Portions of this submission have been deleted from the tabled version to ensure compliance with Standing Order 209.

Sub #20

PUBLIC SUBMISSION

TO

COMMITTEE SYSTEM REVIEW COMMITTEE

By

KEVIN LINDEBERG

21 May 2010

FUNCTIONS OF THE COMMITTEE

The Review of the Parliamentary Committee System Committee is a select committee established by resolution of the House on 25 February 2010. The committee is to conduct an inquiry and report on how the Parliamentary oversight of legislation could be enhanced and how the existing Parliamentary Committee system could be strengthened to enhance accountability.

In undertaking this inquiry, the committee will consider—

- the role of Parliamentary committees in both Australian and international jurisdictions in examining legislative proposals, particularly those with unicameral parliaments;
- timely and cost effective ways by which Queensland Parliamentary Committees can more effectively evaluate and examine legislative proposals; and
- the effectiveness of the operation of the committee structure of the 53rd Parliament following the restructure of the committee system on 23 April 2009.

The committee will include in its report options on models for structuring the Queensland Parliamentary Committee system.

ABBREVIATIONS

CJC - Criminal Justice Commission

CMC - Crime and Misconduct Commission

CSRC - Committee System Review Committee

ICAC - Independent Commission Against Corruption

PCJC – Parliamentary Criminal Justice Committee

PCMC - Parliamentary Crime and Misconduct Committee

IEPPC - Integrity, Ethics and Parliamentary Privileges Committee

The Audit - The Rofe QC Audit of the Heiner Affair

CASE LAW CITED

Cooper Brookes (Wollongong) Pty Limited v Federal Commissioner of Taxation (1981) 147 CLR 297

Sarasvati v The Queen (1990-91) 172 CLR 1

Ostrowski v Palmer [2004] HCA 30 (16 June 2004)

R v Ensbey; ex parte A-G (Qld) [2004] QCA 335

LAWS, RULES AND ORDERS

Crime and Misconduct Act 2001 (Qld)

Integrity Act 2009 (Qld)

Queensland Legislative Assembly's Rules and Orders

Legal Profession Act 2007 (Qld)

Legal Profession Regulation 2005 (NSW)

Acts Interpretation Act 1954 (Qld)

21 May 2010

The Research Director
Committee System Review Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Sir

Please find my public submission dated 21 May 2010 set out as follows. It seeks to address certain elements of the Committee's Terms of Reference.

Due to its contents, of necessity, touching on certain Committee members and its administrative staff, the requirements of Standing Order 272 will need to be respected during deliberations.

I am prepared to attend and provide evidence to the Committee.

Yours faithfully

KEVIN LINDEBERG

"...Neither the few nor the many have a right to act merely by their will, in any matter connected with duty, trust, engagement, or obligation."

Edmund Burke 1791

1. BACKGROUND

1.1. The establishment of the Committee System Review Committee ("**CSRC**") on 25 February 2010 has been presented as yet another demonstration of the Bligh Government's determination to ensure that Queensland's unicameral system of government is as open and accountable as possible.

1.2. This latest demonstration came in the wake of some stringent criticism that things were going off the rails in "post-Fitzgerald" Queensland. Some came in the shape of the lobbyist sector in Queensland of former political mates allegedly abusing their contacts or winning commercial deals with mates in government and being paid excessive 'success fees'. It was essentially a perception problem of 'mates looking after mates.' The Crime and Misconduct Commission ("**CMC**") carried out two investigations in 2009 into allegations against two former Deputy Premiers the Honourable Jim Elder and the Honourable Terry Mackenroth and found no wrongdoing.[1]

1.3. One recommendation in the Elder investigation stated that the CMC was concerned at the Department's general lack of record-keeping, particularly as to representations involving lobbyists.

1.4. On 10 November 2009, the Bligh Government introduced its *Integrity Act 2009* to create *inter alia* a statutory basis for the Register of Lobbyists, a ban on the payment of success fees to lobbyists, and enhancing the function and independence of the Integrity Commissioner by making him/her an officer of the Parliament.

[1] http://www.cmc.qld.gov.au/data/portal/00000005/content/91079001257814620313.pdf and http://www.cmc.qld.gov.au/data/portal/00000005/content/05770001251869251572.pdf

1.5. The other criticism came on 28 July 2009 from former corruption fighter, the Hon Tony Fitzgerald AC QC, in his keynote inaugural speech to the Griffith University's Tony Fitzgerald Lecture Series and Scholarship Fund.[2]

1.6. In his speech which received extensive media coverage, Fitzgerald set down an historical base for all of us to remember, namely that "*...Every generation has a duty to historical truth*"; and, in respect of politicians, he suggested that they should remember that "*...Ethics are always tested by incumbency.*"

1.7. He suggested that during the Beattie regime, in contrast to the Goss regime, that "*...much of the principled willingness to confront Queensland's dark past had been lost and with it the momentum for reform*" because "*...Tacitly at least, Queenslanders were encouraged to forget the repression and corruption which had occurred and the social upheaval which had been involved in eradicating those injustices. Younger Queenslanders know little of that era & are largely ignorant of the possibility that history might be repeated.*"

1.8. In respect of both sides of politics, he said the following which I submit is relevant to this review: "... ***Neither side of politics is interested in these issues except for short-term political advantage as each enjoys or plots impatiently for its turn at the privileges and opportunities which accompany power.....Unfortunately, cynical, short-sighted political attitudes adopted for the benefit of particular politicians and their parties commonly have adverse consequences for the general community***. *The current concerns about political and police misconduct are a predictable result of attitudes adopted in Queensland since the mid-1990s.* ***Despite their protestations of high standards of probity, which personally might well be correct, and irrespective of what they intend, political leaders who gloss over corruption risk being perceived by their colleagues and the electorate as regarding it of little importance. Even if incorrect, that is a disastrous perception. Greed, power and opportunity in combination provide an almost irresistible temptation for many which can only be countered by the near-certainty of exposure and severe punishment***."[3]
(Bold and underlining added)

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[2] http://www.griffith.edu.au/arts-languages-criminology/key-centre-ethics-law-justice-governance/news-events/tony-fitzgerald-lecture-series-and-scholarship-fund

[3] http://www.griffith.edu.au/arts-languages-criminology/key-centre-ethics-law-justice-governance/news-events/tony-fitzgerald-lecture-series-and-scholarship-fund

1.9. On the following day, 29 July 2009, with no coverage in the Queensland media although covered in Sydney by *The Daily Telegraph*[4], former NSW Supreme Court Justice and former Independent Commission Against Corruption ("**ICAC**") Chairman, the Hon Barry O'Keefe AM QC, made a landmark speech to the international 2009 **Australian Public Sector Anti-Corruption Conference** held in Brisbane. He highlighted an unresolved scandal – the Heiner Affair - which covers the entire period Fitzgerald was referring to, including when he (Fitzgerald) suggested that there was supposedly a "*...principled willingness to confront Queensland's dark past* (of corruption)" by the Goss administration. O'Keefe said:

> *"...Here in Queensland there is of course the involvement of what was formerly the Criminal Justice Commission now the Crime and Misconduct Commission, in the Heiner Affair in which, by direction of Cabinet, documents relevant to an inquiry and to possible criminal and other proceedings were destroyed. The opinion has been expressed by a former Chief Justice of the High Court of Australia, the now late Rt Hon Sir Harry Gibbs GCMG AC KBE, that these activities involved prima facie a criminal offence. A like view has been expressed by a leading silk in Queensland and a recent and lengthy submission by Mr D F Rofe QC (a very senior practitioner at the NSW Bar) has raised serious questions as to the actions involved in the destruction of the documents in question. Regrettably this matter does not appear to have been taken up by the anti-corruption body to which it has been referred, notwithstanding the eminent opinions that have been expressed and the writing of a letter by a number of former judges (of whom I was one) and eminent practitioners seeking to have the matter made the subject of an investigation and the appointment of an independent Special Prosecutor in order to restore public confidence in the administration of justice, especially in Queensland."*[5]

1.10 Insofar as Fitzgerald suggested that with the introduction of the CJC into Queensland's governance and that during the Goss administration all systemic corruption was rooted out

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4 http://blogs.news.com.au/dailytelegraph/piersakerman/index.php/dailytelegraph/comments/former_nsw_icac_commissioner_on_heiner/

5 http://www.apsacc.com.au/2009conference/papers09/Day1_29July09/StreamC2/InternationalAntiCorrutpion_BarryOKeefe.pdf

of the system, the Fitzgerald and O'Keefe comments are in serious conflict with each other. Both these comments go to the CSRC's terms of reference regarding "how the existing Parliamentary Committee system could be strengthened to enhance accountability" and, in particular, concern regarding the performance of the pinnacle accountability committee, Parliamentary Crime and Misconduct Committee ("**PCMC**"), arguably the most important committee of Queensland's unicameral Parliament due to its oversight role of the powerful CMC.

1.11 For the record, it is recognized that the Integrity, Ethics and Parliamentary Privileges Committee ("**IEPPC**") also plays a significant role in ensuring that Parliamentary privilege is not abused by politicians and others.

1.12 On 6 August 2009, the Bligh Government released a discussion paper *Integrity and Accountability in Queensland* in order "*...to prompt public discussion on how Queensland's integrity and accountability system could be improved and strengthened*" out of which this review arguably finds its source.

1.13 Premier Bligh hosted two web Q&A forums on integrity and accountability in Queensland on 2 and 7 September 2009, and, along with Queensland's Attorney-General, the Hon Cameron Dick. They were joined by governance luminaries such as Professor Charles Sampford, Messrs Robert Needham, David Solomon, and Dr Anne Tiernan. The Opposition countered this discussion paper by issuing its own calling for a commission of inquiry to investigate corruption in Queensland. This call was summarily dismissed by the Bligh Government by the oft-used refrain, also used by her predecessor Premier Peter Beattie, that a standing independent commission of inquiry already exists in Queensland in the shape of the CMC to which all allegations of suspected official misconduct could and should be referred, purportedly with confidence.

1.14 Due to the Fitzgerald/O'Keefe contrast, it is submitted that the following question unavoidably arises for unicameral Queensland to which the CSRC should turn its collective mind if it wishes to fulfill its task, namely, has the PCMC performed its accountability function as required by law or more generally.

2. A FRAUD ON GOVERNMENT BY THE RULE OF LAW IN UNICAMERAL QUEENSLAND

2.1. On available evidence, it is strongly open to conclude that "*Queensland is the rogue State of the Federation*". This unenviable status, resulting in the present parlous state of the governance in Queensland - the equal of, if not exceeding, Queensland's corrupt governance before the 1987 Fitzgerald Inquiry commenced - can be attributed to three prime factors:

(a) The 1922 abolition of Queensland Legislative Council which has ever since denied the Queensland polity, under the Westminster system of government, a normal and necessary check and balance on the all-pervasive power of Executive Government. This 1922 act seriously undermined government by the rule of law foisting on the polity "an elective dictatorship" where 'mates looking after mates' has an unacceptable foothold;

(b) The apparent inability of public officials (elected and appointed) to understand fully that government by numbers, especially in a unicameral system, without any overriding commitment to government by the rule of law and non-acceptance of any erosion to the Doctrine of the Separation of Powers, can lead to tyranny; and

(c) The failure of the Queensland media in its watchdog role.

2.2. It is now open to add to those three factors the serious failure of the PCMC to perform its pinnacle watchdog role on the CMC. This critical failure and abuse of power in our committee system has emerged out of the Fitzgerald Reform Process which was supposed to ensure accountability in our unicameral system.

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2.5.

Self-serving Majoritarianism or Veto

2.6.

2.7. Any abuse of the spirit and well-established understanding of what bipartisanship means in a parliamentary committee context (especially when dealing with criminal justice matters), namely, to take party-political interests and majoritarian domination out of deliberations and to have matters considered on their merits, is unacceptable. It is open to be seen as a serious breach of the trust bestowed on the PCMC by the Parliament and the Queensland people.

2.8.

2.9.

2.10. Within this legal context, a "majority" PCMC decision regarding whether "to refer" or "not to refer" a complaint to either the CMC or Parliamentary Commissioner for review, is not a decision but a legal nullity. It is equivalent to a hung jury. If it is treated as *functus officio* instead of a legal nullity, then a very serious abuse of power exists.

2.11. In simple terms, pursuant to s 14A of the *Acts Interpretation Act 1954* (Qld), any narrow interpretation of s 295 of the *CM Act* suggesting that 'bipartisanship' only applies when a decision outcome is "to refer" a complaint, is erroneous. Such a view defeats the purpose of the *CM Act* whose purpose is to eradicate corruption in government because it must permit a government majority inside the watchdog PCMC to cover up its own (potential) crimes.

2.12. It is plain that the word "decision" in s 295(3) of the *CM Act* cannot be fettered. If it were so, it creates such a serious mischief that the entire Fitzgerald Reform Process becomes meaningless, and even more so because of our unicameral Parliament.

2.13. Justice McHugh in ***Sarasvati v The Queen*** (1990-91) 172 CLR 1 at 21 said, "*...In many cases, the grammatical or literal meaning of a statutory provision will give effect to the purpose of the legislation. Consequently, it will constitute the 'ordinary meaning' to be applied. If however, the literal or grammatical meaning of a provision does not give effect to that purpose, that meaning cannot be regarded as the 'ordinary meaning' and cannot prevail. It must give way to the construction which will promote the underlying purpose or object of an Act.*" In ***Cooper Brookes (Wollongong) Pty Limited v Federal Commissioner of Taxation*** (1981) 147 CLR 297 at 321, Mason and Wilson JJ earlier said: "*...The propriety of departing from the literal interpretation ... extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.*"

2.14. Exposing this abuse to Parliament is potentially exacerbated because of the confidentiality constraints imposed under s 66 of the *CM Act* and Standing Order 209 of the Queensland Legislative Assembly's Rules and Orders as the Deputy Leader of the Opposition, the Hon Lawrence Springborg, recently experienced in the so-called Eastwood/Needham (tabling) Affair but was subsequently cleared of any contempt in the relevant Integrity, Ethics and Parliamentary Privileges Committee ("**IEPPC**") Report No 103.[6]

2.15. There is no doubt that an understanding in the Queensland Legislative Assembly and in the PCMC itself exists, due to the introduction of obligatory bipartisanship into the *CM Act*, that "majority" decisions **do not and cannot be made** in respect of decisions under s 295 of the *CM Act* and then consider them final. This is attested to in the following relevant statements:

(a) On 30 October 2001 during the second reading debate on the *Crime and Misconduct Bill 2001,* Mr. Geoff Wilson MLA, then PCJC and later PCMC chairman, gave a compelling guarantee that the custom and practice of bipartisanship inside the PCJC was known to all, and was going to continue in all (key) decisions under the (new) PCMC. Relevantly, he said: "*...**In all***

[6] http://www.parliament.qld.gov.au/view/committees/documents/MEPPC/reports/Report%20103.pdf

key decisions, it is required to operate in a bipartisan way in that there must be a multiparty majority."[7] (Bold and underlining added)

(b) On 30 October 1996, then Leader of the Opposition (and former chairman of the first Parliamentary Criminal Justice Committee ("**PCJC**"), the Hon. Peter Beattie, during the second reading debate gave proof to the presence (and necessity) of bipartisanship inside the PCJC in the following statement: "*...Tony Fitzgerald set up the Parliamentary Criminal Justice Committee as an all-party committee to establish a commitment to bipartisanship in the Fitzgerald reform process.*"[8]

(c) In the same debate, the Hon Paul Braddy, former Minister in the Goss ALP Government, indicated strongly in his second reading speech that bipartisanship existed. He said: "*...Governments and Oppositions come and go. However, a spirit of bipartisanship has surrounded all that has occurred in relation to the Criminal Justice Commission subsequent to the Fitzgerald reforms. In his report, Mr. Fitzgerald, QC, as he then was, pointed out the value of being bipartisan, and he successfully urged on the Parliament of Queensland that that principle should apply in relation to the CJC; that there should be a Parliamentary Criminal Justice Committee which should work without members behaving in an overtly party political manner.*"[9]

(d) In an appearance before the **Tasmanian Parliament's Joint Select Committee on Ethical Conduct** ("**JSCEC**") in Parliament House Brisbane on 24 November 2008, when it was taking evidence on whether or not the Tasmanian Government should establish an integrity tribunal, questions were asked of the then Government PCMC members on the issue of bipartisanship and related matters. They made the following relevant statements before a parliamentary committee:

Mr. FINN (ALP/PCMC Member) - So that parliamentary commissioner role is really important for us because if somebody comes to us with a situation that you talk about, concerned about the functioning of the CMC,

[7] State *Hansard* 30 October 2001 p3161.
[8] State *Hansard* 10 October 1996 p3282
[9] State *Hansard* 10 October 1996 p3284

by us **being able to refer it to a commissioner with those powers takes it out of the political arena in any case**. We get that person to investigate and report back to us and then we determine the course of action. (Bold and underlining added)

(e) **Mr. FINN (ALP/PCMC Member) - Firstly, we are required to have bipartisan decision making, so decisions of the committee must be bipartisan. I am not aware of criticism of government using its numbers to direct an investigation, certainly not in my time, or whether that has happened historically.** (Bold and underlining added)

(f) **Mr. HOOLIHAN** (ALP/PCMC Chairman) – **It (i.e. the PCMC) cannot make a majority decision.** (Bold and underlining added)

(g) **(See Point 1.13)** During 7 September 2009 Q&A web forum, the following relevant question was put to (then) CMC Chairman, Mr Robert Needham by moderator **Dr Peter Black**: *Okay, so there's also a question that's come in from Alan for you Mr. Needham which is the parliamentary crime and misconduct committee is said to be bipartisan but what does that mean for instance, can the majority parliament members ever use their numbers to prevent a matter affecting the government from being independently investigated.*

Robert Needham: *No, **the parliamentary committee is set up under the Crime and Misconduct Act so that any significant decision they make has to be taken by what's called a bipartisan majority**. That means it has to be majority that is constituted by more than just the members of one political party. So in other words some of the opposition members on the committee have to go along with the decision of the government members and might I say I've been involved now with the parliamentary committee for almost five years in my present position. Before that I was involved with the parliamentary committee for three years as the parliamentary crime and misconduct commissioner. In effect, acting as their agent and I must say throughout that entire time I've been very pleasantly surprised by the way the committee always works that under both the chairpersons who have been on the committee during that time they always strive to reach a conclusion on any important matter before them. Not by way of the*

bipartisan majority but by way of a unanimous decision. So they certainly do not and they also can not by any form of partisan political decision make the CMC do anything or stop them doing anything.[10] (Bold and underlining added)

2.16 The reality is that the PCMC can, with the best of intentions, reach a "majority" decision outcome. The significant point is, however, that whenever a "majority" decision outcome is reached, it cannot be considered final, as in either 'referring' or 'not referring' a complaint to the CMC or Parliamentary Commissioner for review. When obligatory bipartisanship is a legal condition of decision outcomes, "majority" equates to "gridlock", which is a legal nullity, and cannot be presented otherwise.

2.17

2.18

Extending the Reach of Standing Order 272

2.19 It is submitted that Standing Order 272 – **Impartiality and conflicts of interest** – as it applies to members of the ethics committee, ought to also apply to members of PCMC because it is dealing with equal or more serious issues of criminal justice and corruption in government. It relevantly states: *(1) Any member of the ethics committee who is directly concerned in a matter referred to the ethics committee or who has made any statements in*

[10] http://www.premiers.qld.gov.au/community-issues/open-transparent-gov/online-forum/forum-two.aspx

the House revealing a prior judgement in the matter shall not be involved in any consideration of that matter."[11]

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[11] http://www.parliament.qld.gov.au/view/committees/documents/MEPPC/other/ethicalStandards/CodeOfEthicalStandards.pdf

3.

3.1.

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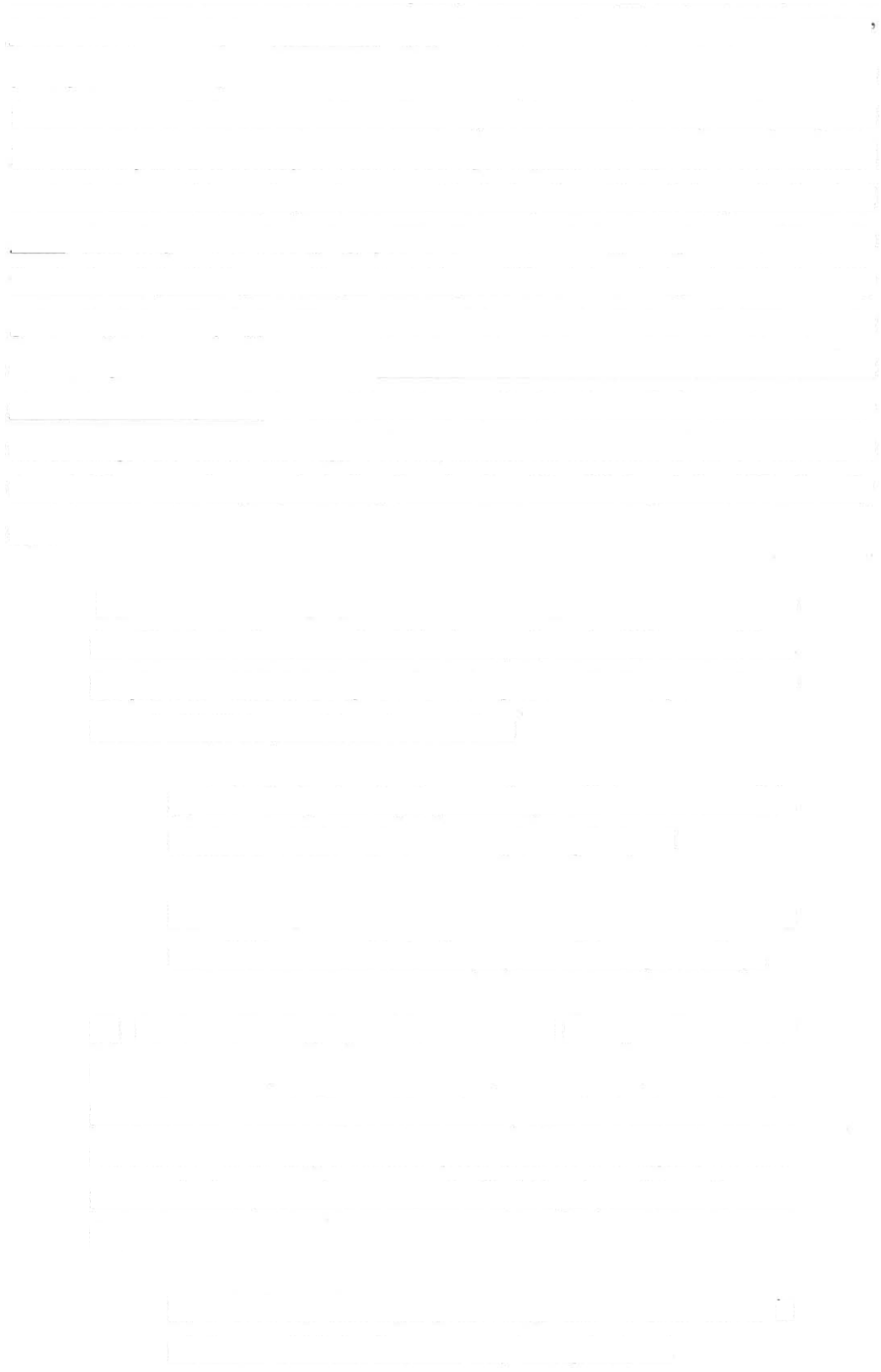

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RECOMMENDATIONS

RECOMMENDATION: 1

That as the PCMC is part of the decision-making processes concerning the administration of criminal justice in Queensland in the 21st century, pursuant to the *Crime and Misconduct Act 2001* (Qld), all related laws be amended to ensure that the PCMC's criminal justice decision outcomes and conduct of the relevant PCMC decision-makers become justiciable and not protected from scrutiny by Article 9 of the *Bill of Rights 1689*.

RECOMMENDATION: 2

That Standing Order 272 be amended to add "the PCMC" to "the ethics committee" requiring a committee member to withdraw from consideration on a matter when the member's position on that matter has been previously revealed in Parliament.