any such problem'.[84] In that submission, the Ethics Committee highlighted the findings of an Ethics Committee report of the 54th Parliament:[85]

> *This report summarised seven references received at that time concerning alleged failures to register an interest. In two of these matters there were no interests that required disclosure. In another two matters, while there was an interest that required disclosure there was no intent to dishonestly fail to register it. In three matters, covering two former Members of Parliament, it was found these Members acted with intent in failing to act in accordance with the regime. The Legislative Assembly passed a motion imposing a $90,000 fine and recommendation one Member be expelled from Parliament. Regarding the other Member, the Legislative Assembly passed a motion imposing fines totalling $82,000. Both Members also served custodial sentences.*[86]

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80 Submission 4, p 3.

81 Submission 4, p 3.

82 Submission 5, p 1.

83 Submission 5, p 1.

84 Submission 5, p 2.

85 Ethics Committee, 54th Parliament, *Report No. 149 – Matter of privilege referred by the Registrar on 16 June 2014 relating to an alleged failure to register an interest in the Register of Members' Interests*, October 2014, https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2014/5414T6291

86 Ethics Committee, submission 71 on the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 (Government Bill), February 2020, p 3, https://www.parliament.qld.gov.au/documents/committees/EGC/2019/Electoralexpenditurecaps/submissions/071

The Ethics Committee submitted that this summary of relevant matters highlights that in each of the matters where there was evidence of wrongdoing, the end result was imprisonment. Accordingly, it queried:

> *… 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.*[87]

Rather, the Ethics Committee asserted, the current legislation, guidelines and conventions have not been shown to be insufficient in dealing with failure to declare conflicts of interest – 'in fact, the opposite is true'.[88] The Ethics Committee submitted:

> *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).*
>
> *Mr Nuttall argued to the Parliament that he had 'never knowingly or wrongfully set out to do wrong'. However the Parliament found otherwise.*
>
> *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.*
>
> *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.*
>
> *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.*
>
> *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*

[87] Ethics Committee, submission 71 on the Government Bill, p 3.

[88] Ethics Committee, submission 71 on the Government Bill, p 3.

conduct has not prevented significant penalties, including imprisonment, as can be seen in the cases of Mr Nuttall and Mr Driscoll.[89]

The Ethics Committee further submitted that it considered Members of Parliament generally have a high level of awareness of the importance of integrity matters, given such matters:

… 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.[90]

Additionally, the Ethics Committee advised that it was unable to find evidence of any other Australian jurisdiction criminalising a failure of a Member of Parliament, or Minister, to comply with their disclosure of interest requirements as per the CCC's recommendations.[91] The Ethics Committee noted that in the two international jurisdictions (Wales and Scotland) in which it is aware that it is a criminal offence for Members of Parliament to fail to register an interest, the relevant offence is a summary offence with a maximum penalty of a fine.[92] The Queensland Parliament, it noted, already has the authority under the POQA to impose fines similar to those that can be imposed in Wales and Scotland.[93] Should a Minister engage in corrupt conduct, potentially gaining a personal benefit as a result of their Ministerial position, the Ethics Committee expressed its confidence that existing regulatory provisions 'are sufficient to ensure the high standards of transparency and accountability that the public is entitled to expect of Members of Parliament'.[94]

Noting the arguments outlined by the Ethics Committee, the QLS submitted:

QLS objects to the introduction of new criminal offences without cogent evidence to demonstrate their need and evidence that existing laws are not capable of capturing the conduct which is the target of the offence. There is no evidence of either. In fact, there is evidence to the contrary.[95]

The Clerk of the Parliament also submitted that he would be unable to support any provisions based on the CCC's recommendations – including those contained in the Bill – due to a lack of available evidence to support the CCC's proposals.[96] The Clerk noted that the recommendations were provided in a CCC media release which provided some details of one matter that was the subject of the CCC's assessment, but which did not set out the case for reform in any detail:[97]

There is no evidence of proper policy formulation prior to the CCC's media release. Proper policy formulation would involve policy analysis such as defining the objective (or mischief), considering alternative mechanisms to achieve the objective, choosing a correct policy instrument, consultation etc. The recommendations do not clearly enunciate the objective, evince a considered response to an issue, are not clear and authoritative, do not provide sufficient detail to allow implementation, do not consider resource implications or set out a policy that is legally sustainable or otherwise appropriately enforceable.

In my opinion the CCC's recommendations are purely reactive and are a direct result of the CCC's impotence in one particular matter. There was no consultation with stakeholders, including those

89 Ethics Committee, submission 71 on the Government Bill, pp 3-4.

90 Ethics Committee, submission 71 on the Government Bill, p 8.

91 Ethics Committee, submission 71 on the Government Bill, p 7.

92 Ethics Committee, submission 71 on the Government Bill, p 7.

93 Ethics Committee, submission 71 on the Government Bill, p 8.

94 Ethics Committee, submission 71 on the Government Bill, p 8.

95 Submission 5, p 2.

96 Submission 1, p 12.

97 Submission 1, p 2.

who have practical experience in the area… [T]*he recommendations have no regard for related issues, including the impact on the administration of the registers of interest and important constitutional conventions and structures.*[98]

3.4.3 Imposing strict liability

The CCC commended the strict liability approach engaged for the Bill's two proposed offences as consistent with the CCC's intention for criminal sanctions to be established merely for failing to declare a conflict of interest, regardless of intent.[99] In relation to the proposed Criminal Code offence provisions, the CCC stated that the absence of a requirement to prove dishonest intent is 'adequately mitigated by the requirement to prove knowledge or objectively reasonable knowledge' of the conflict.[100] The CCC also acknowledged the available alternative approach of providing a defence where a Minister could not reasonably be expected to have been aware of the conflict, and highlighted that for any prosecution to proceed, the DPP would first need to assess whether to proceed with a prosecution.[101]

Further, the CCC highlighted the array of materials available to increase Members' awareness of their obligations and reduce the risk of any conflict of interest being overlooked, such as induction programs, the Code of Ethical Standards, and associated guidelines on the Queensland Parliament's website. Additionally, the CCC noted that Members can seek the advice of the Integrity Commissioner on such matters if they wish.[102]

The QIC, in supporting the CCC's position, stated that 'effectiveness and public confidence should be the critical factors in determining the appropriate regulation framework'.[103]

The Queensland Human Rights Commission (QHRC), in a supplementary submission to the committee's inquiry into the Government Bill, explored the human rights implications of the application of strict liability offences. The QHRC advised in that submission that it considered that a case for introducing strict liability offences could be made if, as the CCC concluded, there is a demonstrated and justified need for such provisions to prevent corruption and provide an appropriately high level of probity (particularly in light of the history of corruption in Queensland). The QHRC noted that corruption is a structural obstacle to the enjoyment of human rights, and that disadvantaged groups suffer disproportionately from corruption, as well as it serving to undermine the rule of law.[104]

The QHRC submitted that the work of the Australian Joint Parliamentary Committee on Human Rights (AJPCHR) offers some guidance in considering such offence provisions, with the AJPCHR having 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'; but that strict 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'.[105]

The QHRC noted that the AJPCHR suggested 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.

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98 Submission 1, pp 2-3.

99 Submission 2, p 5.

100 Submission 2, p 4.

101 Submission 2, p 4.

102 Submission 2, p 4.

103 Submission 3, p 3.

104 Queensland Human Rights Commission (QHRC), submission 17a on the Government Bill, pp 1-2, https://www.parliament.qld.gov.au/documents/committees/EGC/2019/Electoralexpenditurecaps/submissions/017a

105 QHRC, submission 17a on the Government Bill, p 2.

The QHRC noted that the AJPCHR also cited the Commonwealth Attorney-General's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, which suggests that strict liability offences may be appropriate where it is necessary to ensure the integrity of a regulatory regime (including for offences of a regulatory nature such as those dealing with failing to comply with reporting obligations).[106] However, the QHRC also noted that the guide cautioned against justifying offences as strict liability offences by reference to broad uncertain criteria, such as offences being against community interests or for the public good, or because doing so would minimise costs.[107]

In relation to the proposed Criminal Code offence, the QHRC noted that while imposing strict liability, the provisions offer some protection through the application of the test that the Minister 'is aware or ought reasonably to have been aware' of the conflict of interest in the matter.[108] The QHRC submitted that in terms of the restriction on the presumption of innocence recognised under s 32 of the *Human Rights Act 2019, this*:

> *… 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.*[109]

The QHRC also stated that the lower maximum penalties proposed in the Bill (as compared to those proposed in the equivalent provisions of the Government's Bill), offer a 'less restrictive option' that may still be consistent with the CCC's recommendation to apply strict liability.[110]

Other stakeholders expressly objected to the proposed offences being strict liability offences, with the Clerk, the Ethics Committee, and the QLS all expressing concern that the application of strict liability in these instances would criminalise Members for genuine mistakes that may be non-material in nature.

The Clerk questioned whether 'we really want to have laws that make Members of Parliament criminals for innocent omissions or mistakes', citing a range of hypothetical examples in which this may be the case. This included:

- a circumstance in which a Member may be generally unaware of an interest (including where the interest relates to the business of a relative), and declares the interest immediately on becoming aware of the interest
- a circumstance in which a Member relies on a professional third party such as an accountant, who provides incorrect advice as to the status of the Member's interests, and
- a circumstance in which a Member makes a mistake in interpreting the requirements of the register (the cited example hinged on the Member's mistaken belief that an exemption from declaration for motor vehicles (because they are registered) would apply also to a registered caravan used by the Member's family for recreational purposes, noting that there is no definition of a motor vehicle in the Standing Orders, but that under Queensland law a caravan is not a motor vehicle except when it is attached to a vehicle).[111]

The Ethics Committee, in its submission on the Government Bill, explained that when determining whether a contempt of the Assembly has been committed, it applies the balance of probabilities as the standard of proof. It noted that this is a lower standard than the 'reasonable doubt' standard required for criminal matters, but stated that 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. The Ethics Committee noted that in the leading High Court authority in the area,

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106 QHRC, submission 17a on the Government Bill, pp 2-3.

107 QHRC, submission 17a on the Government Bill, p 2.

108 QHRC, submission 17a on the Government Bill, p 4.

109 QHRC, submission 17a on the Government Bill, p 4.

110 QHRC, submission 17a on the Government Bill, p 5.

111 Submission 1, pp 5-8.

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'.[112]

To impose strict liability on Members for failing to comply with register of interest requirements, the Ethics Committee submitted, fails to allow for the variance that Latham CJ referenced in *Briginshaw v Briginshaw*, and would instead see a Member who unknowingly failed to register an interest because they were unaware the interest existed, facing the same outcomes as a Member who intentionally failed to disclose an interest for the sole purpose of engaging in corrupt conduct.[113] The Ethics Committee considered such a scenario 'may create an absurd result and injustice for a member'.[114]

The Ethics Committee also highlighted advice from the Clerk during this committee's 2019 Estimates hearing that there can by 'anywhere from 250 to 500 declarations per year'.[115] The Clerk added that when a regular mid-year notice is sent to Members of Parliament reminding them to update their registers of interests:

> *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.*[116]

The Ethics Committee stated that it anticipated that some may interpret the Clerk's evidence as meaning late updates to Members' registers of interests are common, and therefore, that a strict liability offence would be appropriate.[117] However, the Ethics Committee highlighted the wide range of items that require disclosure in the register, including items with a 'very low risk of creating any actual or perceived conflicts' (eg such that updates to the register are required when a Member receives a new debit card, or joins a community association).[118]

The QLS also expressed concern that such offences would apply to 'administrative tasks' like updating a register of interests and that Members may be punished in instances where they had no dishonest intent:

> *"Strict liability" for these offences will effectively mean that an individual is deemed to have committed the offence even if there was no dishonest intention to do so. Such an outcome is not fair and just in these circumstances and abrogates a cornerstone principle which is fundamental to the effective and efficient operation of our legal system.*[119]

3.4.4 Possible perverse outcomes

The QLS and the Clerk also identified that there may a range of unintended adverse consequences of the establishment of the criminal offences proposed by the CCC, and as sought to be implemented by the Bill.[120]

The Clerk submitted in this respect that 'there are at least five perverse outcomes from putting the registers of interest within a criminal regime' to which the CCC does not appear to have had regard in issuing the recommendations which have informed the proposed amendments:[121]

> *(1) In my 2009 submission to the Integrity White Paper I outlined how much more extensive the Queensland Parliament's disclosure regime was compared to other Parliaments. As*

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112 Ethics Committee, submission 71 to the Government Bill, p 6.

113 Ethics Committee, submission 71 to the Government Bill, p 6.

114 Ethics Committee, submission 71 to the Government Bill, p 6.

115 Ethics Committee, submission 71 to the Government Bill, p 4.

116 Ethics Committee, submission 71 to the Government Bill, p 4.

117 Ethics Committee, submission 71 to the Government Bill, p 4.

118 Ethics Committee, submission 71 to the Government Bill, pp 4-5.

119 Submission 5, p 2.

120 QLS, submission 5, p 2; Clerk, submission 1, p 9.

121 Submission 1, p 9.

outlined above, the disclosure regime will need to be reviewed and narrowed to be suitable for a criminal regime. This will mean that the Queensland Parliament's disclosure regime, which benchmarks highly in terms of disclosure may become less transparent.

(2) Currently Members update their register when they realise they have made a mistake or omission. Members who omit to declare a matter through genuine mistake or error are less likely to rectify their disclosure if they know it may highlight a criminal charge.

(3) The Registrar would have an obligation to report members who have failed to declare their interests as required to the CCC as they would have committed a criminal offence in the knowledge of the Registrar.

(4) Consequent to (2) and (3), if the Registrar (currently the Clerk) is to become an enforcer by default, and members are not willing to disclose errors, then considerable wider harm will befall the Parliament's ethics regime. The contact that members have with the Clerk regarding the registers of interests and other matters of disclosure and procedure enhances, rather than diminishes the ethics of the entire Parliament.

(5) The Ethics Committee will be effectively sidelined by the criminal regime as regards the registers of interest… [T]*he CCC will become the arbitrator of disclosure and whether Members should be charged with criminal offences.*[122]

In terms of broader impacts on the administration of the registers of interest, further, the Clerk, as Registrar, submitted:

- if criminal offences are to be introduced, then as a prelude the register of interest requirements would need to be rewritten and narrowed to ensure there is no subjectivity and that there cannot be confusion or mistake about disclosure requirements[123]
- most communications with Members about the requirements of the register of interest involve simple matters and are currently predominantly oral, with written advice provided only for complicated matters where the Registrar insists on this. If the registers are to be brought within a criminal regime, the Registrar would need to insist upon written requests for advice and to issue written advice in all matters, meaning the administration of the register would increase 'exponentially', and
- defences to any offence should include reliance on advice provided by the Registrar.[124]

The Clerk also raised broader concerns about the further expansion of the CCC's criminal jurisdiction over Members, identifying a risk that the discretionary enforcement of such provisions by the CCC may undermine public confidence in the CCC by 'increasing its involvement in political matters that should be dealt with by the system of responsible government'.[125]

The Clerk submitted there has been an erosion of Ministerial responsibility – a convention 'of responsible government'[126] – in recent decades, which can be partly attributed to governments' propensity to refer matters to the CCC (and its predecessors) that are probably not in the CCC's mandate, as an alternative to committing to the concept of ministerial responsibility.[127] The Clerk explained:

The CCC's "assessment" of such matters usually takes many weeks. If it is escalated to an "Investigation" it will generally take longer. Generally Ministers only stand aside if a matter

122 Submission 1, p 9.

123 Submission 1, p 9.

124 Submission 1, p 9.

125 Submission 1, p 2.

126 Submission 1, p 11.

127 Submission 1, p 11.

> *reaches the declared threshold of "investigation". Whilst the matter is under CCC "assessment" the political heat in the matter usually dissipates. The government usually refuses to discuss the matter or answer questions because it is under CCC assessment. When the CCC responds that there is no corrupt conduct in terms of its jurisdiction {as it usually does), the government proclaims the minister has been "cleared", when in fact what has been resolved is the matter is not within the CCC's jurisdiction. Meanwhile the CCC has taken to not providing reports and, without a report, the complete facts determinable by the evidence provided to the CCC often remains confidential or unknown.*[128]

The Clerk submitted that if the CCC's recommendations of its 6 September 2019 media release are implemented – including the two recommendations addressed by the Bill – this will:

> *… exasperate this routine. The jurisdiction of the CCC over members of parliament will increase significantly. As I have highlighted above, there is a real risk of members breaching disclosure requirements for immaterial matters or without criminal intent. It is inevitable that the ludicrousness of prosecuting members for minor and immaterial matters or even delay will have to occur. There will be in turn be increased discretionary enforcement of penal provisions by the CCC. This increase in discretionary enforcement will undermine public confidence in the CCC itself, as will its overall increasing involvement in political matters that should be dealt with by the system of responsible government.*[129]

3.5 Mr Janetzki MP's response

In response to issues raised in submissions, Mr Janetzki MP welcomed 'the CCC's acknowledgement that this Bill is more consistent with the CCC's recommendations' than the Government Bill. Mr Janetzki MP was 'pleased to note aspects of the Bill the CCC considers best achieve the intent of their recommendations', such as 'the Bill's ability to reflect the seriousness of failing to declare conflicts of interest'.[130]

Mr Janetzki MP also welcomed the QIC's support for the CCC's recommendations.[131]

Committee comment

The committee notes the support for aspects of the Bill from the Crime and Corruption Commission and the Queensland Integrity Commissioner.

The committee also notes the views expressed by other stakeholders about a lack of evidence to support the CCC recommendations underpinning the proposed amendments, as well as the potentially adverse consequences of establishing a strict liability regime, including with respect to the interactions of such a regime with the broader regulatory framework governing the disclosure of interests.

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128 Submission 1, p 11.

129 Submission 1, p 12.

130 Mr David Janetzki MP, correspondence, 6 March 2020, p 1.

131 Mr David Janetzki MP, correspondence, 6 March 2020, p 1.

4 Compliance with the *Legislative Standards Act 1992*

4.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' (FLPs) are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

It is the committee's role to consider whether a bill has sufficient regard to the FLPs articulated in the LSA, and to advise the Legislative Assembly accordingly. Where the committee identifies a possible breach of those principles, it considers and advises on whether the potential breach may be justified in the context of the objectives of the proposed legislation.

The committee has examined the application of the FLPs to the Bill and identified that clauses 4 and 6 raise potential FLP issues. The committee's consideration of, and commentary on, these issues is outlined below.

4.1.1 Rights and liberties of individuals

4.1.1.1 Penalties – Proportion and relevance

Clauses 4 and 6 of the Bill insert new offences and penalty provisions in the Criminal Code and POQA respectively which affect the rights and liberties of individuals.

Specifically, cl 4 inserts new s 97D in the Criminal Code, which provides that if a matter is to be discussed at a meeting of Cabinet or a Cabinet committee, and a Minister is aware or ought reasonably to be aware that they have a declarable conflict of interest in the matter, the Minister must inform the meeting of the conflict.[132] A failure to do so would be an offence, with a maximum penalty of 100 penalty units ($13,345) or one year's imprisonment.

Clause 6, which amends s 69B of the POQA, also establishes an offence with a maximum penalty of 100 penalty units ($13,345), to apply where a Minister fails to notify a change in their statement of interests within one month of becoming aware of the change. Currently, such a failure constitutes a contempt of the Assembly for which the Assembly may decide to fine the person or impose imprisonment on default of the fine,[133] but for which no such offence provision applies.

Whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example, penalties and other consequences imposed by the legislation are proportionate and relevant to the actions to which the consequences relate.[134]

The Office of the Parliamentary Counsel's (OQPC's) *FLP Notebook* emphasises that penalties should be proportionate to the offence:

> *In the context of supporting fundamental legislative principles, the desirable attitude should be to maximise the reasonableness, appropriateness and proportionality of the legislative provisions devised to give effect to policy.*

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132 Bill, cl 4, s 97D (Criminal Code).

133 POQA, s 69B (Statements of interests) (see Notes); s 39 (Assembly's power to deal with contempt).

134 Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental Legislative Principles: The OQPC Notebook*, p 120.

> *… Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.*[135]

The explanatory notes make no reference to the penalties contained in the Bill, or to any equivalent penalty provisions in other legislation.

However, at the public briefing, Mr Janetzki MP stated of the proposed penalties:

> *The bill that has been put forward reflects the recommendations of the CCC… The reflection of the seriousness of any potential offence against provisions of this bill is in fact detailed in the penalty provisions. The maximum penalty for an offence of that nature is limited to 100 penalty units.*[136]

Mr Janetzki MP also noted that the penalty provisions align with similar obligations and offences proposed for mayors and councillors in the government's recent Operation Belcarra reforms (Local Government Electoral (Implementing Stage 2 of Belcarra) and Other Legislation Amendment Bill 2019), but which were subsequently omitted prior to the passing of that bill in October 2019.[137]

4.2 Explanatory notes

Part 4 of the LSA requires that an explanatory note be circulated when a bill is introduced, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the Bill on its introduction in the Legislative Assembly. The notes generally contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

However, the committee identified some shortcomings in terms of the level of detail provided in explaining some provisions and assessing the Bill's consistency with FLPs, as well as with the clarity and accuracy of language used to describe a particular amendment.

4.2.1 Clear and precise language

Section 23 of the LSA, which sets out the information required to be included in the explanatory notes for a Bill, states that the required information must be presented in 'clear and precise language'.[138]

The committee noted that the explanatory notes to the Bill, under the heading 'Achievement of policy objectives', state that the Bill would create:

> *… a criminal offence to apply to a member of Cabinet who fails to comply with the requirements of the statement of interests by not informing the Clerk of Parliament of the particulars of an interest or the change to an interest within one month after the interest arises or the change happens*.[139] (emphasis added)

The Leader of the Opposition, in her introductory speech, also referred to the Bill's creation of an offence applicable to members of Cabinet for:

> *… not informing the Clerk of parliament of the particulars of an interest or the change to an interest within one month after the interest arises or the change happens*.[140] (emphasis added)

However, the proposed s 69B(2A) offence created by cl 6 of the Bill only creates an offence if the change was not notified under s 69B(2) of the POQA, which requires the interest or change to the

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135 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 120.

136 Public briefing transcript, Brisbane, 3 February 2020, p 3.

137 Public briefing transcript, Brisbane, 3 February 2020, p 5.

138 LSA, s 24(1).

139 Explanatory notes, p 1.

140 Queensland Parliament, Record of Proceedings, 23 October 2019, p 3551.

interest to be notified *within one month of the member becoming aware of the interest* (rather than simply within one month of the interest arising or the change happening).

At the public briefing on the Bill, Mr Janetzki MP confirmed that offence provision is intended to apply to non-compliance with s 69B, and therefore, that the timeframe for reporting relates to the Member's awareness of the interest or change in interest as referenced in s 69B, rather than simply the existence of the interest or change in interest.[141]

The committee considers that the statements in the explanatory notes therefore did not communicate the nature of the proposed amendments in a 'clear and precise way'. However, the committee notes the clarification Mr Janetzki MP provided during the public briefing with respect to the intended operation of the proposed amendments.

4.2.2 Consistency with fundamental legislative principles

Section 23(1)(f) of the LSA requires explanatory notes to provide:

> *… a brief assessment of the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.*

Under the heading *Consistency with fundamental legislative principles,* the explanatory notes state only that:

> *The Bill is generally consistent with fundamental legislative principles as outlined in section 4 of the* Legislative Standards Act 1992.[142]

A statement that a Bill is 'generally' consistent implies that the Bill is not wholly consistent with the FLPs, but the explanatory notes do not detail any inconsistency, nor provide any reasons for inconsistency. In this respect, the statement does not meet the statutory requirement in s 23(1)(f) of the LSA.

To comply with that requirement, explanatory notes should either (depending on the factual position) state that a Bill is consistent with FLPs, or set out any areas of inconsistency, including providing reasons for any inconsistency.

4.2.3 Notes on provisions

Section 23(1)(h) of the LSA requires explanatory notes to provide 'a simple explanation of the purpose and intended operation of each clause of the Bill'.

Under the heading 'Notes on provisions', the explanatory notes state in part:

> *… Clause 4 inserts a new part 3, chapter 13A (Ministers' conflicts of interest)…*
>
> *… Clause 6 amends section 69B (Statements of interests).*
>
> *Clause 7 inserts a new chapter 10, part 9* (Criminal Code and Other Legislation (Ministerial Accountability) Amendment Act 2019[])].[143]

These statements are quite general and, while they state what each of those clauses does, they arguably fall short of providing an explanation of the purpose and operation of the clauses.

For example, the new part of the Criminal Code inserted by cl 4 adds four new sections, including a new offence. The new chapter added to the POQA by cl 6 also inserts a new offence. While some general information about the objectives of the amendments is provided in the explanatory notes, very limited details are provided as to the specific aims and nature of the different clauses.

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141 Public briefing transcript, Brisbane, 3 February 2020, pp 1-2.

142 Explanatory notes, p 2.

143 Explanatory notes, p 3.

The committee considers that the provision of more detailed explanation in the 'Notes on provisions' would have aided understanding of the operation of the provisions and more appropriately fulfilled the requirements of s 23(1)(h) of the LSA.

Appendix A – Submitters

Sub #	Submitter
001	The Clerk of the Parliament, Queensland
002	Crime and Corruption Commission
003	Queensland Integrity Commissioner
004	Jennifer Menzies
005	Queensland Law Society

Appendix B – Witness at the public briefing

- Mr David Janetzki MP, Member for Toowoomba South, Shadow Attorney-General and Shadow Minister for Justice

Statement of Reservation

NON-GOVERNMENT STATEMENT OF RESERVATION

The LNP Members of the Economic and Governance Committee wish to make the following Statement of Reservations and concerns regarding the Ministerial Criminal Code and Other Legislation (Ministerial Accountability) Amendment Bill 2019.

The LNP members of the Committee **(the Committee)** support the intent of the *Criminal Code and Other Legislation (Ministerial Accountability) Amendment Bill 2019* **(the Bill)**.

On 6 September 2019, the Crime and Corruption Commission **(CCC)** released a statement identifying several areas for improvement to ensure conflicts of interest are declared and managed more effectively to reduce the risk of corruption. The Bill is designed to respond to the CCC's recommendations to strengthen the framework and obligations on Ministers to ensure that the disclosure of actual, potential and perceived conflicts of interests occur.

The Bill was welcomed by the CCC, which acknowledged that it was more consistent with the CCC's recommendations than the Palaszczuk Labor government's *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019*.

The LNP is committed to restoring public trust and confidence in elected officials in state government. Public trust and confidence is fundamental to maintaining the integrity of government. Without it, our democratic institutions are brought into disrepute.

Ray Stevens
Deputy Chair of Economics and Governance Committee
State Member for Mermaid Beach

Sam O'Connor
Member for Bonney

Dan Purdie
Member for Nlnderry