

Crime and Corruption Amendment Bill 2020

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, Yvette D'Ath, Attorney-General and Minister for Justice and Leader of the House make this statement of compatibility with respect to the Crime and Corruption Amendment Bill 2020 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the *Human Rights Act 2019* (HR Act). I accept that there may be an alternative view as to the compatibility of the Bill, however, it is my view that the amendments in the Bill are compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Bill makes amendments to the *Crime and Corruption Act 2001* (CC Act) to prohibit the publicising of allegations of corrupt conduct and complaints made to the Crime and Corruption Commission (CCC) during a local and state government election period.

In December 2016, the CCC released a report titled *Publicising allegations of corrupt conduct: Is it in the Public Interest* (the 2016 report). The 2016 report, which was initiated by the CCC, recommended the government consider making it an offence for any person to publicise: allegations of corrupt conduct against a councillor or candidate during a local government election period or 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.

In July 2020, the CCC report titled *An investigation into allegations relating to the appointment of a school principal* was tabled in State Parliament (the 2020 report). The 2020 report reiterated the CCC's previous recommendation that a proposed new offence be established in relation to publicising allegations of corrupt conduct during a local government election period, and recommended it be also extended to the state government election period.

The amendments in the Bill closely follow the recommendations made by the CCC by creating new offences relating to publication of allegations of corrupt conduct and complaints (including complaints that will or may be made). The amendments also include provisions for the issuing of injunctions relating to a contravention of the new offences consistent with the CCC's recommendation in the 2016 report that an aggrieved councillor, candidate or the CCC would have a statutory right to obtain an injunction to restrain any person from further publishing the allegations during the relevant periods.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human rights relevant to the Bill are:

- freedom of expression (section 21 of the HR Act);
- taking part in public life (section 23(1) of the HR Act);
- privacy and reputation (section 25 of the HR Act); and
- fair hearing (section 31 of the HR Act).

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

(a) the nature of the right

Freedom of expression (section 21 of the HR Act)

The right to freedom of expression is ‘one of the essential pillars of a democratic system of government, because it enables citizens to freely and effectively participate in the political, social, economic and other affairs of their community’.¹ It protects the right of all persons to hold an opinion without interference and the right of all persons to seek, receive and express information and ideas, including verbal and non-verbal communication. The forms of protected expression are broad, and include expression that is oral, written, print, art or in any other medium. Any act that would be perceived by reasonable members of the public as trying to convey some meaning would ‘impart information and ideas’, whether or not it actually conveys a particular meaning to a specific person, and whether the meaning conveyed is objectively clear and precise or subject to individual interpretation.

The underlying values and interests represented by a right to the freedom of expression have been described as “freedom, self-actualisation and democratic participation for individuals personally; and freedom, democracy under the rule of law and ensuring governmental transparency and accountability for society generally”.²

The ability for an individual to make public statements pertaining to a candidate or councillor or Member of Parliament during an election period is an important part of the democratic participation process and ensuring government accountability. In this sense, the amendments limit the freedom of expression.

¹ *Magee v Delaney* [2012] VSC 407, 181.

² *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89 at [22], per Bell J, in relation to the similarly drafted right under section 15 of the Victorian *Charter of Human Rights and Responsibilities Act 2006*.

Further, noting that the foundation of the right lies in the necessity of electors being informed of matters relevant to exercising their right to vote, the amendments also limit the freedom of expression by preventing members of the public from receiving information about, and being fully informed of, certain matters during the election period through prohibiting publication of these statements during such period.

Taking part in public life (section 23(1) of the HR Act)

The right to take part in public life protects the right and opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives. Public affairs is a broad concept that encompasses the activities of all forms of government, including local government.³ The HR Act also provides that every eligible person has the right, and is to have the opportunity, without discrimination, to vote and be elected at periodic State and local government elections that guarantee the free expression of the will of the electors.

There is an intrinsic connection between the right to participate in public affairs and the right to freedom of expression. The United Nations Human Rights Council has noted that ‘citizens take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves. This participation is supported by ensuring freedom of expression, assembly and association’.⁴

This right to take part in public life is limited by the amendments as they will prevent a person from publicising allegations and complaints relating to corrupt conduct of members, councillors and candidates during an election period that the person may believe to be, and indeed potentially are, directly relevant to that election. This may also result in members of the public not having access to potentially relevant information which would enable them to make a free and informed choice about their preferred candidate.

The lead up to an election is particularly important as a period when the electorate is at a heightened state of awareness to political issues. The provisions in the Bill may therefore act to curtail open discourse on matters of political relevance at a time when the voting public are likely to be the most fully engaged in the democratic process.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The fundamental objectives of the provisions are to protect the robustness of Queensland’s integrity processes and system of government. The amendments do this by limiting publication of allegations of corrupt conduct and CCC complaints for a limited period unless at least three months has elapsed following the CCC being notified of the complaint or allegation, or the person’s intention to publish the allegation or complaint. This is to allow the CCC to complete a preliminary investigation to assess the merits of the complaint or allegation.

³United Nations Human Rights Committee, *General Comment No. 25*.

⁴United Nations Human Rights Committee, *General Comment No. 25*.

The approach of not publicising unsubstantiated allegations when they are still under investigation, or before formal charges are laid in the case of a criminal investigation, ensures that ongoing investigations are not compromised. The CCC in its 2016 report identified a range of ways in which publicity can undermine its assessment processes and investigations, observing that:

Publicising allegations of corrupt conduct can negatively affect the CCC's ability to detect and investigate allegations of corruption. It is arguable that corrupt officials who wish to avoid detection will immediately act to conceal evidence of their actions once alerted to the fact that they are being scrutinised. Making public an allegation of corruption before the CCC has ascertained whether it has merit can result in the destruction of evidence, fabrication of false explanation, interference with witnesses and absconding of subject officers. The public release of information can also limit the CCC's investigative options, particularly covert activity such as physical and technical surveillance, which is often critical to the success of an investigation'.⁵

It is important that the CCC is unimpeded in its ability to fulfil one of its key functions under the CC Act of investigating cases of corrupt conduct. There is a high public interest in a functioning democracy underpinned by the rule of law that elected representatives, or those who would seek to hold such positions, can be held accountable for their actions where they fall short of the high standards that are expected of them. It is equally important that the public has confidence in the ability of our integrity bodies to achieve this outcome. As observed by the CCC, 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'.⁶

This includes ensuring that the CCC is able to make best use of its limited resources. 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 or complaint, without first investing time and resources into an investigation.⁷

The amendments will prevent perceived interference during an election period, during which baseless allegations and complaints may be more likely to be publicly made. Protecting the robustness of integrity processes is essential to our democratic system of government. It has been recognised that some forms of electoral regulation may constitute a justifiable limit on freedom of expression and may, in fact, enhance the underlying values of the freedom by promoting more equal dissemination of diverse points of view.⁸ As observed by the CCC in its

⁵ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 29.

⁶ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 26.

⁷ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 29-30.

⁸ For example, restrictions on the making or receipt of political donations and on election campaign advertising and expenditure: Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Lawbook, 2008), citing, *R (Animal Defenders*

2016 Report, ‘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’.⁹ By seeking to address these kinds of issues, there is greater chance for electors to be exposed to a fuller range of matters that may be relevant to the decision they are required to make at the ballot box.

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’.¹⁰ The CCC’s initial recommendation was limited to the publicising of allegations of corruption and complaints against a councillor or candidate in the lead-up to local government elections based on data as to the large number of allegations it received in the lead-up to elections that turned out to be baseless and merely designed to exact electoral damage. The CCC recently recommended that its recommendation for a prohibition on publication be extended to include the state government election period.¹¹

Further, the amendments in the Bill seek to protect the rights of individuals who are the subject of an allegation or complaint to a fair hearing and to the protection of their privacy and reputation.

The amendments promote the right of privacy and reputation by restricting the publication of statements which may have the direct and immediate consequence of damaging a person’s reputation, and which may affect a person’s work life. A person’s reputation may be irreparably damaged by being the subject of, or associated with, an allegation of corrupt conduct or complaint, whether or not the allegation or complaint is subsequently substantiated or investigated. The amendments require that the CCC must have been notified and allowed at least 3 months to determine the merits of an allegation or complaint before such a statement can be publicised during an election period. As noted by submitters to the CCC, the publicising of spurious allegations can also cause reputational damage to organisations and agencies associated with the individuals who are the subject of the allegations.¹² The amendments will assist in deterring baseless public attacks on a person’s reputation during election periods.

The amendments also go towards ensuring the prospects of a fair hearing for an individual who, following a CCC investigation into an allegation of corrupt conduct becomes the subject of criminal or disciplinary proceedings. Publicity prior to a matter being investigated, either by police or by the CCC, could affect a person’s ability to receive a fair hearing in the future. The

International) v Secretary of State for Culture, Media and Sport [2008] 1 AC 1312 at [28]; *Harper v Canada (Attorney General)* [2004] 1 SCR 827 at [62].

⁹ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 31.

¹⁰ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 30.

¹¹ Crime and Corruption Commission, *An investigation into allegations relation to the appointment of a school principal* (2020) 85.

¹² Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 26.

Queensland Council for Civil Liberties in its submission to the 2016 report referred to ‘clear evidence of the potential prejudicial effect that publication of at least certain facts about a person may have in relation to their prospects of a fair trial.’¹³ By ensuring that the CCC has adequate and appropriate time to investigate the allegation or complaint before any public statement is made, the individual who may be the subject of the allegation is more likely to receive a fair and impartial public hearing in the future, should an allegation or complaint result in subsequent charges and prosecution.

While it is acknowledged that the benefits of the amendments in promoting the right to privacy and reputation and a fair hearing will only be directly applicable during a specified and limited period, this is considered reasonable in that it seeks to protect these rights for individuals at a time when they are particularly susceptible to baseless allegations and allows the CCC sufficient time to assess its merits.

I recognise that it may be open for an alternative interpretation of the purpose of the amendments to be reached. It may be argued that the purpose of the provisions is in fact to limit relevant political debate in the lead-up to an election. However, this is not the Government’s intended purpose. In my view, the purpose is clear on the face of the legislation and is as articulated above, as well as expanded on in the Explanatory Notes to the Bill.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The operation of the offences in the Bill is directly linked to publication in the period leading up to a local or state government election. This ensures that limitations imposed on rights to freedom of expression and participation in public life are limited by reference to an election period. Once a complaint is made to the CCC, they also have existing powers to ensure that the publication of information relevant to a complaint can be restricted.¹⁴

In this way, the amendments are clearly related to the Bill’s purpose of preserving the CCC’s integrity and resources against the publication of unfounded allegations and complaints made for political purposes. They are also clearly related to ensuring that public debate in the lead up to elections is not dominated by baseless allegations. While there is evidence to suggest that the lodgement of baseless allegations in the case of local government elections increases during this period,¹⁵ it must also be acknowledged that any baseless allegation made during an election period is unlikely to go unnoticed. As I referred to above, the lead-up to an election is a unique time when the electorate is particularly attuned to political matters, thus amplifying the potential negative impact of a baseless allegation made during this time.

¹³ Mr Michael Cope, Queensland Council for Civil Liberties, Submission 40 to the Crime and Corruption Commission, *Making allegations of corrupt conduct public: Is it in the public interest?*, 2016.

¹⁴ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 30, referring to *Crime and Corruption Act 2001*, s 213.

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

In addition, the amendments are directed at the publication of corruption allegations and complaints as opposed to mere disclosure. In this way the offence is limited to actions that have the potential to deliver information to a mass audience, where there is the potential for the greatest harm to individual rights and the integrity of democratic institutions and electoral processes. As the CCC observed, the risk to a person's reputation is 'amplified in contemporary society where mass communication methods mean that allegations are instantaneously and widely transmitted, and stay on the public record in perpetuity.'¹⁶

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

There are arguably less restrictive ways to achieve the purposes of protecting the robustness of Queensland's integrity processes and system of government, other than through the amendments proposed by the Bill. There is therefore a risk that the amendments in the Bill are incompatible with the freedom of expression and the right to take part in public life. However, I consider that the measures proposed by the Bill are the most effective way of achieving these purposes.

I do not consider that maintaining the status quo is a reasonable alternative. While the CCC has existing legislative powers to issue directions and guidelines to the Chief Executive Officers of units of public administration that complaints be kept confidential,¹⁷ and to enforce confidentiality where the CCC has provided certain information to a person,¹⁸ it does not have the power to prevent non-government employees from publicising their allegations or complaints of corrupt conduct. Also, as the CCC noted in the 2016 report,¹⁹ prosecutions on the basis that a person has made a complaint that is vexatious, not in good faith, mischievous, reckless or malicious are unlikely to be successful because of the difficulty in identifying the people responsible and proving their state of mind. Maintaining the status quo will fail to address the serious damage that can result when baseless allegations of corruption are publicised during election periods for political gain.

The amendments put a limitation on publicity of allegations or complaints for a limited period unless the CCC has had sufficient time to determine if the allegation or complaint has merit. The limitations are in place for the shortest time period to achieve the purpose, and if this period has elapsed, the allegation or complaint can be publicised (subject to existing lawful limitations). Publication of allegations of corrupt conduct and complaints may also continue to be made (again subject to existing lawful limitations) prior to an election period. Furthermore, the ability for individuals to continue to discuss matters relating to corrupt conduct and freely express their opinions in other ways is not intended to be impacted by the proposed offences.

I do not consider that further narrowing the scope of the proposed offences to prohibit only the publication of complaints, whilst still allowing for allegations of corruption to be published, would be as effective in achieving the stated purposes. Individuals could readily seek to circumvent a more limited offence by simply avoiding any reference to an intention to make a

¹⁶ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 30.

¹⁷ *Crime and Corruption Act 2001*, s 40, 48.

¹⁸ *Crime and Corruption Act 2001*, s 213.

¹⁹ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 31.

complaint to the CCC. The publication of such allegations during an election period may nevertheless be as damaging in terms of the ills that the proposed offences are designed to address. The stated purpose would therefore not be as effectively achieved.

I recognise that it is arguable that the inclusion of exceptions to the offence may also constitute a less restrictive approach to achieving the purposes of the Bill. For example, an exception could be provided to allow publication of the allegation or complaint where information is already in the public domain. However, this is not considered appropriate given that the time necessary to resolve such a question through legal proceedings would likely exceed the operational period of the offence. Given the already limited scope of the proposed offences, I am of the view that exceptions to the offences are not necessary and would undermine the effectiveness of the provisions.

I also note that, as a public entity under the HR Act, the CCC will be required to make decisions and act in a way that is compatible with human rights and give proper consideration to human rights in the exercise of its powers. Moreover, as the CCC highlights, the prohibition on publication will not get in the way of individuals being investigated and ultimately held to account where allegations of corrupt conduct are shown to be founded.²⁰ A CCC investigation may result in a conviction for a criminal offence and, in the case of a local councillor or state member of parliament, this may result in removal from office.²¹

I therefore consider these amendments are the most effective and reasonably adapted way of protecting the robustness of Queensland's integrity processes and system of government and ensuring the CCC can effectively carry out its work unimpeded.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

I consider that the limitations on the rights to freedom of expression and taking part in public life inherent in the offence are outweighed by the positive long-term impacts that curtailing this behaviour will achieve.

I have considered the balance between the importance of preserving the freedom of expression and right to take part in public life and the importance of ensuring the robustness of Queensland's integrity processes and system of government (and the other identified purposes above) which the amendments in the Bill give effect to.

Relevant to this balance is the extent of the limitations imposed by the amendments on the freedom of expression and the right to take part in public life. The limitations on these rights are not blanket limitations. They are only in place for a short period of time and are limited to publication. On the other hand, there are lasting public interest benefits to be gained in ensuring the integrity of our electoral process and efficiency of the CCC, who in turn has a key role to play in enhancing the integrity of, and public confidence in, the public sector by exposing corruption.

²⁰ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 33.

²¹ Crime and Corruption Commission, *Publicising allegations of corrupt conduct: Is it in the public interest?* (2016) 33.

Whilst it is important that the right to freedom of expression is protected, it must also be balanced against the rights of individuals not to be exposed to reputational damage which may ultimately turn out to be founded on baseless allegations, which are likely to be more frequently made in the lead up to an election period. The repercussions for the political process during an election period both for the outcome of the election and the future career prospects of that individual may be extremely negative and long-lasting.

I consider that the amendments strike a fair balance between the rights to freedom of expression and taking part in public life, and the rights to a fair hearing and to privacy and reputation, for the legitimate purpose of safeguarding Queensland's integrity processes and the role of the CCC. The amendments balance the public interest and individual rights when it comes to the publication of allegations of corruption and complaints to the CCC.

While I recognise the fundamental importance of the right to freedom of expression and information in a democratic society, and the right to take part in public life, I consider that the proposals in the Bill strike the right balance between those rights and the importance of the purposes that the amendments seek to achieve.

(f) any other relevant factors

Not applicable.

Conclusion

In my opinion, the Crime and Corruption Amendment Bill 2020 is compatible with human rights under the *Human Rights Act 2019* because it limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

While I acknowledge the amendments in the Bill limit the freedom of expression and the right to take part in public life and in doing so it may be open to conclude that the amendments are incompatible with human rights, it is my view that the limitation is reasonable and justified.

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