

Crime and Corruption and Other Legislation Amendment Bill 2024

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 MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, make this statement of compatibility with respect to the Crime and Corruption and Other Legislation Amendment Bill 2024 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the *Human Rights Act 2019* (HR Act). I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Bill contains amendments to the *Crime and Corruption Act 2001* (CC Act), *Public Interest Disclosure Act 2010* (PID Act), *Public Sector Act 2022* (PS Act), *Right to Information Act 2009* (RTI Act) and the *Telecommunications Interception Act 2009* (TI Act).

Key amendments in the Bill relate to:

- a review of Chapters 3 and 4 of the CC Act to develop uniform provisions with generic application to Crime and Corruption Commission (CCC) functions where appropriate; and clarify what specific privileges are abrogated or unaffected by the provisions of the CC Act to implement recommendation 6 of the Parliamentary Crime and Corruption Committee (PCCC) Report No. 97 *Review of the Crime and Corruption Commission* (Report No. 97);
- establishing a statutory framework under the CC Act to protect the journalist-informant relationship by creating a qualified journalist privilege (known as shield laws) applying in CCC investigations and hearings; and
- implementation of recommendations of the Commission of Inquiry relating to the Crime and Corruption Commission (COI) relating to advice from the Director of Public Prosecutions (DPP) about potential charges arising from corruption investigations.

The Bill also contains amendments addressing various other PCCC report recommendations, including:

- recommendation 1 of the PCCC in Report No. 106, *Review of the Crime and Corruption Commission's activities* (Report No. 106), by amending the CC Act to include a requirement that at least two of the three ordinary commissioners must have a demonstrated interest and ability in community affairs, public administration or organisational leadership;
- recommendation 3 of the PCCC in Report No. 106, by introducing a 30 day timeframe within which the PCCC must notify the Minister whether an appointment to the position of CCC Commissioner (including the Chairperson) or Chief Executive Officer (CEO)

has bipartisan support and to allow the PCCC to publish (as part of its annual report) information about the PCCC's participation in the appointment process;

- recommendation 4 of the PCCC in Report No. 106 and recommendation 5 in Report No. 108, *Inquiry into the Crime and Corruption Commission's Investigation of former councillors of Logan City Council; and related matters* (Report No. 108), by:
 - introducing a seven-year fixed non-renewable term for the Chairperson, Deputy Chairperson and Ordinary Commissioners to apply prospectively to new appointments to these roles;
 - retaining the current requirement for the CEO i.e. permit multiple terms no longer than five years to a maximum of 10 years; and
 - retaining the requirement for up to five-year appointments for senior officers and relaxing the restrictions on tenure (by removing the current restriction on appointments up to 15 years) and including a provision allowing tenure limits for senior officers to be reset after a period of 10 years has elapsed for an officer who has permanently left the CCC;
- recommendation 5 of the PCCC in Report No. 106, by enabling the CCC to give directions for the performance of duties by CCC officers engaged under section 256 of the CC Act;
- recommendation 9 and recommendation 27 of the PCCC in Report No. 106 and Report No. 97 respectively, relating to public interest disclosures by CCC officers; and
- recommendation 28 of the PCCC in Report No. 106, by clarifying the Parliamentary Crime and Corruption Commissioner (Parliamentary Commissioner) can investigate on their own initiative a matter relating to a CCC officer that would otherwise be considered corrupt conduct.

Further, the Bill contains the following amendments not related to PCCC report recommendations:

- amendments responding to recommendation 3(b) of the CCC in the report, *Culture and Corruption Risks in Local Government: Lessons from an investigation into Ipswich City Council (Operation Windage)* (Windage Report), by providing criteria for prescribing entities as units of public administration (UPA) for the purposes of the CC Act;
- amendments to allow for the transfer of the records and data of the Inquiry into the Future Role, Structure, Powers and Operations of the Criminal Justice Commission (known as the Connolly-Ryan Inquiry) to Queensland State Archives for storage while retaining the Parliamentary Commissioner's role in allowing access to the records;
- amendments to section 25 of the TI Act to allow the Parliamentary Commissioner and the Public Interest Monitor to report on contraventions of telecommunications interception warrant conditions;
- amendments to establish technology-based arrangements for hearings and issuing of notices; and
- some minor and technical amendments to the CC Act, TI Act and PS Act to:
 - replace incorrect references to the 'commission' with 'committee' in section 290 of the CC Act;
 - ensure consistency and clarify the relationship between sections 84 (Notice may be a confidential document), 180 (Conduct of hearings) and 202 (Publication of names, evidence etc.) of the CC Act;

- categorise offences carrying a maximum penalty of 5 years imprisonment as misdemeanours and ensure that section 219 of the CC Act applies on the basis that they are an indictable offence;
- amend section 281 of the PS Act to broaden the scope of persons to whom the Premier may delegate a ministerial function; and
- amend section 29 of the TI Act to clarify that a reference to the authority's records means the authority's Part 2-5 warrant records.

Human Rights Issues

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

A number of amendments in the Bill engage and limit a range of rights under the HR Act, namely:

- recognition and equality before the law (section 15 of the HR Act);
- freedom of expression (section 21 of the HR Act);
- the right to have access, on general terms of equality, to the public service and to public office (section 23(2)(b) of the HR Act);
- property rights (section 24 of the HR Act);
- privacy and reputation (section 25 of the HR Act);
- right to liberty and security of person (section 29 of the HR Act);
- fair hearing (section 31 of the HR Act); and
- rights in criminal proceedings (section 32 of the HR Act).

However, the Bill does so in a way that is designed to minimise any limitations and is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The Bill is also designed to promote human rights. By ensuring the CCC has the powers it needs to investigate major crime and corruption effectively, the Bill serves to ensure crime and corruption is investigated, prosecuted and deterred. This is an important way that the State fulfils its positive obligations to protect the right to life and security of the person (sections 16 and 29(1) of the HR Act). By introducing a new qualified journalist privilege, the Bill also promotes the right to freedom of expression (section 21 of the HR Act), as protection of journalistic sources is one of the basic conditions for press freedom which is an aspect of the freedom of expression.¹ Additionally, this promotes the right to life and security of the person (sections 16 and 29(1) of the HR Act) insofar as the privilege may work to protect a confidential informant in circumstances where their life or safety may be jeopardised if their identity as a source is revealed.

¹ *Goodwin v United Kingdom* (1996) 22 EHRR 123, [1996] ECHR 16, [39].

Amendments arising from review of Chapters 3 and 4 of the CC Act

- **streamlined powers to issue notices**
- **consolidated offence provisions relating to failure to answer questions, produce documents and information**
- **streamlined processes for consideration of claims of reasonable excuse, including privilege**

Recommendation 6 of the PCCC in Report No. 97, tabled on 30 June 2016 and accepted by Government, required a review of Chapters 3 and 4 of the CC Act to develop uniform provisions with generic application to CCC functions where appropriate; and clarify what specific privileges are abrogated or unaffected by the provisions of the CC Act.

The Bill implements a range of amendments arising from this review to provide:

- a single power for the Chairperson to issue a notice to require the production of documents or things in the context of a crime investigation, specific intelligence operation (crime), a corruption investigation, a specific intelligence operation (corruption) and the witness protection function (new sections 72 – 77 inserted by clause 12);
- a single offence provision for failure to comply with a notice to produce issued under new section 73 (new section 76 inserted by clause 12);
- a single power for the Chairperson to issue a notice to require an oral or written statement of information to a person holding an appointment in a UPA in the context of a crime investigation or specific intelligence operation (crime) (new section 81E inserted by clause 12);
- a single power for the Chairperson to issue a notice to require an oral or written statement of information to any person in the context of a corruption investigation or specific intelligence operation (corruption) (new section 81F inserted by clause 12);
- a single offence provision for failure to comply with a notice to discover issued under new sections 81E or 81F (new section 81H inserted by clause 12);
- a single power for the presiding officer at a hearing to require the production, including the immediate production, of a document or thing in the context of a crime investigation, specific intelligence operation (crime), a corruption investigation and a specific intelligence operation (corruption) (new sections 81C – 81D inserted by clause 12);
- a single offence provision for refusal to produce a document or thing at a hearing (new section 185 inserted by clause 25); and
- a single offence provision dealing with refusal to answer a question at a hearing (new section 189 inserted by clause 25).

The review generally did not consider amalgamation of the confiscation related investigation powers as these are provided to the CCC to support its civil confiscation role under the *Criminal Proceeds Confiscation Act 2002* (CPC Act), which are subject to Supreme Court oversight. However, the Bill does amend the provisions of Chapters 3 and 4 of the CC Act which apply to confiscation related investigations to bring the existing sections into alignment with the approach for the consolidated provisions referred to above. Specifically, this includes a single power to require production of documents or things for confiscation related investigations (and corresponding offence for failure to comply) (new sections 78 – 81B inserted by clause 12).

For the purposes of this statement of compatibility, the above provisions will be referred to jointly as ***‘investigation requirements’***.

For investigation requirements issued in the context of specific functions, the Bill further provides for:

- a consolidated process for consideration of claims of reasonable excuse (including privilege) made outside a hearing and corresponding procedures for the safekeeping of documents and things subject to claims (new Division 1 in Part 2 of Chapter 4A inserted by clause 32);
- a single process for consideration of claims of reasonable excuse (including privilege) made in a hearing and corresponding procedures for the safekeeping of documents and things subject to claims (new Division 2 in Part 2 of Chapter 4A inserted by clause 32);
- consolidated processes for consideration of claims of reasonable excuse (including privilege) by the Supreme Court and powers to make other orders (new Part 3 of Chapter 4A inserted by clause 32); and
- a single process for consideration by the Supreme Court of claims made in relation to search warrants and seizures with corresponding procedures for the safekeeping of documents and things subject to claims (new Part 4 of Chapter 4A inserted by clause 32).

For investigation requirements issued in the context of confiscation related investigations, provisions providing for Supreme Court determination of claims of privilege and corresponding procedures for the safekeeping of documents and things subject to claims are dealt with separately (new Part 6 of Chapter 4A inserted by clause 32). These provisions are designed to retain the powers and processes that apply to confiscation matters under the current CC Act but with some minor modifications to better align the provisions with the new drafting approach being applied to the other functions.

The existing definition of privilege in Schedule 2 (Dictionary) is to be deleted and replaced. The new definition (new section 205B inserted by clause 32) will apply across all functions. The definition is to provide that in relation to an answer, information, communication, document, or thing, privilege means:

- parliamentary privilege; or
- legal professional privilege; or
- public interest immunity; or
- a claim on the ground of confidentiality; or
- self-incrimination privilege; or
- journalist privilege.

Confidentiality and self-incrimination privilege are defined in Schedule 2 of the CC Act, while journalist privilege is defined based on the existing definition contained in section 14V of the *Evidence Act 1977* (Evidence Act) (new section 205D inserted by clause 32).

As discussed further below, self-incrimination privilege under the CC Act is abrogated for the CCC’s investigation requirements for all functions, subject to a direct use immunity being provided in most instances.

Human rights that are limited by the proposals (Part 2, Divisions 2 and 3 HR Act)

The new processes relating to the issuing of investigation requirements and the processes applying to dealing with claims of reasonable excuse, including privilege, made in relation to these requirements, engage and limit the following human rights:

- freedom of expression (section 21 of the HR Act);
- property rights (section 24 of the HR Act);
- privacy and reputation (section 25 of the HR Act);
- fair hearing (section 31 of the HR Act); and
- rights in criminal proceedings (section 32 of the HR Act).

The corresponding offence provisions for failure to comply with investigation requirements also engage and limit property rights (section 24 of the HR Act), the right to liberty and security of the person (section 29 of the HR Act) and rights in criminal proceedings (section 32 of the HR Act).

Whether any limits on human rights are reasonable and justifiable (section 13 HR Act)

(a) the nature of the right

The *right to freedom of expression* under the HR Act protects the right of all persons to hold an opinion without interference and to seek, receive and express information and ideas orally, in writing, in print, by way of art, or in any other medium. Some cases from overseas suggest that ‘freedom of expression necessarily entails the right to say nothing or the right not to say certain things’.² The power to issue an investigation requirement may limit this right because it compels a person to divulge information.

The Bill also limits the right to freedom of expression in the context of applications to the Supreme Court in relation to claims of reasonable excuse, including privilege. For applications made in relation to a crime or corruption investigation or the witness protection function, the matter is to be heard in closed court unless the court permits another person to be present at the hearing in the interests of justice. When a court is closed, this limits the right to freedom of expression of journalists who seek to report on the matter and upon the public’s freedom to receive information on the matter. Further, for all applications to the Supreme Court, the court may make orders restricting who may access material relating to the proceeding, and that it is not to be publicly accessible. The right to freedom of expression includes an implied right to access information held by the government, at least where such information engages the public interest or the individual seeking the information has a legitimate interest in the information.³ Where the court makes such an order, this will therefore limit a journalist’s right to report on matters and the general public’s right to seek, receive, and express information.

The *right to privacy and reputation* protects the individual from all unlawful or arbitrary interferences upon their privacy, family, home, or correspondence and not to have their reputation unlawfully attacked. The scope of the right is broad, and the underlying value of the right is the importance of protection of a person’s freedom from the unjustified involvement of

² *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038, 1080.

³ *XYZ v Victoria Police* (2010) 33 VAR 1; [2010] VCAT 255, [515] – [559].

public authorities in their private sphere.⁴ The power to issue an investigation requirement will engage a person's right to privacy in that a person can be compelled to divulge information about their private life and their associates, which in turn may lead to them being personally attacked because of the information they have provided to the CCC.

However, the right to privacy will only be limited if the interference with privacy is unlawful or arbitrary. In a human rights context, 'arbitrary' refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought. If an interference is proportionate under section 13 of the HR Act, it will not be arbitrary. Accordingly, whether the interference with privacy is arbitrary will be addressed below when considering the factors in section 13.

The *right to property* protects the right of all persons to own property and provides that people have a right to not be arbitrarily deprived of their property. The power to issue an investigation requirement will engage a person's right to not be arbitrarily deprived of their property in that they can be compelled to provide documents or things belonging to them to the CCC. However, the right will only be limited if the deprivation of property is arbitrary. Again, in a human rights context, a deprivation of property will be arbitrary if it is capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought. Again, that question will be addressed below when considering section 13 of the HR Act.

The *right to a fair hearing* under section 31 of the HR Act provides that a person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

In the context of a criminal trial, what constitutes a fair hearing is likely to require:

- the hearing be held in public;
- the defendant to have a right to a lawyer, and for legal professional privilege to be upheld which assists the person to communicate in confidence with the lawyer;
- the defendant has the right to confront the prosecution's witnesses and test their evidence, and to obtain and adduce evidence of their own;
- the burden of proof should be on the prosecution;
- the right to be presumed innocent and the right not to incriminate oneself (the privilege against self-incrimination); and
- the right to an interpreter.

Rights in criminal proceedings under section 32 of the HR Act include the requirement that a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law and to not be compelled to testify against themselves or to confess guilt. At common law this is referred to as the privilege against self-incrimination.

The right also provides a set of specific rights to be afforded to accused persons in criminal trials, many of which would also be required in the context of the right to a fair hearing under

⁴ *Director of Housing v Sudi* [2010] VCAT 328, [29].

section 31. There is therefore a significant degree of overlap between the rights under sections 31 and 32 of the HR Act.

The engagement of the fair hearing and criminal proceeding rights by the CC Act is complicated as there has yet to be a definitive judicial determination in Australia as to the scope of the rights in this context and, in particular, whether they are held by uncharged suspects or only persons who have been charged.

While the right to a fair hearing and rights in criminal proceedings apply when a hearing is underway or an individual has been charged with a criminal offence or is a party to civil proceedings, case law indicates that the right against self-incrimination is engaged prior to a trial. In the case of *SQH v Scott*⁵ the CCC submitted that the rights in sections 31(1) and 32(2)(k) of the HR Act are not engaged by coercive questioning before the CCC because those rights only protect a testimonial immunity of any accused person at trial. That is, the rights only have a role to play in a trial before a court, and the CCC's hearings do not involve a trial before a court. The Supreme Court rejected that submission and found that the scope of the rights embraces coercive questioning before the CCC. The Court did not, however, address other aspects of the scope of the rights such as whether they apply to protect uncharged suspects.

The decision of Warren CJ in *Re Application under Major Crimes (Investigative Powers) Act 2004*⁶ considered these issues in the context of the Victorian equivalent to sections 31 and 32(2)(k) of the HR Act, where it was determined that an individual's right against self-incrimination can be infringed regardless of whether any charges have been laid. As the position with respect to the scope of the rights under sections 31 and 32 of the HR Act is subject to some doubt, this compatibility assessment will consider the effect of investigation requirements on both charged and uncharged persons.

The proposed investigation requirements, which replicate those under the current CC Act, may require an individual to provide information or documents to the CCC or answer questions. Failure to comply may be an offence, or a contempt of the CCC, if the investigation requirement is issued for or in relation to a hearing, unless the person has a reasonable excuse, including a valid claim of privilege.

The privilege against self-incrimination is expressly abrogated for all investigation requirements. Section 197 of the CC Act will continue to apply in these circumstances, with the exception of documents or things produced in the context of a corruption investigation, which is in line with the position under the current CC Act. Section 197 ensures that the answer, document, thing or statement given or produced is not admissible in evidence against the individual in any civil, criminal or administrative proceeding with limited stated exceptions, including where the individual consents or the proceeding is about the falsity or misleading nature of an answer, document, thing or statement given.

This is known as a direct use immunity and is designed to lessen the impacts of the abrogation of the privilege against self-incrimination on the individual's rights in subsequent hearings.

⁵ *SQH v Scott* [2022] QSC 16; (2022) 10 QR 215.

⁶ [2009] VSC 381; (2009) 24 VR 415.

Section 197(7) goes on to expressly remove any derivative use immunity applying to the compelled evidence, stating that while the compelled evidence is not admissible this does not prevent any information, document or other thing obtained as a direct or indirect consequence of the individual giving or producing the answer, document thing or statement from being admissible in evidence against the individual in a civil, criminal, or administrative proceeding.

Therefore, the proposed abrogation of the privilege against self-incrimination under an investigation requirement, subject only to a direct use immunity, limits an individual's rights to a fair hearing and rights in criminal proceedings in that derivative information obtained as a result of the answers given or document, thing or statement provided by the person could be used in a prosecution against them for a criminal offence.

The proposed abrogation of the privilege against self-incrimination under an investigation requirement issued in the context of a corruption investigation for the production of documents and things, in the absence of a direct use immunity, further limits an individual's rights to a fair hearing and rights in criminal proceedings in that the document or thing produced may be used against the individual as evidence in a future civil, criminal or administrative proceeding.

The requirement for some matters to be held in closed court including consideration by the Supreme Court of claims of privilege limits a person's *right to a fair hearing* in that the hearing will not be held in public. The ability for the court to make an order restricting who may have access to material relating to proceedings, which may include making an order that material not be disclosed to a party to the proceedings, also limits an individual's right to fair hearing in that it may prevent a person accessing material that may be relevant to their ability to establish their claim. The right to a fair hearing is engaged by 'any legal process for the enforcement, vindication, determination or protection of a civil (as distinct from a criminal) right or obligation'.⁷ It is generally considered that the right to a fair hearing encompasses that parties to a proceeding ought to know what case the opposite party seeks to make and how the party seeks to make it, including the disclosure of evidence.⁸ Further, open justice is a central principle of the right to a fair hearing and is closely linked with the right to freedom of expression in that all interested persons and the media have the right to attend and to publish reports of legal proceedings.⁹ Despite this, it is accepted that the public interest in the media having access to court proceedings and relevant evidence is subject to some limitations, including the risk of harm that this may cause for members of the community or law enforcement methods. Balancing these rights is a necessary process for courts when considering making such orders.¹⁰ To this end, section 31(2) of the HR Act explicitly qualifies the right to a fair hearing as it relates to public hearings providing that 'a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of a hearing in the public interest or the interests of justice'.

⁷ *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221; [2011] VSC 42 at [172] – [173].

⁸ *Condon v Pompano* (2013) 252 CLR 38; [2013] HCA 7 at [156] – [157].

⁹ *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4 at [22]; *News Digital Media v Mokbel* (2010) 30 VR 248; [2010] VSCA 51 at [38]; *PQR v Secretary, Department of Justice and Regulation* (2017) 53 VR 45; [2017] VSC 513 at [34] – [42].

¹⁰ *J v L & A Services Pty Ltd* [1995] Qd R 10; *Mohr-Edgar v State of Queensland (Legal Aid Queensland)* [2020] QIRC 136 at [34].

The *right to liberty and security of person* (section 29 of the HR Act) protects personal liberty and requires that due process be followed when state authorities exercise their powers of arrest and detention. The right protects against deprivation of liberty that is arbitrary or unlawful. The right is relevant whenever a person is placed at risk of imprisonment.

The offence provisions relating to non-compliance with investigation requirements may place a person at risk of imprisonment or a fine if successful prosecution action is taken and the person is sentenced to a custodial sentence or ordered to pay a fine, thereby limiting the right to own property or the right to liberty and security of person.

The offence provisions provide for a reasonable excuse and that a person does not commit an offence where they have made a claim of reasonable excuse under new Chapter 4A as inserted by the Bill. To this extent, the provisions also engage rights in criminal proceedings as the onus of establishing the existence of a reasonable excuse is placed on the defendant, thereby encroaching on the right to be presumed innocent under section 32(1) of the HR Act. As a general rule, it is for the prosecution to prove a defendant's guilt.¹¹

- (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 overarching purpose for the creation of uniform investigation requirements and consolidated processes for consideration of claims arising from the issuing of such requirements is to enhance the CCC's ability to perform its functions under the CC Act. The inclusion of corresponding offence provisions for failure to comply with investigation requirements is similarly directed towards this purpose. Attaching criminal penalties for non-compliance serves to reflect the serious nature of the conduct involved and act as a deterrent against non-compliance which would necessarily have adverse impacts on the CCC's ability to perform its functions. The offence provisions include a requirement for the defendant to establish any claim of reasonable excuse. Reversing the onus with respect to a reasonable excuse assists in achieving meaningful prosecution outcomes, noting it would be very difficult if it were up to the prosecution to establish matters that are likely to be peculiarly within the defendant's knowledge. By contrast, an unworkable offence provision may ultimately encourage non-compliance with investigation requirements, thereby hampering the CCC's ability to perform its functions under the CC Act.

Specifically, the Bill's amendments relate to the following functions of the CCC:

- major crime – to investigate major crime and incidents involving criminal organisations which pose threats to public safety;
- corruption – to raise standards of integrity and conduct in units of public administration (UPAs) and ensuring complaints about corruption are dealt with in an appropriate way;
- intelligence – to gather and analyse intelligence to support the proper performance of its functions;

¹¹ *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481-2 (Viscount Sankey LC); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 119-20 [46] (French CJ and Crennan J), 135-6 [100]-[102] (Hayne and Bell JJ), 153 [159] (Kiefel J); *Lee v NSW Crime Commission* (2013) 251 CLR 196, 266 [176] (Kiefel J), 313 [318] (Gageler and Keane JJ); *Lee v The Queen* (2014) 253 CLR 455, 467 [32] (French CJ, Crennan, Kiefel, Bell and Keane JJ).

- witness protection – to operate the witness protection program; and
- civil confiscation – to undertake civil proceedings to recover the proceeds of crime.

The public has a significant interest in the effective investigation of major crime, which, under the CC Act, includes criminal activity involving serious indictable offences, paedophilia, organised crime and terrorism, in order for perpetrators to be held to account and to ensure public safety.

Similarly, there is high public interest in ensuring that corruption can be uncovered so that public officials can be held accountable for their actions where they breach the trust that the public has placed in them and confidence in public institutions can be maintained or restored.

An effective civil confiscation regime ensures individuals cannot benefit from assets derived from the commission of serious crimes which, in turn, assists in preventing and deterring further crime. An effective witness protection program also has significant value in the investigation of serious crime.

The effective performance by the CCC of its statutory functions is a proper purpose consistent with a free and democratic society based on human dignity, equality and freedom. Importantly, the CCC's effective performance of its statutory functions is dependent upon the extent to which the public has confidence in its investigative methods as well as outcomes.

One aspect of this requires the CCC to discharge its functions in a way that ensures that important individual rights are not unnecessarily curtailed. For example, appropriate safeguards are directed to the rights of persons, and persons related to them, who appear before the court in CCC proceedings in terms of their right to privacy and reputation and, in some cases, their right to life, where disclosure of their involvement in a CCC investigation may threaten their safety or that of their family or other associates. In this way, the amendments also help the State to fulfil its positive obligations to protect the rights of victims and potential victims of crime, including the right to life, the right to security of the person, and the right of children to protection in their best interests (sections 16, 26(2) and 29(1) of the HR Act). Other provisions are directed towards the ability of the CCC to maintain the integrity of its investigative techniques and methodologies and those of its partner agencies which are also essential to ensuring that the CCC is able to effectively perform its functions under the CC Act.

(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 interference or limitation on the rights to freedom of expression, privacy and reputation, property, liberty and security of person and a fair hearing and rights in criminal proceedings will achieve the purpose of enabling the CCC to effectively perform its functions under the CC Act.

Without powers of compulsion and effective and appropriate sanctions for non-compliance, many persons in possession of valuable and probative evidence may be reluctant to assist the CCC due to confidentiality or statutory non-disclosure requirements.

The difficulties investigators face in uncovering major crime and corruption have also been well documented.

The judgment in *SQH v Scott* refers to Victoria's 2014 reforms to its *Major Crime (Investigative Powers) Act 2004* to remove the derivative use immunity that had been read into the coercive questioning powers by the Victorian Supreme Court. The judgment highlighted the following relevant extract from the statement of compatibility in respect of the reforms:

There are significant difficulties in detecting and prosecuting organised crime offences. Criminal organisations are well known to engage in serious violence against persons who provide information to police. They use that reputation to ensure that even persons who are not involved in the offences do not assist police with their investigation. The code of silence can operate both within the criminal organisation and outside it. The [amendment] aims to assist in the detection and prosecution of such offences and thereby prevent further offences.

The inability to use any evidence derived from answers, against the person who gave them, significantly undermines the effectiveness of the coercive powers scheme in achieving that aim. ...

While it may limit the privilege against self-incrimination, the reading in of a derivative use immunity significantly undermines the important purposes of the act and there are no other less restrictive means reasonably available¹².

In *SQH v Scott*, the CCC also referred to the 2015 amendments to the *Australian Crime Commission Act 2002* (Cth) where the explanatory memorandum for the Commonwealth amendments, as quoted in the judgement, stated:

...examinations and hearings are used in support of investigations into serious and organised criminal activities and law enforcement corruption issues, both of which have demonstrated a long-standing resistance to traditional law enforcement methodologies.¹³

With respect to corruption, it has been noted:

Anti-corruption and integrity bodies mandated with the role of exposing and investigating corruption require a broad set of powers to be effective. It has been argued that the suite of powers required by such bodies is necessary because of the nature of corruption, in that it 'is an extraordinary crime' and that 'it is almost impossible to detect or expose using ordinary investigative powers'¹⁴.

The ability to rely directly on documents and things produced in the context of a corruption investigation will ensure the CCC is able to effectively discharge its corruption function under the CC Act. This power means that the CCC's corruption investigations, with the ultimate goal of uncovering corruption and maintaining the integrity of public institutions, cannot be frustrated by an individual claiming privilege and preventing the CCC from using a document or thing to address corruption.

¹² *SQH v Scott* [2022] QSC 16 [354] (Williams J).

¹³ *SQH v Scott* [2022] QSC 16 [355] (Williams J).

¹⁴ *Inquiry into an Independent Integrity Commission*, Select Committee on an Independent Integrity Commission, ACT, October 2017.

The additional limitation imposed in respect of documents or things required to be produced in the context of corruption investigations is essential to ensuring that serious and systemic corruption in the public sector can be exposed.

It is important and appropriate that persons engaged by the public sector or holding appointments in UPAs should not be able to claim privilege in respect of documents or things that they have created or have access to by virtue of their position. In most cases, such documents and things would be required to be kept under record keeping requirements. Similarly, it is reasonable that persons who deal with the public sector or UPAs should not have the benefit of a use immunity in respect of documents or things relevant to a corruption investigation.

Corruption investigations are inherently different from investigations into criminal activity. At their heart, corruption investigations have the ultimate goal of protecting the integrity of public institutions in the public interest. There are many ways in which this goal can be achieved, not limited to prosecuting those who may be guilty of corrupt conduct that reaches a criminal standard. Exposing corrupt conduct for the purposes of prevention, education and disciplinary activities is equally important. On the other hand, criminal investigations are generally directed at the gathering of admissible evidence for subsequent criminal prosecutions. It is therefore appropriate and consistent with a free and democratic society based on human dignity, equality and freedom that key documents and things exposing corruption activities should be able to be directly relied upon by the CCC for a corruption investigation. The application of effective criminal sanctions, in line with the current penalties imposed under the CC Act, for non-compliance with investigation requirements is an appropriate way to increase the likelihood that a person will choose to comply with an investigation requirement, thereby assisting the CCC in the performance of its functions under the CC Act.

Overall, it may be said that while the issuing of investigation requirements and corresponding offence provisions limits individual rights, this is done in support of ensuring the CCC is able to effectively perform its statutory functions for the benefit of the entire community. As was noted by the Honourable Tony Fitzgerald AC KC in his report on the Commission of Inquiry into Official Corruption in Queensland from 1987 – 1989:

*The powers needed for effective law enforcement can encroach on individual rights and liberties, but it must be remembered that the individual also has a right to protection from the State. Civil liberties are available to criminals along with the rest of society, and can be abused by them. Civil liberties are of limited worth if society is so altered by crime that they cannot be properly exercised or enjoyed.*¹⁵

The ability to hold certain matters in closed court and the court's discretion to otherwise restrict access to material is also important for ensuring the CCC's ability to perform its statutory functions. Without such protections, sensitive evidence may be compromised and the risks that may flow from its disclosure may cause irreparable damage to the potential success of a given investigation and, ultimately, to the CCC's ability to effectively perform its functions under the CC Act. The requirement for certain matters to be held in closed court also ensures that the

¹⁵ Report of a Commission of Inquiry pursuant to orders in Council, dated 26 May 1987, 25 August 1988, 29 June 1989, (Fitzgerald Report), at p. 360.

CCC is able to effectively perform its functions under the CC Act. For example, one of the CCC's functions is to investigate criminal organisations; those giving evidence or appearing before the court in some way to assist in such a proceeding may require anonymity to protect them from reprisal. In some instances, even the knowledge that such a proceeding is underway may endanger persons, their family or associates. The provision also allows for sensitive evidence, for example, evidence pertaining to law enforcement methodologies or information where disclosure would otherwise not be in the public interest, to be heard in private. This ensures that information related to law enforcement methodologies, or other similar information that may give forewarning and enable persons to avoid being apprehended, remains confidential, as this would not be in the public interest and could jeopardise the functions of CCC or other law enforcement investigations.

Generally, it is appropriate that the starting point for proceedings¹⁶ in relation to crime or corruption investigations is that they be held in closed court given the fact that these investigations will likely be on-foot and any disclosure of the mere fact that a matter is being investigated could significantly impede the effectiveness of the CCC's investigation and ultimate outcomes. Proceedings in the context of the witness protection function very clearly require confidentiality and secrecy given their highly sensitive nature and the dire consequences that may flow from a protected witness' identity being revealed. Witness protection is a crucial function of the CCC which allows individuals to give evidence in a range of matters and be protected from potentially harmful ramifications through various protections.

The additional limitations imposed as a result of the court's ability to make orders restricting access to material in proceedings are designed to allow access restrictions to be put in place where this is necessary to ensure investigations, intelligence operations and proceedings are not prejudiced or where restrictions are in the public interest or necessary to protect the safety and welfare of individuals involved in CCC investigations, including confidential informants, their family and any other person who may be adversely affected by the disclosure. All of these things are important to ensuring the effective performance by the CCC of its functions under the CC Act.

(d) Whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

There are no less restrictive, reasonably available alternatives to achieve the purposes of the proposed amendments.

Without powers to issue investigation requirements and offences for non-compliance, the CCC would have to rely on people engaging in investigations on a voluntary basis which would severely impact, and likely render impossible, its ability to effectively discharge its functions under the CC Act. Further, requiring the prosecution to establish the existence of a reasonable excuse would make it very difficult, if not impossible, to successfully prosecute an individual for failure to comply with an investigation requirement where the matters going to reasonable

¹⁶ Proceedings in this context means proceedings under the CC Act as opposed to proceedings relating to a criminal prosecution flowing from a CCC investigation which has resulted in a person being charged with a criminal offence.

excuse are likely to be peculiarly within the defendant's knowledge and relatively easy for the defendant to establish.

With respect to the extent to which a person is compelled to comply with an investigation requirement in circumstances where the privilege against self-incrimination is abrogated, subject to a direct use immunity, the following alternatives were considered but ruled out because they would not be as effective in ensuring the CCC is able to fulfil its functions:

- providing a transactional immunity, meaning that a witness would have an immunity from prosecution simply because they were compelled to give self-incriminating evidence;
- providing a derivative use immunity, but only for evidence that could not have been obtained, or the significance of which could not have been appreciated, but for the compelled evidence of the witness.

However, these alternatives would not be as effective in ensuring the CCC can effectively investigate major crime and corruption and perform its civil confiscation and witness protection functions.

A transactional immunity would effectively allow a person to protect themselves against future prosecution. A further passage from the statement of compatibility to the 2014 Victorian reforms which was referred to in *SQH v Scott* highlights this point: “*This undermines the ability to prosecute persons responsible for serious organised criminal offences, which is an important purpose of the act. In addition, the risk of a person immunising themselves from prosecution adversely affects the way in which Victoria Police and the chief examiner use the powers under the Act, reducing the scope and value of the chief examiner's powers*”.¹⁷ The same can be said in the context of ensuring the effectiveness of the CCC's coercive powers in uncovering major crime and corruption and ultimately being able to ensure perpetrators are held to account.

Allowing a limited derivative use immunity would also be less effective. The inability to use derived evidence also undermines the effectiveness of coercive powers and risks significant inefficiencies at the investigation and prosecution stages. The rationale put forward in the explanatory memorandum to the National Anti-Corruption Commission Bill 2022 for not extending the use immunity to material derived from investigation material is equally applicable and relevant in relation to the approach taken in the Bill to self-incrimination privilege:

*It is important that material derived from investigation material can be used to investigate, disrupt and—where appropriate—prosecute persons involved in serious or systemic corrupt conduct, including by prosecuting persons who have been witnesses before the Commissioner. For example, material provided by a witness in a hearing may lead the Commissioner to pursue new lines of investigation, which ultimately culminate in a brief of evidence against the witness. It is critical that such evidence can be used to disrupt corrupt conduct, including by prosecuting persons who have been witnesses.*¹⁸

¹⁷ *SQH v Scott* [2022] QSC 16 [354] (Williams J).

¹⁸ National Anti-Corruption Commission Bill 2002, Explanatory Memorandum, page 173.

I acknowledge that the Victorian Supreme Court came to a different conclusion in the case of *Re Application under Major Crime (Investigative Powers) Act 2004*.¹⁹ In that case, the Supreme Court found that the prevention and prosecution of organised crime may still be achieved while retaining a form of derivative use immunity.²⁰ However, the Supreme Court also noted that detailed proportionality submissions were not made in support of why major crime could not be investigated effectively while offering a limited derivative use immunity.²¹ By contrast, this statement of compatibility has set out above the reasons why major crime and corruption cannot be effectively investigated by the CCC if witnesses are given a derivative use immunity. That is why I have come to a different conclusion to the Victorian Supreme Court.

With respect to the additional but discrete limitation imposed on an individual's right to a fair hearing and rights in criminal proceedings by the absence of any use immunity, derivative or otherwise, for documents or things produced in the context of a corruption investigation, there are also no less restrictive, reasonably available alternatives to achieve the intended purpose.

The alternative to the approach adopted by the Bill is for a derivative use immunity to be applied, but this would mean investigators would be required to rely on the execution of a search warrant to obtain the evidence where direct reliance on the evidence was required. A search warrant is arguably a more invasive and intrusive process insofar as an individual's right to privacy is concerned, noting that the privilege against self-incrimination does not apply for search warrants. Moreover, it is appropriate to expect a higher level of compliance and engagement with investigators by an individual involved in a corruption investigation by virtue of their position within, or involvement with, the public service or a UPA.

To ensure that the proposed amendments are the least restrictive available option, there are also a range of safeguards which prevent the arbitrary exercise of the power to issue an investigation requirement and lessen the extent of any limitation on the identified rights where an investigation requirement is made.

Investigation requirements may only be issued where the CCC is satisfied to the necessary threshold that the information, document or thing to be compelled is relevant to the CCC's investigation, operation or function. Section 57 of the CC Act imposes a general duty on the CCC to act independently, impartially and fairly having regard to the purposes of the CC Act and the importance of protecting the public interest. Therefore, the power to issue an investigation requirement may only be used to advance the purposes of the CC Act and their use for any other purpose unrelated to investigating major crime or corruption would be improper. Further, any evidence obtained from an investigation notice that was issued for a purpose unrelated to a CCC investigation would run the risk at a subsequent criminal proceeding of being subject to an objection on the basis of the principle in *Bunning v Cross*²² (that a court has a discretion to reject evidence that is illegally obtained).

¹⁹ [2009] VSC 381; (2009) 24 VR 415.

²⁰ [2009] VSC 381; (2009) 24 VR 415, 451 [156].

²¹ [2009] VSC 381; (2009) 24 VR 415, 451 [160], 452 [164].

²² (1978) 141 CLR 54.

The extent of the limitation on the right to privacy and reputation, in particular, is tempered by the application of existing protections under the CC Act which protect the confidentiality of information obtained by the CCC. These include the provision which allows the CCC to maintain confidentiality in relation to any information in its possession and abstain from reporting on a matter to which confidential information is relevant (section 66), the offence applying to disclosure, or making a record, of confidential information which applies to any person including a CCC officer except in limited circumstances such as where the record or disclosure is made for the purposes of the commission or the CC Act (section 213), and the provision stating that a person may not be compelled to disclose confidential information to any court unless the CCC is a party to the proceeding, the production is necessary to give effect to the CC Act or in relation to a prosecution started as a result of an investigation conducted by the CCC (section 213(4)). Further, section 211 (Injury or detriment to witness) and section 212 (Offence of victimisation) of the CC Act provide additional safeguards.

CCC hearings are also not generally open to the public unless the CCC considers that opening the hearing will make it more effective and it would not be unfair to a person or contrary to the public interest. In conducting a closed hearing, the presiding officer may give directions about who may be present and there are penalties for non-compliance (section 179). The presiding officer may also make orders prohibiting the publication of any answer given, or document or thing produced at a hearing or information that may enable the existence or identity of a person who is about to give evidence to be ascertained (section 180(3)).

The impact on a person's subsequent rights to a fair hearing and rights in criminal proceedings brought about by the abrogation of the privilege against self-incrimination in the absence of a derivative use immunity are also lessened by the existence of safeguards in the proposed provisions and the existing framework of the CC Act.

These include the retention of a direct use immunity (section 197), the provisions relating to confidentiality outlined above, the right of a person to obtain legal advice for the purposes of a CCC hearing (sections 181 and 205) or in relation to the issuing of an investigation requirement. In circumstances where a proceeding for an indictable offence is before a court, the CCC is required to take necessary action in order to avoid prejudicing the trial, which can include the making of non-publication directions and orders (section 331). There are also powers available to a trial judge hearing a criminal trial to determine not to admit evidence if this would be unfair (section 130 of the Evidence Act) and to grant a permanent or temporary stay of proceedings if unfairness becomes manifest.²³

Under section 332 of the CC Act, a person may apply to a Supreme Court judge for a mandatory or restrictive injunction on the basis that a corruption investigation is being conducted unfairly or that a complaint or information about corrupt conduct that is being, or is about to be, investigated does not warrant an investigation.

Privileges operate to exempt persons from disclosure in order to protect fundamental human rights or important personal interests, as well as to serve broader public interests such as national security.²⁴ The proposed approach to the definition of privilege under the CC Act will

²³ *Strickland v DPP* [2018] HCA 53; (2018) 266 CLR 325.

²⁴ *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, ALRC Report 129.

enhance these rights by ensuring that reasonable excuse, based on privilege, is available in the same way regardless of the function or power that the CCC is exercising. As outlined above, the following privileges may be claimed: legal professional privilege, self-incrimination privilege (abrogated), journalist privilege, parliamentary privilege, public interest immunity, and confidentiality.

Where a person makes a valid claim of legal professional privilege, the investigation requirement cannot be insisted upon. This privilege protects confidential communications between a lawyer and a client. There are numerous benefits arising from the operation of the privilege, including positively engaging an individual's right to privacy and rights to a fair hearing and in criminal proceedings under the HR Act, as well as broader societal interests in relation to encouraging compliance with the law and the efficient administration of justice.

While a claim established on the ground of confidentiality will not relieve a person from complying with an investigation requirement unless this would be against the public interest, there is potential for the interests of the individual and, for example, their right to privacy, to intersect with the public interest in circumstances where disclosure is not required. Claims in relation to parliamentary privilege and public interest immunity on the other hand are unlikely to overlap with individual rights.

The availability of a claim of journalist privilege under the amendments in the Bill also represents a lesser restriction on the right to freedom of expression. It is well-recognised that press freedom is an aspect of freedom of expression, and that protection of journalistic sources is one of the basic conditions for press freedom.²⁵

Finally, a person may refuse to comply with an investigation requirement on the grounds that they have a reasonable excuse, not based on privilege. This term is not defined. However, the High Court has made it clear that there is no exhaustive list of what may constitute a reasonable excuse as the legislative intent is to give the courts power to determine the content of such defences by reference to the particular facts and circumstances of a case.²⁶ The ability to claim a reasonable excuse is therefore a broad and significant protection which has the potential to prevent interference with a range of human rights depending on the particular facts and circumstances in which the excuse is raised.

For all matters other than claims of privilege made in relation to search warrants and seizures or confiscation related investigations (following preliminary consideration by a CCC officer these matters may proceed straight to the Supreme Court), claims made outside a hearing will initially be determined by the Chairperson or a senior officer (who is different to the officer who issued the investigation requirement). A person will be afforded the opportunity to make written submissions in support of their claim and where a claim is not accepted, are to be advised of their right to apply to the Supreme Court. Where the person's claim is not based on a claim of privilege, the person must apply for leave to apply to the Supreme Court. Where the person's claim is based on a claim of privilege, application to the Supreme Court is as of right.

²⁵ *Goodwin v United Kingdom* (1996) 22 EHRR 123, [1996] ECHR 16, [39].

²⁶ *Taikato v The Queen* [1996] HCA 28; (1996) 186 CLR 454.

For claims made in the context of a hearing, the presiding officer will consider the claim, but a person will have corresponding rights to apply to the Supreme Court (with or without leave depending on whether the claim is based on privilege).

Safe-keeping provisions will apply both to claims made outside or at a hearing to make clear that the CCC is not to have access to any document or thing, which is the subject of a claim, when forming their opinion as to whether a claim of reasonable excuse or privilege is made out.

The Bill also provides for the deciding officer or presiding officer to decline to decide a matter in circumstances where they are unable, based on the information available to them and which they are able to access, to make a decision about a claim of privilege. This is an important safeguard and acknowledges limitations on the CCC's ability to decide claims where it is prevented from accessing documents or things the subject of claims. In these circumstances, if the CCC wishes to insist on the investigation requirement, it must apply to the Supreme Court for a determination of the claim.

The clear alternative to the limitation on the rights to freedom of expression and a fair hearing by the hearing of certain matters in closed court and restricting who has access to information, is to have no restrictions or to minimise the restrictions that may be put in place, for example to close the court only during specific evidence. However, these alternatives would not be as effective in ensuring the CCC's ability to effectively investigate major crime and corruption and perform its civil confiscation and witness protection functions.

Where a matter is to be held in closed court, the Bill provides the court with a discretion to permit another person to be present at a hearing for the application if the court considers it is in the interests of justice to do so. Moreover, every court has an overriding obligation to ensure a fair trial and all statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights pursuant to section 48 of the HR Act. Therefore, when interpreting the requirement to allow a person to be present at the hearing or to make orders restricting who has access to information, the court will be required to consider human rights in making their decision and is required to make the decision most compatible with human rights.

As there is no less restrictive alternative available to achieve the purpose of ensuring the CCC can effectively discharge its various functions under the CC Act, the limits or interferences on the rights to freedom of expression, privacy and reputation, property, liberty and security of the person and a fair hearing and rights in criminal proceedings are considered necessary.

- (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 human rights, taking into account the nature and extent of the limitation

The ability to issue investigation notices accompanied by corresponding sanctions for non-compliance, subject to a range of statutory safeguards, strikes a fair balance between the rights to freedom of expression, privacy and reputation, property, liberty and security of person and to a fair trial and rights in criminal proceedings, on the one hand, and the need to ensure that the CCC is able to carry out its functions under the CC Act, on the other.

The approach taken represents a fair balance as it does not favour the effectiveness of the investigation at all costs. While the ability for a person to resist an investigation requirement on the basis that they have a reasonable excuse or valid claim of privilege may impede CCC investigations or operations due to the suppression of relevant evidence or by delaying or frustrating it, the ability to make such claims is fundamental to avoiding arbitrary interference with the rights of those who may be subject to an investigation requirement. Further, in circumstances where a person's excuse is not accepted or claim of privilege overridden, a range of protections will operate to ensure that any impacts on the identified rights are mitigated.

While an individual's liberty or property rights may be limited if they are charged and convicted of an offence for failure to comply with an investigation requirement, this is outweighed by the importance of ensuring that the CCC is able to effectively fulfil its functions under the CC Act which benefits society at large. Further, the extent of the limitation on the right to be presumed innocent, arising from the reversal of onus in relation to reasonable excuse, is minimal given the matters to be established will be within the personal knowledge of the defendant. Provisions of this type are not uncommon and are not considered overly onerous. Inclusion of a 'reasonable excuse' ensures a degree of flexibility and that the obligation imposed by the offence is not unreasonable. Further, the reasonable excuse provision operates in addition to the general defences available under the Criminal Code.

Limiting the right to freedom of expression and the right to a fair hearing by requiring closed court hearings and restricting who may have access to certain information or documents is important to preserve, as much as is possible, an individual's (including an informant's) right to privacy, to protect their safety and welfare and that of their family, and any other affected person; to ensure investigations, intelligence operations and proceedings are not prejudiced; and to otherwise guard against disclosure of relevant material where this would not be in the public interest. For these reasons, the limitations on such rights are proportionate and therefore justified in the circumstances.

As the interference with privacy and property is proportionate and not arbitrary, the rights to privacy and property are not limited by the proposed amendments. The limits on the freedom of expression, the right to a fair hearing and rights in criminal proceedings are proportionate and therefore justified. The proposed amendments are therefore compatible with those human rights.

Journalist shield laws

The Bill applies journalist privilege (known as 'shield laws') to the CCC and applications to the Supreme Court under the CC Act. Similar to the approach in the Evidence Act, the privilege is qualified and may be overridden if the public interest in disclosing the informant's identity outweighs: any likely adverse effect of the disclosure on the informant or another person; and the public interest in the communication of facts and opinions to the public by the news media and the news media's ability to access sources of facts.

Human rights that are limited by the proposal (Part 2, Divisions 2 and 3 HR Act)

The proposal to apply shield laws to the CCC engages and limits the following human rights:

- freedom of expression (section 21 of the HR Act); and

- privacy and reputation (section 25 of the HR Act).

Whether any limits on human rights are reasonable and justifiable (section 13 HR Act)

(a) the nature of the right

The *right to freedom of expression* under section 21 of the HR Act protects the right of all persons to hold an opinion without interference and to seek, receive and express information and ideas orally, in writing, in print, by way of art, or in any other medium. The forms of protected expression are broad and may include spoken or sign language, books, newspapers, pamphlets, posters, banners, dress, legal submissions, and audio-visual, electronic and internet-based expressions.

The Bill limits the right to freedom of expression as it does not provide an absolute protection from compelled disclosure of a journalist's informant. As outlined above, the Bill instead provides for a qualified privilege whereby the privilege may be overridden if the CCC, but ultimately the Supreme Court, determines that a balance of public interests requires disclosure.

In human rights cases overseas, it has been recognised that press freedom is an aspect of freedom of expression and that protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with the right to freedom of expression unless it is justified by an overriding requirement in the public interest.²⁷

Section 25 of the HR Act provides for a *right to privacy and reputation*. The right to privacy protects individuals against unlawful or arbitrary interference with their privacy, family, home, or correspondence (written and verbal). Privacy is generally understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. The concept of lawfulness in the context of the right to privacy means that no interference can take place except in cases envisaged by the law, while the concept of arbitrariness extends to interferences that may be lawful but that are capricious, unpredictable, unreasonable and disproportionate.

The application of shield laws to the CCC may limit the right to privacy if the Supreme Court ultimately orders the disclosure of the confidential source's identity or the production of information that may disclose their identity. However, the right to privacy will only be limited if the interference with privacy is unlawful or arbitrary. As outlined above, 'arbitrary' in a human rights context, refers to conduct that is capricious, unpredictable or unjust, and to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought. If an interference is proportionate under section 13 of the HR Act, it will not be

²⁷ *Goodwin v United Kingdom* (1996) 22 EHRR 123, [1996] ECHR 16, [39].

arbitrary. Whether the interference with privacy is arbitrary is addressed below when considering the factors in section 13.

- (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

There is a strong public interest in the effective performance of the CCC's various functions under the CC Act, including its crime function, corruption function and civil confiscation function.

The limitations on the right to freedom of expression and the right to privacy are designed to ensure that the CCC is able to effectively perform its various functions under the CC Act.

- (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 limitation on the right to freedom of expression, will achieve its purpose of facilitating the effective performance by the CCC of its functions under the CC Act by ensuring that the CCC has access to the confidential source's identity or information that discloses the identity of the confidential source where this is important to a CCC investigation and the information is not readily able to be obtained by other means.

The limitations on the right to privacy will achieve their purpose of ensuring the CCC can effectively perform its functions under the CC Act, while balancing the confidential source's right to privacy. This is the foundation of the balancing test that the Supreme Court must engage in when determining whether or not to make an order requiring disclosure of the information despite journalist privilege.

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

There are two main alternatives to the proposed application of a qualified privilege to the CCC: introducing an absolute journalist source privilege or retaining the current framework under the CC Act which does not allow journalist privilege to be claimed in response to CCC investigation requirements. These alternatives are either more restrictive on human rights, or not as effective in achieving the purpose:

- an absolute privilege would strengthen the protections of the confidential source's right to privacy but would fundamentally limit the ability of the CCC to effectively perform its functions under the CC Act where there may be no other investigative leads available to it; and
- retaining the current framework under the CC Act would promote the CCC's ability to effectively perform its functions under the CC Act by allowing the CCC access to the relevant information but would limit the confidential source's right to privacy.

As such, there are no less restrictive and reasonably available ways to achieve the purpose.

The application of shield laws under the CC Act will rely on elements of the shield laws framework under the Evidence Act which has also been developed to appropriately balance human rights. For example, the same broad definition of journalist will apply (new section

205C inserted by clause 32), to ensure a wide range of persons engaged in journalistic work are captured and the right to privacy of confidential sources more broadly protected. Similarly, the shield will also extend to prescribed persons associated with the journalist to ensure the right to privacy is not restricted through compelled disclosure from a person working with the journalist (see definition of ‘relevant person’ for a journalist in new section 205A inserted by clause 32).

According to the European Court of Human Rights, the importance of press freedom means that the protection of journalists’ sources must be attended by legal safeguards. First and foremost among these safeguards is the guarantee of review by a court, or other body separate from the executive and other interested parties, invested with the power to: determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material; and to prevent unnecessary access to information capable of disclosing the sources’ identity if it does not.²⁸ The proposed amendments comply with those human rights standards.

- (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

The limitation on the right to freedom of expression is appropriate to ensure the CCC is able to effectively perform its functions under the CC Act. The balancing of the competing rights — including whether the information provided by the confidential source is a matter of public interest and the importance of the informant’s identity to the effective performance by the CCC of its functions — is the foundation of the balancing test that the CCC and the Supreme Court must engage in when determining whether to insist on a requirement (new section 205ZF in clause 32) or make an order (new section 205ZS in clause 32).

The limitations on the right to privacy will be authorised by law and are appropriate as a balancing of the competing rights — including any likely adverse effect of disclosure of the source’s identity on the source or another person and whether this effect can be mitigated, and the importance of the informant’s identity to the effective performance by the CCC of its functions — is the foundation of the balancing test referred to above.

Further, existing provisions in the CC Act will apply to ensure that the impact on the right to privacy and reputation of the source is minimised. These provisions include that the application to the Supreme Court is confidential (section 200A), future examinations by the CCC relating to the informant can be conducted in private (section 177) and limitations imposed in relation to who may be present (section 179), and offences which apply in relation to publication of any answers given, or documents or things produced at a commission hearing (section 202).

Because the interference with privacy is proportionate and not arbitrary, the proposed amendments do not limit the right to privacy. Because the limit on freedom of expression is proportionate, the limit on that right is justified. Accordingly, the proposed journalist shield laws are compatible with human rights.

²⁸ *Sanoma Uitgevers BV v The Netherlands* [2010] ECHR 1284, [88] – [90].

Prosecution of corruption offences

Clause 7 of the Bill inserts new Subdivision 2 (Prosecution of corruption offences) into Chapter 2, Part 3, Division 5 of the CC Act and makes related amendments to implement COI recommendations relating to advice about potential charges arising from corruption investigations.

Human rights engaged or limited (Part 2, Divisions 2 and 3 Human Rights Act 2019)

The new processes relating to the prosecution of corruption offences engage and limit a number of human rights, including:

- privacy and reputation (section 25 of the HR Act);
- fair hearing (section 31 of the HR Act); and
- rights in criminal proceedings (section 32 of the HR Act).

Whether any limits on human rights are reasonable and justifiable (section 13 HR Act)

(a) the nature of the right

The scope of the *right to privacy* is broad. It protects personal information and data collection. It also extends to a person's private life more generally, so protects the individual against interference with their physical and mental integrity, including appearance, clothing, gender, sexuality and home.

The amendments limit the right to privacy and reputation due to the requirement to provide a report on potential charges to the DPP. The contents of the report may contain personal information identifying the person the subject of the corruption investigation, the facts surrounding the alleged offending, as well as other material which may identify other related persons and all relevant information which may support a defence that may be available to the person.

This right protects the privacy of people in Queensland from 'unlawful' or 'arbitrary' interference. Arbitrary interference includes when something is lawful, but also unreasonable, unnecessary or disproportionate. If an interference with privacy is proportionate under section 13 of the HR Act, it will not be arbitrary. Accordingly, whether the interference is arbitrary will be addressed below when considering the factors in section 13.

The protection against an attack on someone's reputation is limited to unlawful attacks. As the amendment will provide lawful authority to provide a report on potential charges, any interference with reputation will be lawful. Further, the right does not extend to protect against the foreseeable consequences of one's own actions, such as the commission of a criminal offence.²⁹ Accordingly, the right to reputation is not limited.

The *right to a fair hearing* and the *privilege against self-incrimination* are rights which define the relationship between the individual and the state and reflect the philosophy that the state must prove its case without recourse to the suspect.

²⁹ *Matalas v Greece* [2021] ECHR 247; (2021) 73 EHRR 26, 975-6 [39].

New sections 49B and 49C (inserted by clause 7 of the Bill) provide that the report to the DPP (for the purposes of obtaining advice about a potential charge or charge in exceptional circumstances) must contain all relevant information known to the CCC and this may include self-incriminating information obtained by use of the CCC's coercive powers. There is a risk that the DPP may gain a forensic advantage in exercising its prosecutorial function because the CCC's report to obtain advice about corruption charges as required under the Bill contains the evidence of an accused person obtained under compulsion. Accordingly, the amendments also engage the right to a fair hearing in section 31 of the HR Act and the right of a person not to be compelled to testify against themselves or to confess guilt in section 32(2)(k) of the HR Act.

- (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

Corruption investigations by the CCC serve a crucial role in society by eliminating corruption and instilling public trust and confidence in democratic institutions. Where charges are brought but later withdrawn, that public trust and confidence may be undermined. The provision of the report for the consideration by the DPP in providing 'genuine, independent advice' is necessary for the proper consideration as to whether there is sufficient evidence for a corruption charge. The role of the DPP in reviewing all relevant information provides an important safeguard and supports sound charging decisions. This will promote public confidence in the CCC and confidence in the justice system more broadly.

- (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

Providing a report on CCC corruption investigations is essential to ensuring the DPP is able to provide 'genuine, independent advice' on whether a charge should be brought. The report will be limited to all relevant information known to the CCC.

- (d) Whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

There are no less restrictive, reasonably available alternatives to achieve the purpose of providing genuine, independent advice on the prosecution of corruption offences.

In making its recommendations, the COI considered three different options: outsourcing the charging function to the QPS; briefing members of the Queensland Bar before deciding to charge; or obtaining advice from the DPP before deciding to charge.

Outsourcing of charging back to the QPS

This option would result in double-handling of the file with the QPS conducting their own investigations before deciding whether to charge. The COI also found that an immediate disadvantage arises where the investigation involves allegedly corrupt conduct by a QPS officer or employee and therefore the QPS investigation is likely to be perceived as lacking independence and impartiality. This process would also result in significant delays given a further investigation would be undertaken by the QPS.

While the QPS would be bound by confidentiality and privacy principles, they would still be in possession of the same material provided to the DPP. Therefore, this option is not less restrictive on a person's right to privacy.

With respect to compelled material, the QPS may be in the same position as the DPP with respect to a potential forensic advantage and risk of an unfair trial, where they are the prosecuting entity, particularly at the early stages of the criminal proceedings.

The COI also noted that while the QPS has extensive experience in criminal law, they may lack experience in broader areas of law, including administrative and public law. The DPP already has experience dealing with CCC corruption investigations and the prosecution of criminal matters. As canvassed by the COI, the QPS is, therefore, not an effective alternative approach.

The outsourcing of charging back to the QPS is not a less restrictive, reasonably available alternative. As suggested by the COI, this option is not the most appropriate to achieve the purpose of requiring charge advice for the prosecution of corruption offences.

Briefing members of the Queensland Bar

In relation to this option, concerns were raised by the COI as to the risks of inconsistency of decision-making by members of the private Bar in assessing whether the prosecution is in the public interest. Given the briefs would likely be given to different barristers from time to time it is reasonable to assume they might apply the test differently. Further, concerns were raised about a perception that the CCC would brief a barrister likely to recommend a prosecution. This perception would interfere with instilling public trust and confidence in democratic institutions and the justice system.

The lack of guarantee that members of the Bar would be able to provide advice more expeditiously than the DPP was also a consideration as to why this option was not preferred by the COI. The COI noted that a senior barrister experienced in criminal law would likely be required to provide advice, which might limit available counsel.³⁰ This would potentially cause further delays.

Given members of the Bar would receive the same material to be provided to the DPP, this option would be no less restrictive on a person's right to privacy.

With respect to compelled material, the separation of the material being considered by a private barrister and then prosecuted by the DPP or QPS would potentially be a less restrictive way on the right to a fair hearing and the privilege against self-incrimination as it might limit the risk of the prosecuting entity coming into possession of or viewing the compelled material.

However, while briefing members of the Queensland Bar may be a less restrictive alternative, in light of the reasons canvassed by the COI, this option is not considered to be the most appropriate to achieve the purpose and is therefore not reasonably available.

³⁰ *Commission of Inquiry relating to the Crime and Corruption Commission* report, at p. 127.

Obtaining advice from the DPP

The DPP is the body that ultimately holds the discretion about whether a charge proceeds or not and can provide genuine independent advice on whether a charge should be laid.³¹ That discretion is also the subject of constant review as the DPP may exercise a discretion not to proceed with a matter at any time during the criminal proceedings.

Any person employed in the Office of the Director of Public Prosecutions (ODPP) is subject to section 24A of the *Director of Public Prosecutions Act 1984* (DPP Act) which states that a person must not disclose confidential information that came to the person's knowledge because of the employment or because of an opportunity given by the employment (subject to some exceptions, including that disclosure is required under a requirement of a court). This will ensure that there will only be limited access to the material which includes the personal information of the person the subject of the corruption investigation (for example, their home address, email address or bank account details), any police intelligence in support of the charges, compelled evidence and facts surrounding the alleged offending.

The other options considered by the COI to outsource the charging to the QPS or brief the private Bar, would also limit the right to privacy and would not be less restrictive ways, as the CCC report provided in either circumstance would contain the same material as the report to be provided to the DPP.

The COI acknowledged that the provision of coerced evidence complicates the two-tiered test in the Director's Guidelines (involving the sufficiency of evidence and public interest), but that coerced material may need to be considered by a charging entity to form a proper view about whether discretionary factors dictate that the matter should not proceed.³² The COI also considered the provision of coerced evidence and its use by a prosecuting authority and coerced evidence in the context of the relevant human rights.³³ The COI concluded that 'It seems therefore lawful for material coerced pre-charge to be provided to an entity considering whether to charge the person from whom that material was coerced'.³⁴

The DPP is an expert prosecutorial body, experienced with the complexities of CCC corruption investigations, including the lengthy briefs and the provision of compelled material. Further, the DPP is acutely aware of its obligations in light of relevant decisions of the High Court.³⁵ The internal governance of the ODPP operates in a way that any compelled material is quarantined from the trial prosecutor.³⁶ Under the new provisions, the memorandum of understanding between the CCC and DPP must also provide for processes for how the DPP deals with material received for the purposes of giving advice which would not ordinarily be received by the prosecution. The DPP may also brief members of the private Bar to prosecute

³¹ *Commission of Inquiry relating to the Crime and Corruption Commission* report, at p. 131.

³² *Commission of Inquiry relating to the Crime and Corruption Commission* report, at p. 129.

³³ *Commission of Inquiry relating to the Crime and Corruption Commission* report, at Appendix H.

³⁴ *Commission of Inquiry relating to the Crime and Corruption Commission* report, at Appendix H.

³⁵ *X7 v Australian Crime Commission* 597 (2013) 248 CLR 92; *Lee v New South Wales Crime Commission (Lee No 1)* 598 (2013) 251 CLR 196; and *Lee v R (Lee No 2)* 599 (2014) 253 CLR 455.

³⁶ *R v Pinzone; Di Carlo* [2023] QDCPR 8 at [19].

matters, creating further protections around quarantining of compelled material. This experience means the DPP is the most appropriate option to undertake this advisory function.

The Director's Guidelines provides for duties of prosecutors to act fairly and impartially and ensure that the prosecution case is presented properly and with fairness to the accused,³⁷ which provides an additional safeguard that an accused's rights in criminal proceedings and to a fair hearing are not limited.

The CC Act already contains a number of safeguards in relation to the use of compelled material to ensure the fair trial of an accused. This includes:

- section 180 which provides that when conducting a hearing, the presiding officer can make an order to prohibit the publication of evidence given or produced at that hearing or anything about that evidence;
- section 197 which restricts the use of privileged answers, documents, things or statements disclosed or produced under compulsion, and renders it inadmissible evidence against the individual in any civil, criminal or administrative proceeding, except in certain circumstances;
- section 202 which prohibits the disclosure of a range of material relating to any commission hearing without the CCC's written consent or contrary to the CCC's order; and
- section 331(2) which provides actions the CCC must take where there is a proceeding for an indictable offence conducted by or for the State, if failure to do so might prejudice the accused's right to a fair trial.

The other options considered by the COI would potentially be less restrictive ways on the right to a fair hearing and the privilege against self-incrimination. The risk of a prosecutor coming into possession of or viewing compelled material may be mitigated if the QPS or a member of the private Bar was providing external oversight of the decision to charge in respect of corruption investigations. However, these options would not be as effective in ensuring public confidence in the CCC and that the administration of justice is maintained.

- (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 human rights, taking into account the nature and extent of the limitation

A person's right to privacy will be limited by the disclosure of the report for the consideration of the DPP under these provisions. However, the involvement of the DPP in considering whether the alleged corruption offences meet the two-tier test in the Director's Guidelines is an appropriate front-end safeguard which strikes a fair balance.

As outlined above, the current prohibition on disclosure of information in the DPP Act provides significant privacy protections. Further, the advice provided by the DPP to the CCC will be privileged under the provisions in the Bill.

A person's right to a fair trial and the privilege against self-incrimination will be limited where a report to the DPP contains relevant compelled material. However, this information is only provided where it is relevant for the purpose of the DPP's advice function under the Bill. The COI noted that coerced evidence is already provided by the CCC in reports to prosecuting

³⁷ Director's Guidelines, Guideline 1 – Duty to be fair, at p. 1.

authorities and that such evidence may need to be considered by a charging entity to form a proper view about whether the matter should proceed. The DPP is experienced in dealing with these matters (and the COI report notes that in practice section 49 has not stopped the CCC seeking the views of the DPP) and has processes in place to ensure ethical walls are maintained, information is quarantined where necessary and the right to a fair trial is not impacted.

On balance, the proposal strikes a fair balance between the limitations on the right to privacy, the right to a fair hearing and rights in criminal proceedings and the purpose of maintaining public confidence in the CCC and the Queensland justice system more broadly. There are sufficient safeguards in the form of legislated confidentiality provisions protecting the information that are likely to limit the amount of interference in the person's privacy and reputation where possible. The internal structure of the ODPP will ensure any compelled materials obtained during coercive hearings are used appropriately when considering and providing advice on the charging, but not the prosecution, of corruption offences.

Accordingly, the proposed provisions relating to the DPP's advice about potential charges arising from corruption investigations are compatible with human rights.

Tenure and appointments

The Bill in clause 36 amends the CC Act to provide for a single non-renewable seven-year term of appointment for the Chairperson, Deputy Chairperson and Ordinary Commissioners of the CCC, and in clause 37 amends the CC Act to relax the pre-condition permitting a CCC senior officer to be employed for up to 15 years and to include a provision allowing tenure limits to be reset after a period of 10 years has elapsed for a senior officer who has permanently left the CCC. The existing limits on tenure for the CEO are retained in the Bill (up to a five year term to a maximum of ten years). These amendments address recommendation 4 of the PCCC in Report No. 106 and recommendation 5 in Report No. 108. The PCCC did not recommend any change to the tenure limits for the CEO and none is made. Nevertheless, the principles discussed below also apply to the retained term and tenure limit for the CEO.

Human rights engaged or limited (Part 2, Divisions 2 and 3 HR Act)

The amendments in relation to term limits and tenure limits arguably limit the right to take part in public life (section 23 of the HR Act) and the right to privacy (section 25 of the HR Act).

Whether any limits on human rights are reasonable and justifiable (section 13 HR Act)

(a) the nature of the right

The *right to take part in public life* affirms the right of all persons to have access to positions in the public service and in public office. The amendments to term and tenure limits may limit the right by preventing the continued employment of employees in public office (noting that the CCC is not a public sector entity under section 221B of the CC Act).

The right interacts with the general right to equality (section 15 of the HR Act), which requires processes for appointment or promotion within the public service to be objective, reasonable

and non-discriminatory. In addition, the United Nations Human Rights Committee in considering the right noted that:

*basing access to public service on equal opportunity and general principles of merit, and providing secured tenure, ensures that persons holding public service positions are free from political interference or pressures.*³⁸

Considering the internal limitation in the right which provides for access to public office ‘on general terms of equality’, it is also arguable that the right is not limited by the proposals which apply equally to all and do not have any effect on who may ‘access’ the various offices. The right is directed to preventing privileged groups from monopolising public service, in the sense of monopolising the composition of the public service³⁹. However, this statement of compatibility will take a cautious approach and proceed on the basis that the right is limited.

The amendments, by curtailing the terms of appointment of commissioners, may also engage the right not to have a person’s privacy unlawfully or arbitrarily interfered with as outlined in section 25(a) of the HR Act. The right to work is not specifically recognised in the HR Act however, it is a right set out in the International Covenant on Economic, Social and Cultural Rights to which Australia is a signatory. In Europe, the right to respect for private life (which is analogous to the right in section 25) has been interpreted to extend to protect against interference with the right to seek employment on the basis that such restrictions may interfere with the development of relationships with others and impact enjoyment of private life. In Victoria, this question was discussed but left undecided by Bell J at [82]-[95] in *ZZ v Secretary, Department of Justice* [2013] VSC 267. After outlining the European approach, His Honour also discusses a substantial argument against adopting the European jurisprudence in Victoria in that the rights are expressed in different ways in Europe and in Victoria. In Europe, the right is a positive right to have ‘respect’ for one’s private and family life, home and correspondence. In Victoria (as in Queensland), the right is expressed in negative terms not to have one’s privacy ‘unlawfully or arbitrarily interfered with’. His Honour went on to decide the case before him on the assumption the right to privacy was limited, but without determining the question. It is therefore an open question whether the right to privacy is engaged by the proposals or not.

However, the right to privacy will only be limited if the interference with privacy is unlawful or arbitrary. In a human rights context, ‘arbitrary’ refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought. If an interference is proportionate under section 13 of the HR Act, it will not be arbitrary. Accordingly, whether the interference with privacy is arbitrary will be addressed below when considering the factors in section 13.

The amendment allowing tenure limits to re-set after 10 years has elapsed does not limit human rights.

³⁸ Human Rights Committee, *General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, 57th sess, UN Doc CCPR/C/21/Rev.1/ Add.7 (12 July 1996).

³⁹ *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95, [324].

- (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 purpose of relaxing tenure limits is to enhance the operation of the CCC by allowing the CCC to retain and rely on the wealth of corporate knowledge of senior officers and allow them to progress and move within the senior ranks of the CCC, which will enable the CCC to more effectively perform its anti-corruption and major crime functions.

The purpose of maintaining some form of tenure limit, including for the Chairperson and Commissioners, is to reduce corruption risks within the CCC that may undermine its ability to perform its functions and may diminish its public standing and reputation. Tenure limits also contribute to renewal of leadership and guard against the development of a ‘siloes’ mindset within an institution.

- (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 introduction of a single non-renewable seven-year term for the CCC Commissioners will increase the independence of the roles from Government by removing the imperative of re-appointment. It will also allow for fresh ideas and a re-energisation of the executive at regular intervals.

The amendment to relax the pre-condition for re-appointment of senior officers will enhance the ability of the CCC to re-appoint a senior officer for up to two further five-year terms, permitting a longer period of employment and the retention of the knowledge and skills of the senior officer in what is a highly specialised field. That being said, there will remain a limit on the number of years a senior executive or Chairperson, Deputy Chairperson and Ordinary Commissioner can be employed.

Long-term tenures at the executive level of an organisation can lead to a potential corruption risk and other issues including entrenched views relevant to a culture and environment of an organisation. Tenure limits ensure renewed senior leadership to provide fresh ideas and approaches and to ensure an organisation’s culture is kept up to date and in line with contemporary community standards. At the same time, ensuring tenure limits are not too restrictive ensures the effective operation of an organisation through the retention of experienced staff and their corporate knowledge. As the PCCC in Report No. 106, quoting the Parliamentary Commissioner, noted:

as a general rule, any position anywhere which leaves people in place for too long without checks and balances can build up a culture that attaches itself to the views of whoever the head officers are. If that culture is not healthy, that means the whole organisation is crippled for a long time. They might be partisan to a particular view, they may not be willing to move towards technology or there may be all kinds of areas where I think it is more healthy to reinvigorate an organisation by timely changes. The issue is: what is the time? Clearly, two years would be too short a time. I do not know whether 10 years is too long. In particular, anti-corruption agencies play such an

*important role—and there are other similar agencies—and I think that is why there are restrictions on the time during which people can serve a term.*⁴⁰

Effective anti-corruption bodies contribute to community wellbeing and the maintenance of the rule of law which in turn ensures a free and democratic society based on human dignity, equality and freedom. Both measures will contribute to improved performance of the CCC in responding to major crime and corruption by increasing the independence of its leadership and enabling the retention of experienced staff for significant periods of time while ensuring sufficient reinvigoration to guard against corruption and the development of entrenched cultures. Improved performance by the CCC will ensure it retains the support and confidence of the Queensland public.

(d) Whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

To impose no term and tenure limits, while potentially less restrictive to human rights, would not achieve the purpose of reducing the risk of corruption within the CCC itself and would potentially make the CCC less effective in its public role. The risk of corruption is particularly important to address for a body established to fight corruption to ensure public confidence is maintained. For similar reasons, this approach of term limitation is common for other statutory integrity positions within Queensland (for example, the Auditor-General) and for similar anti-corruption bodies in interstate jurisdictions.

While a single term of a longer duration would potentially enhance independence this would be at the risk of a commissioner being in the role for too long, leading to stagnation of ideas and, at its worst, increasing the risk of corruption.

The proposal in relation to senior officers does not change the maximum tenure period but does relax the pre-condition under which the maximum may apply. This relaxation is required to ensure the effective operation of the CCC by reducing staff turnover in a specialised field, while still maintaining a safeguard against corruption risks. While it is a matter of balance, there is no reasonably available alternative which will achieve these twin objectives. While it is open to permit a lesser extended tenure period, the proposed period already aligns with the existing circumstances where, as a limited exception, a senior officer could be extended for a further five-year term if necessary for the efficient operation of the CCC. A lesser tenure period while reducing the risk of entrenched corruption would weaken the overall skill level of the senior ranks of the CCC and likely reduce its effectiveness in fighting corruption. Security of tenure for a reasonable length of time also gives certainty to employees and enhances independence.

(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 human rights, taking into account the nature and extent of the limitation

The amendment providing a single non-renewable term for CCC commissioners will remove the imperative for re-appointment and support the independence of the CCC. It will also allow for renewal and fresh ideas in the executive. Such provisions strike an appropriate balance with

⁴⁰ PCCC Report No. 106, *Review of the Crime and Corruption Commission's activities*, at p 16.

the right of equality of access to public office and protecting the overarching imperative of guarding against corruption risks within the CCC. Given the nature of the role the CCC plays as the State's primary anti-corruption body, it is vital any corruption risk is appropriately mitigated.

Even if impacts on access to employment interferes with privacy, as the interference would be proportionate and not arbitrary, the right to privacy is not limited. Even if the right of equal access to public office is limited, that limit is proportionate. Accordingly, the amendments related to tenure and appointment are compatible with human rights.

New provisions for video/audio conferencing and issuing of notices by email

The Bill amends the CC Act to provide the CCC with the ability to issue notices by email (in clause 16) and allow the attendance of witnesses via audio or audiovisual link (in clause 22), provided certain conditions are met. This will be advantageous in circumstances where recourse to the usual means of service of notices or in-person hearings is not practicable or desirable.

These provisions expand the existing ways to receive service or attend a hearing in circumstances where a person is not obliged to use the alternative methods. In addition, there are a range of safeguards included both in the Bill and existing in the CC Act to ensure that a person should not be disadvantaged should they choose service by email or remote attendance. In this way, the amendments arguably engage and promote a person's right to recognition and equality before the law (section 15 of the HR Act).

Timeframe for supporting appointments

The Bill (in clause 35) amends section 228 of the CC Act to introduce a 30-day timeframe (with possible 2 week extension if requested) within which the PCCC must notify the Minister whether an appointment to the position of CCC Commissioner or CEO has bipartisan support. The Bill (in clause 42) also amends section 292 to allow the PCCC to publish (as part of its annual report) information about the PCCC's participation in the appointment process, including: the application of timeframes in a particular matter; reasons for any delays in providing support; and, where appropriate, the reasons for withholding that support provided the reasons do not identify any personal information or other confidential information. Placing this timeframe on the PCCC to notify the Minister does not engage any human rights under the HR Act.

Allowing the PCCC to publish information in its annual report about its participation in the appointment process also does not engage the right to privacy or any other human rights given the amendments specifically prohibit the inclusion of any personal or confidential information.

Directions on the performance of duties by commission officers

The Bill (in clause 39) amends section 257 of the CC Act to enable the CCC to issue directions on the performance of duties by commission officers who are employed by the CCC under section 256 of the CC Act.

Report No. 106 notes the CCC's submission to the PCCC that the power for the CCC to issue a direction for the performance of duties by CCC officers (including a direction that a person

participate in a disciplinary interview), is limited to those employees engaged under sections 254 and 255 of the CC Act, and does not extend to those officers engaged as agents under section 256. Employees engaged under section 256 are ‘relevant employees’ for the purposes of Division 9 in Part 1 of Chapter 6 the CC Act and are subject to disciplinary action in accordance with this division. To the extent that a subject officer may, because of a disciplinary interview, be subject to disciplinary action (which can include termination of employment or reduction of classification level or remuneration) the amendment engages and potentially limits the right to property (section 24 of the CC Act) and right to privacy (section 25 of the CC Act).

However, the exact nature of any limits on rights arising as a result of the amendment will not crystallise until a direction is issued and at this time the CCC would be required to have regard to relevant human rights of the subject officer.

Criteria for prescribing entities as Units of Public Administration

The Bill (in clause 4) amends section 20 of the CC Act to provide criteria for prescribing entities as UPAs for the purposes of the CC Act.

Currently, the CC Act provides for an unfettered ability to prescribe by regulation any entity not currently covered by section 20 to be a UPA for the purposes of bringing it within the jurisdiction of the CCC. The amendment introduces a set of criteria, including a requirement to consider whether it would be in the public interest for the entity to be prescribed, which must be satisfied before an entity may be prescribed as a UPA.

The potential exists for human rights to be engaged and limited where a person is involved with a UPA, whether by virtue of the fact that they hold an appointment within the UPA or in some other way, and the CCC exercises its jurisdiction to deal with a complaint involving corruption against the person. The introduction of criteria that must be satisfied before a UPA may be prescribed helps to ensure that any such limitations are only imposed where it is in the public interest to do so. Further, human rights would need to be considered when any entity is prescribed.

Scope of public interest disclosures under PID Act

The Bill (in clauses 49 – 54) amends the PID Act. The PID Act provides a comprehensive framework to facilitate public interest disclosures of wrongdoing in the public sector and protect the interests of those who are the subject of such disclosures as well as the persons making public interest disclosures. The proposed amendments to the PID Act are designed to allow disclosures to be made in relation to officers of the CCC. This ensures that the important protections offered by the PID Act framework apply to both a person making a disclosure against a CCC officer and the subject officer, thus protecting the rights of both parties.

Delegation of Minister’s functions

Clause 56 amends section 281 of the PS Act to replace the reference to the ‘chairperson of the council’ with a reference to ‘the chief executive of the department in which the *Parliament of Queensland Act 2001* is administered; or another appropriately qualified person’. This amendment appropriately broadens the scope of persons to whom a ministerial function under

section 192 of the PS Act may be delegated. The amendment does not alter the existing requirement that a delegation cannot be subdelegated.

The amendment to section 281 of the PS Act contained in this Bill does not limit any human rights under the HR Act.

Data and records of the Connolly-Ryan Inquiry

The Connolly-Ryan Inquiry was established in October 1996 but was terminated in August 1997 following the issuing of a Supreme Court injunction. Section 374 of the CC Act currently requires the Parliamentary Commissioner to secure the data and records in the Parliamentary Commissioner's possession so that only persons who satisfy the Parliamentary Commissioner that they have a legitimate need of access to the data and records are able to have access to them.

The Bill (in clauses 44 and 46) omits section 374 and replaces it with new section 346C to allow the data and records of the Connolly-Ryan Inquiry to be transferred to the Queensland State Archives for storage while maintaining the Parliamentary Commissioner's role in determining applications for access to the records. The Queensland State Archives are considered an appropriate secure environment for the records such that there is no increased risk of unauthorised access to them.

The Bill (in clause 58) also makes a related amendment to Schedule 1 (Document to which this Act does not apply) of the RTI Act to maintain the exclusion of the Connolly-Ryan Inquiry records from the operation of the RTI Act irrespective of who has access to and/or possession/control of the records.

There are no human rights limited by the amendments. The proposed amendments deal solely with the storage of physical records and do not change the existing regime under which the Parliamentary Commissioner must approve access to the records. The amendments therefore impose no greater or lesser limit on any human rights that may be said to be engaged by the existing access requirements.

Reporting on contraventions of warrant conditions or restrictions

The Bill (in clauses 59 – 61) amends the Queensland TI Act.

Domestic telecommunications interception is governed by Commonwealth legislation. The Queensland TI Act provides the recording, reporting and inspection regime required by the *Telecommunications (Interception and Access) Act 1979 (Cth)* (Commonwealth Act) for Queensland law enforcement agencies that access interception warrants under Part 2-5 of the Commonwealth Act and also requires the involvement of the Public Interest Monitor in the warrant application process.

Part 4 of the TI Act establishes inspecting entities to inspect the records of law enforcement agencies and ascertain and report on the agency's compliance with Part 3. This is an important safeguard given the highly intrusive nature of telecommunications interception which represent a limit on the right to privacy. While an inspecting entity may have access to a broad range of information, including personal information of individuals, it remains bound by obligations

under the Commonwealth Act relating to the disclosure of intercepted information or interception warrant information.

The amendment to section 25 of the TI Act in the Bill clarifies the power which already exists under the TI Act to report on inspections. The information that may be contained in the report is limited and may only be provided to specified persons. On this basis, the proposal protects and promotes the right to privacy. No human rights are limited by the proposal.

The further technical amendment to section 29 of the TI Act contained in this Bill does not limit any human rights under the HR Act.

Conclusion

In my opinion, the Crime and Corruption and Other Legislation Amendment Bill 2024 is compatible with human rights under the *Human Rights Act 2019* because the Bill limits human rights only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

YVETTE D'ATH MP
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Minister for the Prevention of Domestic and Family Violence

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