

Crime and Corruption Amendment Bill 2020

Explanatory Notes

Short title

The short title of the Bill is the Crime and Corruption Amendment Bill 2020 (the Bill).

Policy objectives and the reasons for them

Summary of the Bill

The policy objectives of the Bill are to amend the *Crime and Corruption Act 2001* (CC Act) to implement the recommendations of the Crime and Corruption Commission (CCC) relating to the publicising of allegations and complaints in the following reports:

- *Publicising allegations of corrupt conduct: Is it in the Public Interest?*, December 2016 (CCC's 2016 report); and
- *An investigation into allegations relating to the appointment of a school principal*, July 2020 (CCC's 2020 report).

CCC's 2016 report

As highlighted in the CCC's 2016 report, whether publicising allegations of corrupt conduct is in the public interest has been the subject of debate since 1992.¹ The CCC's inquiry closely examined the arguments dominating this debate, as well as reviewing existing Queensland legislation, previous reviews of the Queensland approach, the approaches taken in other Australian jurisdictions and relevant CCC data.

The CCC's 2016 report recommended that the government consider making it an offence for any person to publicise:

- a) allegations of corrupt conduct against a councillor or candidate during a local government election period; or
- b) the fact that a complaint (whether or not it involves corrupt conduct) has been, will be or may be made to the CCC against a councillor or candidate during a local government election period

without first notifying the CCC and allowing the CCC at least three months to determine whether the allegations have merit.²

¹ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 1.

² Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 32.

As noted by the CCC, ‘Publicising untested allegations involving public sector organisations and officials can also unfairly damage the public’s trust in their institutions of government. The institution of local government, and by extension democratic government, is being damaged by the high number of baseless allegations being made against councillors and individuals seeking election’.³

While the CCC acknowledged public discussion and debate are important elements of open, transparent and accountable government, having regard to relevant data, it stated it is open to conclude that a large number of allegations received by the CCC in the lead up to local government elections are baseless and merely designed to effect electoral damage on political opponents. The CCC observed that confidence in it can be ‘undermined when it is required to deal with allegations that, on their face, appear to have reputational damage as their goal and attempt to leverage the involvement of the CCC to achieve this’.⁴

The CCC stated that given it ‘prioritises the assessment of politically sensitive matters in the public interest, it is also of concern that significant assessment resources are directed to baseless matters and diverted from other potentially more important matters’.⁵ The CCC was also concerned that the tendency for allegations of corruption engaged in by councillors to be publicised in the media means that corrupt individuals get advance warning that they are being scrutinised by the CCC and can destroy or fabricate evidence. As highlighted by the CCC, it will not know whether or not an investigation is baseless, or has been irreparably compromised by the publication of an allegation, without first investing time and resources into an investigation.⁶

The CCC also considered the particular impacts of digital and new media, noting that the risk of damaging a person’s reputation arising from the publication of a baseless allegation was ‘amplified in contemporary society where mass communication methods mean that allegations are instantaneously and widely transmitted, and stay on the public record in perpetuity’.⁷

CCC’s 2020 report

The CCC’s 2020 report details an investigation into a Department of Education recruitment process for the selection of a principal at the new Inner-City South State Secondary College following an allegation that the then Deputy Premier interfered with the recruitment process. In comments made about its investigation process, the CCC observed:

³ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 30.

⁴ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 26.

⁵ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 30

⁶ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 29.

⁷ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 30.

*‘This investigation was not simple. It involved the utilisation of various investigative methodologies executed in circumstances where the allegations were in the public domain. Such a situation is less than ideal and can impede investigations, as those who may be subject to the investigation are, you might say, “put on alert” and may seek to prepare their “story” or destroy evidence’.*⁸

At paragraph 668 of the CCC’s 2020 report, the recommendation from the CCC’s 2016 report is noted and at paragraph 668 the CCC recommended this proposal be implemented and extended to the state government election period.⁹

In making these recommendations the CCC repeated observations it had made publicly in a previous media statement, as follows:

*‘It is the CCC’s longstanding position that it is always the preference for complaints and other correspondence relating to assessments and investigations to remain confidential so matters can proceed without allegations being aired publicly. Publication of a complaint or correspondence may compromise how effective inquiries undertaken by the CCC can be, especially when potential witnesses have advanced warning. The publication of a complaint can also lead to unsubstantiated allegations being aired publicly, and may give the appearance a complaint is motivated for political gain or other reasons’.*¹⁰

Achievement of policy objectives

To achieve its objectives of implementing the CCC’s 2016 report and CCC’s 2020 report relating to the publicising of allegations and complaints, the Bill will amend the CC Act to make it an offence to publish:

- a corrupt conduct allegation about a candidate for a State election during the election period for the election; and
- a corrupt conduct allegation about a candidate for a local government election during the election period for the election.

The offences will carry a maximum penalty of 50 penalty units or six months imprisonment.

Consistent with the CCC’s 2016 report, the amendments in the Bill also provide for a related statutory injunction power.¹¹

⁸ Crime and Corruption Commission, *An Investigation into allegations relating to the appointment of a school principal* (2020) 8.

⁹ Crime and Corruption Commission, *An Investigation into allegations relating to the appointment of a school principal* (2020) 85.

¹⁰ Crime and Corruption Commission, *An Investigation into allegations relating to the appointment of a school principal* (2020) 85.

¹¹ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 33.

Corrupt conduct allegation

The Bill includes a definition of corrupt conduct allegation which addresses both complaints and allegations of corrupt conduct consistent with the CCC's 2016 report. Corrupt conduct is defined in section 15 of the CC Act.

Definition of 'publish'

The definition of 'publish' under the Bill is intended to target publication that has the potential to deliver information to a mass audience. The definition covers newspaper, radio or television or other electronic or printed forms of mass media. This reflects the concerns raised in the CCC's 2016 report in relation to the particular impacts of digital and new media.¹²

Consistent with the CCC's 2016 report, it is not intended the offence would prevent people from accessing legal advice or discussing their views in ordinary social discourse.¹³

Definition of 'candidate'

The definition of 'candidate' under the Bill is intended to include those people who nominate to be a candidate under relevant electoral legislation, incumbent Members of the Legislative Assembly and councillors and those people who otherwise announce or publicly indicate an intention to be a candidate.

Notifying the CCC

Where a person has made or notified a complaint to the CCC or notified the CCC of the intention to publish an allegation, and three months have passed, the offences do not apply. This reflects the recommendation in the CCC's 2016 report that it should be an offence for any person to publicise an allegation or the fact of a complaint without first notifying the CCC and allowing the CCC at least three months to determine whether the allegations have merit.

Alternative ways of achieving policy objectives

There are no alternative ways to achieve the policy objectives.

Estimated cost for government implementation

Any costs arising from the amendments will be met from within existing resources or considered through normal budget processes.

Consistency with fundamental legislative principles

¹² Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 30.

¹³ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 32.

The fundamental legislative principles (FLPs) include requiring that legislation has sufficient regard to the rights and liberties of individuals (section 4(2)(a) of the *Legislative Standards Act 1992*) (LSA) and the institution of Parliament section 4(2)(b) of the LSA.

Rights and liberties of individuals – s 4(2)(a)

Human rights (Clauses 3 and 5)

The amendments in new section 216B and the injunction provisions under new sections 344A to 344C of the CC Act engage a number of human rights including the rights to freedom of expression, taking part in public life, privacy and reputation, and the right to a fair hearing. The extent to which these rights are considered to be limited by the provisions in the Bill is addressed in the Statement of Compatibility with Human Rights.

Strict liability (Clause 3)

The offences do not include an element of intent or knowledge. An FLP issue may arise where legislation that defines criminal liability does not require proof of specific intent in appropriate cases.

While proof of intent was required under the common law, the Queensland Criminal Code, which replaced the common law concerning criminal liability, does not generally require proof of intent for Queensland offences.¹⁴

Under the Bill, the prosecution will be required to prove beyond reasonable doubt the fact of publication of a corrupt conduct allegation and that a particular person was responsible for the publication. In light of the short period of time in which the offences operate (i.e. during an election period), it is considered that any additional requirement to prove an individual's intention in relation to publication would be overly onerous for the prosecution.

The CCC in the context of prosecutions related to the making of complaints that are vexatious, not in good faith, mischievous, reckless or malicious highlighted the unlikelihood of achieving successful prosecution outcomes due to the difficulties associated with identifying the people responsible and proving their state of mind.¹⁵

The offences in this Bill are designed to avoid the difficulties inherent in proving an element of intention. It is also noted that there are a number of existing publication offences included within the Queensland statute book under which strict liability is imposed,¹⁶ including existing section 202 in the CC Act relating to publication of information in the absence of authorisation.

¹⁴ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, 124 – 5.

¹⁵ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 31.

¹⁶ For example, sections 304 and 307Q of the *Adoption Act 2004* and section 181 of the *Electoral Act 1992*.

The offences in the Bill will also operate subject to the existing defences and excuses in the Criminal Code.

Proportionality of penalties (Clause 3)

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, consequences are proportionate and relevant to the actions to which the consequences are applied by the legislation. Legislation must impose penalties which are proportionate to the offence.

The amendments in the Bill create two new offences relating to publishing:

- a corrupt conduct allegation about a candidate for a State election during the election period for the election; and
- a corrupt conduct allegation about a candidate for a local government election during the election period for the election.

The maximum penalty for both offences is 50 penalty units or six months imprisonment.

The penalties for these offences are considered proportionate and relevant to the action to which they apply, taking into account comparable existing offences, including those already in the CC Act.

While there is an inconsistency of penalties across the CC Act, and other similar offences carry a higher penalty (for example, under section 213 (Secrecy)), the lower penalties under the Bill are considered appropriate given that the offences do not similarly require an element of ‘wilfulness’.

Freedom of speech and the implied constitutional right to communication on matters of government and politics (section 4(2))

Since the High Court decision in *Lange v Australian Broadcasting Commission* [1997] 189 CLR 520 there has been the implied right to communication about government or political matters in the Commonwealth Constitution. However, the implied freedom is not absolute.

It is noted that freedom of speech issues were considered in the CCC’s 2016 report.

Consultation

In June 2016, the CCC invited public submissions on a discussion paper titled *Making allegations of corrupt conduct public: Is it in the public interest?* Eighty-two written submissions were received from legal stakeholders, academics, members of the public, interest groups, local councils and Queensland Government agencies.¹⁷

¹⁷ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) Appendix 1: List of submissions.

In October 2016, the CCC invited 22 people who had made written submissions and whose opinions represented the range of views put forward to participate in a public forum to further explore key issues.¹⁸ The CCC also reviewed relevant legislation, previous reports, CCC data and conducted staff focus groups to explore the impact of publicity on CCC processes.

The CCC's 2016 report notes that the key arguments put forward by those in favour of publicising allegations of corrupt conduct (including most media groups) were that:

- the public has a democratic 'right to know';
- open discourse informs opinions and supports democratic participation;
- it provides a 'check and balance' on the CCC's performance;
- it provides greater scrutiny of the process of investigating allegations (seen as particularly important in the context of the practice of devolving complaints to agencies complained about to investigate themselves);
- it will bring others forward to report their concerns (e.g. media attention that led to the Fitzgerald Commission of Inquiry); and
- it is reasonable that elected officials and candidates should be subjected to greater accountability and scrutiny than ordinary individuals.

The key arguments put forward by those against publicising allegations of corrupt conduct (including the Queensland Law Society, Local Government Association of Queensland, local governments, and the Queensland Council for Civil Liberties) were that:

- it risks longstanding reputational damage for individuals, noting digital media can be far more widespread and does not disappear from the public record;
- it risks reputational damage for agencies and organisations, not just individuals;
- it undermines investigation processes by alerting the subject of allegations and other parties involved who can then destroy evidence or concoct false versions of events;
- limits investigative options, particularly covert strategies;
- encourages baseless allegations to be made for political gain; and
- may have a prejudicial effect that erodes the possibility of a fair trial.

This consultation informed the CCC's recommendations which are addressed in the Bill.

The CCC was consulted on a draft of the Bill.

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland and is not uniform with, or complementary to, legislation of the Commonwealth or another state.

However, all Australian jurisdictions have provisions allowing their respective integrity commissions to have certain information be treated confidentially (similar to the CCC's existing provisions).

¹⁸ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) vii and 2.

While no other Australian jurisdiction has a specific offence relating to publicising allegations of corrupt conduct during an election period, section 56 of the South Australian *Independent Commissioner Against Corruption Act 2012* (ICAC Act) makes it an offence for a person to publish, without the authority of the Commission or a court hearing proceedings for an offence against the ICAC Act, any information relating to a complaint, report, assessment, investigation or report under the ICAC Act, where the information published might enable certain people associated with the complaint etc (including the subject) to be identified. The concept of ‘publish’ under section 56 includes publication by newspaper, radio or television as well as the ‘internet or other electronic means of creating and sharing content with the public or participating in social networking with the public’.¹⁹

¹⁹ ICAC Act 2012 (SA) s 4.

Notes on provisions

Clause 1 provides that, when enacted, the Bill will be cited as the *Crime and Corruption Amendment Act 2020* (the Act).

Clause 2 states that the Act amends the *Crime and Corruption Act 2001* (CC Act).

Clause 3 inserts a new section 216B (Unlawfully publishing corrupt conduct allegations during election periods) after existing section 216A.

Subsection (1) in new section 216B makes it an offence for a person to publish a corrupt conduct allegation about a candidate for a State election during the election period for the election. Subsection (2) in new section 216B makes it an offence for a person to publish a corrupt conduct allegation about a candidate for a local government election during the election period for the election.

Each offence carries a maximum penalty of 50 penalty units or 6 months imprisonment.

Subsection (3) provides that liability under subsections (1) and (2) does not apply if the publication of the corrupt conduct allegation occurs at least three months after: (a) the complaint was made or notified to the commission (for a corrupt conduct allegation identifying a relevant complaint); or (b) the commission was notified of the person's intention to publish the allegation.

Subsection (4) provides that subsections (3)(a) and (b) apply whether the notification or complaint was made before or after commencement of the Act.

Subsection (5) provides that new section 216B does not limit another provision of the CC Act or another law that restricts the publication of a corrupt conduct allegation.

Subsection (6) provides definitions for the following terms for new section 216B: 'candidate'; 'corrupt conduct allegation'; 'election period'; 'local government election'; 'publish'; 'relevant complaint'; and 'State election'.

'Candidate', for either a State or local government election, is defined as a person who holds an office to be contested in the election, or a person who has publicly indicated their intention to be a candidate for the election, or a person who has nominated to be a candidate under an Act applying to the election (including for example the *Electoral Act 1992*).

'Corrupt conduct allegation' is defined as a statement that indicates that a relevant complaint has been, or is proposed to be, made or notified to the commission (paragraphs (a) and (c)), or a statement that identifies the subject matter of a complaint made or notified to the commission (paragraph (b)), or a statement that alleges a person is, may be, or has been involved in corrupt conduct (paragraph (d)).

The definition of 'relevant complaint' means a complaint about a person that involves, or may involve, corrupt conduct of the person. Corrupt conduct is defined under existing section 15 of the CC Act.

The definition of ‘*election period*’ refers to the relevant periods under the *Electoral Act 1992* and the *Local Government Electoral Act 2011*.

The definition of ‘*local government election*’ refers to the *Local Government Electoral Act 2011*, Schedule 2.

The definition of ‘*publish*’ means publicly disclosing a corrupt conduct allegation or causing a corrupt conduct allegation to be publicly disclosed, by using either newspaper, radio or television or other electronic or printed media for communicating to the public or participating in social networking with the public. It is not intended the offence would prevent people from accessing legal advice or discussing their views in ordinary social discourse.

‘*State election*’ is defined as an election of a member or members of the Legislative Assembly.

Clause 4 amends the heading of existing section 344 (Injunctions) to insert, after ‘Injunctions’, the words ‘for contraventions of s 212’ consequential to the amendments in clause 5.

Clause 5 inserts a new sections 344A to 344C after existing section 344.

New section 344A (Applications for injunctions for contraventions of s 216B) creates a new statutory right to apply for an injunction.

Subsection (1) provides for the circumstances in which the statutory right for an injunction under new section 344A will be available. An injunction may be applied for where a person has engaged, is engaging or is proposing to engage in conduct that constitutes or would constitute an offence of unlawfully publishing corrupt conduct allegations during an election period under new section 216B. In order to apply for an injunction the CCC, or candidate, must have reasonable grounds to believe that an injunction would mitigate any adverse effect on the CCC or the candidate to whom the conduct relates.

Subsection (2) provides that an injunction is available to the CCC or a candidate during the election period to which the conduct for the offence relates. It also provides that the application for the injunction may be made to the District Court.

Subsection (3) outlines the types of injunctions the District Court may grant, namely an injunction to stop the person from engaging in the conduct that constitutes or would constitute an offence under section 216B, or to require the person to do anything else that the court considers desirable.

Subsection (4) allows the District Court to grant an interim injunction until the application is finally decided.

Subsection (5) confirms that the powers to make an injunction under new section 344A do not limit any other powers of the District Court.

Subsection (6) provides that where the CCC applies for an injunction the court need not require any undertaking from the CCC as to damages or costs.

New section 344B (Injunctions if s 216B proceeding started) provides a Magistrates Court with the power to grant an injunction in circumstances where offence proceedings under section 216B have started in the Magistrates Court.

Subsection (1) provides that in order for the section to apply the proceedings for the 216B offence must have started in the election period to which the proceeding relates.

Subsection (2) allows the magistrate to constitute the court to consider whether an injunction should be made.

Subsection (3) provides that the magistrate may grant an injunction to stop the person from engaging in the conduct to which the section 216B proceedings relate or to require the person to do anything else which the court considers is desirable.

Subsection (4) provides that the magistrate may act on the magistrate's own initiative to grant the injunction or on application by the prosecution.

Subsection (5) indicates the circumstance in which subsection (6) will apply, namely where a section 344A injunction proceeding has started in the District Court; and the proceeding relates to the same conduct to which the section 216B proceeding relates.

Subsection (6) provides that the District Court may transfer any existing proceeding in relation to an application for an injunction made under section 344A to the Magistrate Court.

Subsection (7) provides that if the District Court orders the transfer of injunction proceedings under subsection (6), the registrar of the District Court must send to the clerk of the relevant Magistrates Court a copy of the order and any record of the hearing of the section 344A injunction proceeding.

Subsection (8) defines the terms 'section 216B offence proceeding' and 'section 344A injunction proceeding' for the purpose of new section 344B.

New Section 344C (Hearing and deciding s 344A or 344B injunctions) sets out procedural matters applying to injunctions under new sections 344A or 344B.