The Research Director
Legal Affairs and Community Safety Committee
Parliament House
Brisbane QLD 4000

22 January 2016

Dear Research Director

Thank you for the invitation to comment on the Crime and Corruption Amendment Bill 2015.

The move of the CEO from Commissioner status to a more usual public CEO role is entirely appropriate and is in line with good public sector practice. While managing directors can be full members of the board in public companies, this can limit the effective capacity of the board to supervise the CEO. In a public service context it is almost always better that there is clear separation in preference to the CEO being a member of the body charged with supervising her or her actions.

Given that the termination of the CEO's tenure is carried out by the Governor in Council, having the CEO as a member of the Commission to who he or she is accountable may be seen to be giving too much power to the CEO and limiting effective accountability.

Retaining the five-member Commission and allowing the vacancy created by the absence of the CEO to broaden the range of expertise in the Commission is sensible. While boards and commissions should ideally reach unanimous rather than majority decisions, an odd number is better if the latter is necessary.

We have always supported the corruption prevention function and we are glad to see this has been clearly reinstated by the Bill.[1]

We have previously made submissions with regard to the importance of the independent CCC research functions[2] and have supported the use of anonymous complains to the CCC[3]. We support the current proposal.

We strongly support bipartisan selections incorporated in the original legislation as passed by the then National Party Government and supported by all parties until very recently. Despite some theoretical problems (and the occasional actual one) for game playing that could be predicted by any game theorist the requirement for bipartisan PCCC support has generally served Queensland well and provides an example of Queensland innovation that should be celebrated.[4]

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[1] See attached: Sampford, *Submission to the Legal Affairs and Community Safety Committee: Crime and Misconduct and Other Legislation Amendment Bill* 2014, p 9.
[2] See attached: Sampford, *Submission to the Legal Affairs and Community Safety Committee: Crime and Misconduct and Other Legislation Amendment Bill* 2014, p 10.
[3] See attached: Sampford, *Submission to the Legal Affairs and Community Safety Committee: Crime and Misconduct and Other Legislation Amendment Bill* 2014, pp 7-8.
[4] See attached: Sampford, *Submission to the Legal Affairs and Community Safety Committee: Crime and Misconduct and Other Legislation Amendment Bill* 2014, p 11.

We refer the Committee to our previous submission regarding changes to major integrity institutions, including the CCC (under whatever name it currently resides) that should be considered by a permanent body with similar functions to the Electoral and Administrative Review Commission (EARC).

Kind regards

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SUBMISSION TO THE LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE: CRIME AND MISCONDUCT AND OTHER LEGISLATION AMENDMENT BILL 2014

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OVERVIEW

At the time of the Callinan/Aroney Review, a thorough review of the Crime and Misconduct Commission (CMC) was long overdue. A body as powerful as the CMC should be subject to a regular, intensive review by a body of experts reporting to Parliament. The great pity is that the Electoral and Administrative Review Commission (EARC) was not available to undertake a review.

It is not necessary to criticize either Hon Ian Callinan QC or Professor Nicholas Aroney to say that a body such as EARC would have been in a position to do a better job and secure more support for its recommendations. The formation of EARC was recommended by Hon Tony Fitzgerald QC in his landmark report. It was implemented by the National Party government as part of its promise to implement Fitzgerald recommendations 'lock stock and barrel', supported by the ALP but disbanded after only five years.

EARC was established as a non-partisan body appointed by a bi-partisan process reporting to a committee including all parties before going to the floor of Parliament In my view, all integrity agencies should be reviewed by a body similar to EARC at least once every 10 years:

a. Such reviews should consider the functions the integrity agencies are intended to perform; how well they perform them; and, how well they assist other integrity agencies in performing their functions.
b. An advantage of an enduring body is that it would develop expertise in the operation of the integrity system and its agencies - including strengths, weaknesses, gaps, overlaps and co-ordination problems. This process would help address systemic problems as well as examine the particular issues generated by individual agencies.
c. Like the original EARC, the body should not only include lawyers but other disciplines with relevant knowledge of how public institutions work.
d. If EARC had continued, it would have built up a deep and extensive knowledge of the various integrity institutions and the integrity system as a whole. It would be cognisant of all the interactions, checks, balances, mutual supports and overlaps. It would have undertaken at least two extremely thorough, expert and interdisciplinary reviews during the period. If these reviews had occurred, there would be now less to do, fewer issues to cover and the issues likely to be much less controversial.

I very much hope that the Queensland Parliament will go beyond considering which of the 2014 reforms should be retained, reversed, extended or otherwise modified. I would hope that they would decide to return to a version of the reform process that served us so well in the 1990s, and I make that my first and most earnest recommendation.

However, I have been invited to comment on current Act that has been produced by a sub-optimal process and will do so. By way of introduction, I want to address what I understand to be the great mischief to be avoided and the best means for addressing it. The practice of publicly stating that you are taking a complaint to the CCC, whether for political or other reasons, should be very strongly discouraged. But I would suggest that the best way of doing this is by requiring complainants to keep their complaints confidential. Breaches of confidentiality should be a criminal offence and, probably more importantly, should void any privilege otherwise enjoyed by the complainant. I argue that this is far preferable to the Act's approach of raising the threshold for all complaints (statutory declaration, reasonable suspicion of a criminal offence etc.) and criminalising those deemed 'improper'. There are a number of detailed points I will make but I would suggest that we apply the 'crime stoppers' test: would we contemplate these measures for citizens reporting ordinary crime? If not, why would we do so for much

more complex crimes in which clever people are at great pains to hide all evidence of their criminality? It is axiomatic in normal police work that public information is the lifeblood of successful policing.

I will also make submissions on a number of other issues concerning this Bill: numbers of complaints; research, education, ethics and prevention functions; and the new hierarchy of purposes.

QUEENSLAND'S CONTRIBUTION TO GOVERNANCE REFORM: FROM FIGHTING CORRUPTION TO BUILDING INTEGRITY

In 1989, Queensland awaited the report from what was possibly the most dramatic and influential Commission of Inquiry in Australia's history.[1] The two major parties had attempted to outdo each other in promises to fully implement its recommendations, torturing their thesauruses to find ways to circumvent mathematical inevitability that there is no way to go beyond 100 per cent. Queenslanders were keen to find out what had gone wrong. But they were also very keen to find out what Commissioner Fitzgerald thought they should do about it. It was in the latter that he achieved the most lasting influence locally and internationally.

Fitzgerald did not recommend the then fashionable Hong Kong model for combatting corruption (a strong anti-corruption law and a strong Independent Commission Against Corruption or 'ICAC' to enforce it). While his proposal did include an ICAC type body, he recognised that ICACs were very powerful bodies which needed to be subject to regular review. Most importantly, he did not think Queensland should rely on anti-corruption laws and institutions alone. He realised that many other reforms were needed, but he did not set out to prescribe them. He did not claim to have all the answers. But he had a very good idea of what the governance questions were and a process for answering them. He recommended a process of reform that has not been bettered in any other jurisdiction. That governance reform process was led by an independent Electoral and Administrative Review Commission (EARC) chaired by a lawyer with wide experience beyond the law[2] and two other commissioners. On 21 different issues, EARC (a) did an in depth study with the assistance of expert consultants; (b) published an issues paper; (c) called for public submissions and held public seminars and hearings; (d) responded to public submissions; (e) produced a final report to parliament with its recommendations resulting in the formation of a the Parliamentary Committee for Electoral and Administrative Review (PCEAR or, colloquially, 'PEARC') which received further submissions and sometimes commissioned further papers and delivered its own report to parliament before the normal legislative process began. While it was appropriate for the Parliament to form its own conclusions, the recognition by all major parties that reform was necessary, the quality of EARC's work and the inclusiveness of the process meant that most of the proposals were accepted. EARC also had the benefit of looking at the whole system of governance in Queensland and could understand the way existing institutions operated and how new ones might fit. By examining all the relevant institutions, they could better understand how each interacted. The result was an integrated set of norms, laws and institutions that would improve the governance of Queensland, promote integrity and reduce corruption. Because of the strong ethical foundation and the prominence given to public sector ethics, I called that set of norms, laws and institutions an 'ethics regime'. Others recognised the value of this integrated approach and Lord Nolan[3] proselytised it. The Organisation for Economic Co-operation and Development (OECD) also adopted it but changed the name to 'ethics infrastructure'.[4] When Jeremy Pope, the first CEO of Transparency International visited Australia, he saw the same benefits in this approach and called it an 'integrity system'.[5] While the OECD, the UN and some others still use the term 'ethics infrastructure', the term that has enjoyed the widest usage is 'integrity system':[6] the term used by Transparency International, the World Bank and many others engaged in governance reform. It is the term that I will use in this submission.

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[1] Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Fitzgerald Inquiry).

[2] First Tom Sherman a former Commonwealth Crown Solicitor and Australian Government Solicitor and later David Solomon (Press Secretary, the editor High Court Commentaries, and later a contributing editor with *The Courier Mail*). See, M. Lewis et al., "Integrity Reforms in Developing Countries: An Assessment of Georgia's Integrity System," *Public Integrity* 15, no. 3 (2013).

[3] The Right Hon Lord Nolan, *Standards in Public Life: 1st Report of the Ctte on the Standards in Public Life* (London: HMSO, 1995).

[4] C. Sampford, "From Deep North to International Governance Exemplar: Fitzgerald's Impact on the International Anti-Corruption Movement " *Griffith Law Review* 19 (2010).

[5] See, J. Pope, ed. *TI Source Book* (Berlin Transparency International, 2000).

[6] Jeremy Pope and I later agreed that the best term would have been 'integrity regime'. Integrity fits better as it is the obverse of corruption and regime is a better description of something that is never quite orderly enough to be called a 'system' - and benefits from its non-systematic qualities in being harder to take over.

Governance Reform Commissions

EARC was charged with considering the large number of governance reform issues listed in the Fitzgerald report and spelt out in the EARC legislation - a list of issues that had tripartite support. As indicated above, it generated the an integrity system that became something of a global gold standard for governance.

I have to say that I was enormously impressed with the process, being invited to speak at a number of public conferences organised by EARC and PCEAR. As a Queenslander who had grown up in Victoria and just returned to Brisbane as Foundation Dean of Law at Griffith, I remember my first appearance before PCEAR. While I knew, as a constitutional lawyer, that the Chairman came from the majority party, I did not know the party affiliations of the other committee members. After an hour of excellent questions and high quality discussion on important governance issues, I left the committee none the wiser about the political affiliations of the other members. This was an example of governance reform that was not only effective but inspiring.

I am not engaging in nostalgia for a past that seems better now than it ever was then. Nor am I ignoring the special dynamics of the time when the tri-partisan anger at past corruption led to an extraordinary degree of collaboration in, and commitment to, root and branch reform. However, the legitimacy secured for the process and the institution would have assisted EARC in making non-partisan contributions to the review, reform and development of the Queensland integrity system and its agencies. In my view, this legitimacy should not have been squandered and it was institutionally reckless to do so. (This criticism should not be seen as partisan - as you will see, in making criticisms and giving credit where I believe it is due, I tend to be an equal opportunity offender.) When consideration is given to changing the rules of the game, and the institutions through which they are played, there is no substitute for the bi-partisan consideration of non-partisan recommendations.

The task of reform is never complete. Anyone who thinks an integrity system has been perfected has placed a giant 'banana skin' in their path. Neither party was that complacent: and further reforms were introduced. Following a collaborative research project led by the Key Centre for Ethics, Law, Justice and Governance (which later became the Headquarters of our UNU institute), the Office of the Integrity Commissioner was established with bi-partisan support.[7] Our proposal for the leaders of the main integrity agencies to meet on a regular basis was rejected by the government but undertaken informally at state and later federal levels. One of the acts of the Bligh government was commissioning David Solomon to make proposals to go beyond 'Freedom of Information' to the 'Right to Know'. The current Premier is now talking of going further, asserting, as we have for nearly a decade that information collected by the government is the property of the people and a good reason needs to be given for keeping a people from their property.[8] The investigation, conviction and gaoling of two ministers in 2009 who had not taken the new governance arrangements seriously was, in part, an endorsement of the effectiveness of the integrity system but also a shock to the system that led Premier Bligh to establish an Accountability and Integrity Round Table[9] which proposed a number of measures.

None of these measures, however, involved a comprehensive and on-going reform process with a dedicated independent body such as EARC. As outlined earlier, the Fitzgerald report recommended an 'enduring body.' As Peter Forster[10] stated:

> 'although it was always envisaged that the list of priorities identified by the Fitzgerald Inquiry would be satisfactorily investigated and reported within the first few years, the Commission could have an ongoing

[7] Indeed, the then Coalition Opposition wanted access to the Integrity Commissioner's advice, something not granted for another decade. I should also acknowledge the research project and the Key Centre itself had bi-partisan support. The project was initially supported by an earlier iteration of the Public Service Commission under Premier Goss and reaffirmed under Premier Borbidge. Funding for the Key Centre was initially committed by Premier Borbidge and confirmed by Premier Beattie.

[8] Address to the Open Government Forum, Red Room, Parliament House Brisbane, August 2013.

[9] Including Premier Bligh, Attorney Cameron Dick, Director General of Premier and Cabinet Ken Smith, Prof Alan Fels, Assoc. Prof Ann Tiernan, Dr David Solomon and myself.

[10] P. Foster, "Establishing EARC," in *Was EARC Worth It?*, ed. S. Prasser (Brisbane: RIPA (Qld), 1993).

> mandate to monitor the impact of reform and address what it thought appropriate or were brought to its attention. The concept of a part time Chair with the capacity to call the Commission into action when and if required was the enduring model envisaged.'

Hopefully, this ongoing mandate would involve regular reviews of the integrity agencies established so that all integrity agencies should be reviewed by a body similar to EARC at least once every ten years. Such reviews should consider the functions the integrity agencies are intended to perform; how well they perform them; and, how well they assist other integrity agencies in performing their functions.

An advantage of an enduring body is that it would develop expertise in the operation of the integrity system and its agencies - including strengths, weaknesses, gaps, overlaps and co-ordination problems. This process would help address systemic problems as well as look at the particular issues generated by individual agencies. Professor Colin Hughes pointed out that the PCEAR in its short life was able to develop sufficient understanding of the issues to assist in the integration of various reforms by pointing out inconsistencies in different reports.[11] Like the original EARC, it should include lawyers together with members from other disciplines with relevant knowledge of how public institutions work. Even if EARC was not resurrected, there are a number of ways in which its functions could be continued. Some advocates were very disappointed that our proposals for an 'EARC lite' costing so little that even a razor gang would smile were rejected by successive ALP governments that were otherwise very well disposed to our work and our proposals for reform.

The recent review of the CMC was conducted by two eminent lawyers (Hon Ian Callinan and Professor Aroney) and has generated much controversy. In my view, a major review of the CMC was long overdue. A body as powerful as the CMC should have been reviewed at least twice and probably three times. The fact that I believe that an enduring body such as EARC or an EARC-lite replacement might have been able to do a more comprehensive and less controversial review on a more regular basis is no criticism of the personal qualities of those the lawyers - one of whom (Hon Ian Callinan) is reported to have played a critical role in the establishment and protection of the Fitzgerald Inquiry. As we discovered in the course of that inquiry and subsequent reforms, institutions matter as well as individuals.

COMPOSITION OF GOVERNANCE REFORM COMMISSIONS (EARC or EARC 'lite')

There is much to be said for a lawyer to chair an EARC: however, a range of other skills are needed to consider the effectiveness of institutions and their interaction with others. A total of seven EARC commissioners were appointed. Three of them were lawyers (Sherman and Solomon, the two chairs and Colin Hughes) but all three were multi-disciplinary and had extensive experience outside the law (public sector management, journalism and election oversight).[12] Two had academic experience (Hughes and Virginia Hall), one local government (Brian Hunter), two were from industry (Marie Blake and Susan Davis) and one from the not-for-profit sector (Hall).

It is important that governance reform commissions are not merely law reform commissions. As I have argued elsewhere, governance reform involves a combination of ethical standard setting, legal regulation and institutional reform[13] and requires the inputs of ethicists, lawyers, political scientists and economists.[14] As one of the EARC reforms (on legislative standards and the parliamentary draftsman) reminded us: legislation should not be the first resort and alternatives should always be considered. In governance reform, legislation is generally a part of the answer but is rarely the whole of the answer.

'INTEGRITY'

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[11] Colin Hughes, "A Reform Program: Time and Methods," in *Was EARC Worth It?*, ed. S. Prasser (RIPA (Qld), 1993) 72-80.
[12] Colin Hughes had been an Australian Electoral Commissioner.
[13] C. Sampford and D. Wood, "The Future of Business Ethics? Legal Regulation, Ethical Standard Setting and Institutional Design," *Griffith Law Review* 1, no. 1 (1992).
[14] C. Sampford, "Adam Smith's Dinner," in *The Future of Financial Regulation*, ed. J. O'Brien I. Macneil (Oxford U.K.: Hart Publishing, 2010).

Words like 'integrity' can be given a number of meanings and philosophers tend to say that there is no one 'right' meaning but more or less useful definitions. For me, integrity and corruption are conceptually linked terms - with one the obverse of the other. Transparency International defines corruption as the 'misuse of entrusted power for private benefit'. By contrast, integrity is 'the use of public power for officially endorsed and publicly justified purposes'. The latter definition is primary because you cannot know what an abuse is if you do not know what the correct 'use' is. The form of official endorsement will vary from system to system but, in a democracy, the officially endorsed uses of public power are those set by the elected government and legislature. Indeed, democratic competition is about differing views as to how public power should be used for the benefit of citizens.

Integrity is also linked to ethics. Personal ethics involves asking hard questions about your values, giving honest and public answers and then living by those answers. If you do, you have integrity, you are true to yourself. Institutional ethics involves an organisation asking hard questions about itself, giving honest and public answers and living by them. If it does it has integrity. Of course, the processes of asking, answering and living by those answers are more complex in an organisation - they are the stuff of governance.

In Appendix two, I include a glossary of governance terms that some find useful. I also include extracts from a recent keynote I was invited to deliver in Delhi which pulls together some of these themes - and deals with governance and integrity systems as a form of risk management.

ISSUES RAISED BY THE BILL

Most of the major issues raised by the Bill reflect issues of importance to the Review and I will generally start from the Review in discussing them.

Number of integrity institutions and overlaps between them

The Review listed 15 integrity agencies, wondered if there were others and seemed to think that this was too many. The Key Centre for Ethics, Law, Justice and Governance undertook an integrity systems assessment of Queensland in 2001. In addition to those listed by the Review, we listed five levels of courts, the Department of Public Prosecution (DPP), and parliamentary committees. I am not wedded to any number though I recognise that there are clearly extremes: a very small number of integrity institutions may concentrate too much power and too many becomes unwieldy. However, there are bound to be a significant number for several reasons:

a. The whole point of an integrity system is to have a range of different agencies mutually supporting and checking each other.
b. If you look at the functions of the various integrity agencies, you will want them performed by some body.
c. A variety of agencies interacting with each other will be better able to keep watch on each other.

The key questions are: What functions need to be performed? Who can perform them best? And, which functions should be combined and which kept separate (for example, giving advice and investigation of wrongdoing need to be kept separate)? These are just the kind of questions a revamped EARC could consider. It would be in an excellent position to do so.

Some groups of institutions have long standing relationships with each other or other bodies that allows their work to be ordered - such as parliamentary committees or courts. Some have clearly demarcated and complimentary roles (for example, investigators in police or CMC, DPP and courts).

This Bill does not involve a reduction in numbers of integrity institutions (though it may limit some of the integrity functions performed within the system). There does seem to be a concern to avoid overlaps in moving some functions to the Public Service Commission and heads of agencies. I would caution against being too concerned about the existence of apparent overlaps:

a. No system of coverage will be perfect. There will inevitably be either overlaps or gaps. If we err on the side of avoiding overlaps, we will leave gaps which will get wider as wrongdoers discover them and exploit them until gaps become gaping holes.
b. Most systems have some redundancy built in - especially in crucial areas.
c. A degree of overlap in function will mean that other integrity agencies will see a little of what other agencies do (though the main basis for this occurring is complementary functions).

This is not to say that we should ignore potential overlaps and duplications. Overlaps, potential duplication and, most importantly of all, the location and combination of functions within integrity agencies would be a primary and ongoing concern of any reconstituted EARC.

Publicity generated by the lodging of a complaint

The Review quoted my strong criticisms of the practice of publicly reporting that you are 'going to the CMC'. I called it an 'abomination'. Victims of such practices are justifiably furious.

If a complainant really believes that another may be doing something wrong, the last thing they should contemplate is alerting the alleged wrongdoer and thereby giving the latter an opportunity to destroy evidence, coerce potential witnesses, or concoct and share stories among potential witnesses. Such publicity reduces the chance of the alleged wrongdoer being caught.

If a complainant makes the complaint public and thereby reduces the likelihood of wrongdoers being prosecuted, it would suggest an ulterior motive - generally political or economic advantage.

I generally supported the Review's requirement of confidentiality. The exceptions should be carefully considered. They should not rule out making complaints to other bodies (for example, some corrupt behaviour might also breach other laws such as insider trading). Nor should they rule out complaining to oversight bodies if they are concerned that the complaint is not being properly investigated. Indeed, after a reasonable interval (best defined by statute), the complainant should be free to complain to the media that the CMC/CJC has not done its job investigating their complaint. By that time, the CMC/CCC would have had time to consider the matter and be able to respond so that baseless claims will be seen as such, and subject to defamation proceedings. It is one thing for someone to raise publicly a claim of corruption against another person and say they are taking it to the CMC before the CMC has had an opportunity to consider it and is therefore unable to comment. It is quite another for them to say: here is my complaint, the CMC has not dealt with it effectively and for the public to immediately hear that the CMC has already investigated it and found it baseless. Of course, if there are legitimate grounds for criticising the CMC/CCC who are charged with investigating complaints then the press have a second, and even more important, story.

I support strong sanctions for anyone who publicly reports that they are making a complaint for the simple reason that they are putting at risk the investigation they claim to be necessary. However, the confidential reporting of an honest belief in the facts alleged should be protected.

Under new section 88L, those making complaints 'honestly and reasonably' are immune from all civil, criminal and administrative process and can claim 'absolute privilege' in cases of defamation.[15] I generally support this provision - though I would suggest that honesty is sufficient as I am not sure what the test of 'reasonableness' would involve in these circumstances. I would suggest that this privilege should be lost if the complainant discloses that the complaint has been made. Indeed, I would go further, supporting the availability of exemplary damages and criminal sanctions to match those for officials under 88M (below). However, the inability to make the complaint public beforehand and the fact that unsubstantiated complaints will not see the light of day means that there is not much point in making such complaints - dealing with the primary mischief to be addressed.

I entirely support the requirements of confidentiality placed on the CCC under new 88M of the amended act. We should be very suspicious of leaks by the CMC/CCC for the same reason as we are cautious about leaks by the police. Police leaks have been done for money, to prejudice a jury or for political motivation. All three are totally unacceptable for police as they should be for the CMC/CCC. Of course, there are reasons when the police will want to make a public call and Royal Commissions may have good reason to hold some hearings in public. Such hearings should be permitted for CCC as they are for other such commissions (and ad hoc Commissions of

[15] Though the conditions on honesty and reasonableness give this the flavour of 'qualified privilege'.

Enquiry). While these procedures could be abused, there are a number of safeguards (including transparency, legal representation and judicial review). There is room for more safeguards to be built in to public hearings.

I am not, at this stage, advocating criminal penalties for media who report information about complaints leaked by officials under 88M or by complainants. The issues here are the same as for reporting of other criminal investigations. They can provide a great service in some cases to encourage further information on crimes the police are publicly investigating. On the other hand, they can prejudice investigations that need to be carried out in secret - including under-cover and 'sting' operations and investigations into terrorism, spying, insider trading, collusive tendering and various forms of organised crime - including corruption. However, reporting restrictions on sensitive investigations should be considered collectively rather than for corruption by itself.

Where the media undoubtedly have a key role is in raising a hue and cry against failures to investigate - either because there is no body to carry out these investigations (as was the case when *Moonlight State* was broadcast) or because they argue that the designated body is not doing its job. .

Change and Hierarchy of purposes

The current act gives the CMC two functions: to combat and reduce the incidence of major crime and to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector. This Bill would give the first priority and limit the second to combating corruption.

First, I do not see this distinction as particularly helpful and it does not send a good signal. Corruption will often fit into the definition of major crime in that it is generally 'organised crime'. Fitzgerald exposed a high degree of organisation by corrupt officials in the 1980s. I am sure that the drafters of this Bill would not suggest that this was not a major crime. But even when it does not fit that definition, it is a serious and highly insidious form of crime. Democratic polities entrust their power to elected and appointed officials. The abuse of that trust and the use of that power for the officials or groups to which they belong risks that trust on which democracy is founded. While the dints in that trust by acts of 'petty corruption' may be limited, they may encourage others to follow, excusing themselves that it is only minor, a 'perk of the job' and something that everybody does. The last excuse can become a self-fulfilling prophesy. Thus low levels of corruption have a tendency to increase and 'petty' corruption breeds 'grand corruption'. Even low levels of corruption can fuel a belief that civil servants and politicians are just in it for themselves, reducing trust in government.

Secondly, there is one key feature of the integrity/misconduct function that is most worthy of preservation. The second function is not just one of combating corruption but of promoting integrity. This function is directly linked to the two greatest contributions that Queensland made to the global anti-corruption movement:

1. That the promotion of integrity is the primary goal and that corruption is merely one of the ways to limit public integrity.
2. The promotion of integrity and combating corruption require a combination of ethical standard setting, legal regulation and well-designed institutions that form an 'integrity system'.

This function puts the CMC at the heart of the integrity system and gives it a system-wide role in promoting integrity. Now the logic of integrity systems does not require that the anti-corruption body should be given this role. To some extent that role is shared among a number of integrity institutions and the leading role could be given to another integrity institution with similar independence to the current CMC. On first principles, I would have thought that the education and ethics functions might be placed within another integrity institution (e.g. the public ethics office proposed by EARC or the Integrity Commission). The promotion of integrity could be given to another body along with the ethics and education functions. But, it is not clear what other body could be given the responsibility of combating corruption/misconduct. Any such shift should follow a detailed study of the integrity system (preferably by an EARC style body). And, any such shift should ensure that these functions are not only done but done better than the CMC (to justify the transaction costs of moving that function).

The change from 'official misconduct' to 'corruption' raises a number of issues. Behaviour that amounts to 'official misconduct' would fall within TI's and other definitions of corruption. Under section 14 of the CMC Act, it includes abuses of entrusted power by making decisions that are not honest or impartial, a breach of trust and misuse of information for personal benefit or the benefit of others. (It also includes inducing others to so act.) The Bill would call such acts new act and would call them corruption rather than official misconduct. However, there is benefit in having a less charged term than corruption. Some might feel that corruption is much more serious and quite different from what they are doing. Complainants and juries might think of corruption as essentially much bigger than the offences covered under official misconduct/corruption. The use of the less charged term 'official misconduct' might be seen as analogous to the creation of offences covering negligent driving causing death after Australian juries proved reluctant to convict drivers of homicide.

What is of more concern is that the CCC would only be able to investigate more serious corrupt conduct cases. There is a practical difficulty with this in that the seriousness of the corruption may not become evident until investigation has been completed. It may also give an apparent (and presumably false) signal that lower levels of corruption are not really a problem and of minor concern to the State of Queensland.

High thresholds for making complaints

The Review suggested raising the bar for complaints and the Bill certainly does so. The Bill amends section 36 of the Act to require a complaint about corruption to be made to the commission by statutory declaration.[16] Complainants might be deterred by the change of wording to 'corruption', thinking only of classic bribery rather than the various abuses of public trust contained in the definitions of both official misconduct and corruption. Such thoughts might be supported by the list of examples given in section 15(2). Of more concern, potential complainants might be discouraged from reporting corruption, which is not 'serious' enough for the CCC. This would particularly be the case where the potential complainant had only caught a small glimpse of a much larger corrupt network. If a corrupt network has managed to conceal 99 per cent of their corruption, the small glimpse may be all that any individual can get. But different individuals could gain different glimpses which the CCC could start to put together - but only if they are reported.

I understand the concern that there may be large numbers of complaints and the opportunity to make vexatious complaints. I believe that enforcing the confidentiality of complaints will deal a huge blow to the latter and that this should be tried before further barriers are made to the receipt of information from the public.

Effective crime control is heavily reliant on information from the public. This is particularly the case where the victims are not present during the commission of the crime (as is classically the case with corruption). Individual members of the public may have fragments of information - but fragments that may be particularly useful in alerting investigators to potential criminal behaviour, especially when added to other information they may have. Whether these fragments add up to the elements of a crime, official misconduct or matters that might lead to dismissal will be something that is considered after some collating of information and checking - often as late as when the police/CMC are preparing a report to the DPP recommending prosecution. Getting to that point requires legal knowledge (about the elements of the crime), considerable investigation and the collection of facts, which members of the public are unable to do. ART argue that NSW ICAC would never have caught up with Mr Obeid had this threshold applied. Even if you disagree that ART is correct in the Obeid case, it is easy to see that it could be in others. A lowly health official with an expensive lifestyle or a procurement official living in a very expensive house might be worth a quick initial check by the CMC. Or to take the most relevant example from Queensland, the fact

[16] The amendment does not stipulate the requirements of the statutory declaration as suggested by the Callinan/Aroney Recommendation 3B. Some of these would have been particularly onerous, especially on lay people. For example, the Review recommended that the statutory declaration should state that complainants know the meaning of official misconduct, that complaints must allege matters that the complainant reasonably suspect would be (cf. 'could be') a criminal offence, official misconduct or grounds for termination of employment and that complaints must be made with reference to the definition of corruption.

that police officers are regularly seen walking past a known brothel would be insufficient to ground a complaint under the new system.

We encourage information from the public in other areas of crime control. Neighbourhood Watch and other mechanisms typically try to make it easy for the public to provide information. We should be very careful of putting barriers in the way of investigating corruption that we would never dream of for Neighbourhood Watch or Crime Stoppers. Most of the crimes reported by the latter are relatively straightforward and most citizens would have a good idea of whether they are witnessing a likely burglary or assault. It is much harder to know whether you are witnessing corruption - but what you do witness may be a part of a wider picture that only a body like the CMC/CCC can draw.

Criminalising complaints

Under s216, it is currently an offence to make a complaint twice if the complainant was told by the CMC that the first was vexatious or frivolous. This provision is retained with respect to frivolous complaints about corruption. But for vexatious and a range of other 'improper' complaints a new 'one strike' rule applies. Complaints to the Commission that are made (i) vexatiously; (ii) not in good faith; (iii) primarily for a mischievous purpose; (iv) recklessly or maliciously attract up to a year's gaol. This would have a chilling effect on anyone considering making a complaint, especially given the high threshold that applies to complaints. While few of us would condone complaints that fall within most of those categories, lay people may be uncertain what is meant by these terms. Potential complainants could fear that they might be accused and pursued through the courts with the attendant cost in time, emotion and maybe even gaol. Potential complainants concerned about what they believe to be corruption within a future government might be particularly concerned if the entire Commission was appointed by that government.

Objection might be taken to some of the categories of improper complaints. What if someone reported another 'primarily for a mischievous purpose' but secondarily because he knew that the person was corrupt. Someone might make a reckless assertion of corruption but might be correct. Someone might know another official was corrupt but only report them because they felt genuine malice towards them. Indeed, given the chilling effect these provisions might have on those involved in making complaints, the only people who are prepared to make complaints might be those who really hate those they are accusing.[17]

These problems are exacerbated by the high threshold placed on complaints. Members of the public do not appear to be able to merely point out suspicious facts that might be worthwhile investigating. They must effectively make an accusation of criminal conduct.

As indicated, the requirements of confidentiality and the loss of privilege for complaints that are disclosed should be sufficient to deter the most egregious of improper complaints. I would suggest that these measures are trialled before the more drastic measures suggested here.

There may be a role for an offence that is the equivalent of 'wasting police time' but applied at least as circumspectly as police do - given their desire to secure information from the public. Similar to restrictions on reporting, such measures can be considered in the light of publicly funded investigators rather than confined to complaints about corruption.

From CMC investigation to Media prosecution

Given the high threshold for making a complaint and the chilling effect of criminalisation, the obvious alternative complaint mechanism is to drop a quiet word to the media. While the media can play a critical role, especially when the normal channels fail to investigate properly, I do not see this as the best way of investigating most complaints of corruption. The ABC and the *Courier Mail* did sterling service in helping to air strong suspicions of corruption and the associated investigative journalism they performed. But Queensland did not rely on the media in the 1980s

[17] Joseph Heller, author of 'Catch 22' would be impressed!

and certainly did not resolve to rely on them in the future. That was why the CMC was created - with significant powers to get to the bottom of what looked suspicious.

Information provided other than by a complaint.

The above has been driven by a concern that complaints may be discouraged by high barriers and potential criminal penalties. Section 36(1) also contemplates individuals giving information or matter involving misconduct/corruption to the Commission. If so, individuals could merely relay their suspicions to the Commission in the same way as neighbourhood watch. Provided citizens were aware of this option and the Commission was willing to act on suspicions that would, individually or in conjunction with other suspicions reported, there might be little difference - except that there would be very few complaints at all. However, given that the corruption function is framed in terms of handling complaints ('to ensure a complaint about, or information or matter involving, corruption is dealt with in an appropriate way, having regard to the principles set out in section 34'), I doubt if that is intended. Indeed, s34 and new 35A and 35B all concentrate on handling complaints.

Number of complaints

The Review seemed to be very concerned about the numbers of complaints, a concern that appears to be shared by the drafters of this Bill. I would respond in two ways.

First, we need some detailed analysis of the costs involved and put it in perspective of the potential costs of corruption. I have long argued that we should see integrity measures as a form of insurance against the risk of corruption (see Appendix One). We should look at the total revenue and assets of the state and ask what is a reasonable proportion of revenue that should be spent on protecting the rest. We should ask how much insurance it is reasonable to take out. Our integrity system includes the parliament, its committees, the courts and a range of watchdog bodies such as the Auditor General, the CMC, the Integrity Commissioner, DPP, some aspects of the Public Service Commission etc. We count the total number of institutions in the low 20s (see numbers above). The total cost of these institutions is considerable. In integrity systems, as in property management, we can over insure and under insure. To know whether we are under or over-insuring, we need a lot of facts and estimates of the kind indicated by ART. Concerns about the number of staff in the CMC handling complaints needs to be placed in that larger context. A reconstituted EARC would be in a good position to do that.

Any integrity system will be at risk of receiving too many complaints or too few. There are no 'Goldilocks' solutions. Although measures can be undertaken to reduce baseless complaints and encourage genuine complaints, our choice is on the side on which we err. Even 25 years after Fitzgerald, it is natural for Queenslanders to err on the side of spending a few hundred thousand too much on triaging citizens' complaints than risk another episode like the 1980s. It is often argued that you should always take out 'catastrophe' insurance - insurance against the catastrophes against which you cannot afford to self-insure. The question we might ask (rhetorically or otherwise) is whether the corruption of the type that Queenslanders long suspected but only discovered in the late 1980s is just such a catastrophe.

Research, prevention, education and ethics

There are queries about whether the CMC should perform these functions and whether they should be performed at all. I do not know whether or not they are done well and I am not sure that they are best done by the CMC even though they are done well by similar agencies in other jurisdictions (for example, Hong Kong ICAC). These functions need to be performed: and, if they are done well by a particular institution in a particular integrity system, it is generally wise to leave that function with them. If it is not done well, then consideration needs to be given as to whether the agency performing that function should be required to do it better or whether it should be given to another agency. Such consideration would, again, be a task that a new EARC could do very well and better than other agencies would.

Preventing and combating corruption obviously requires well-drafted laws but this is only the starting point. It also needs:

a. Tip offs and suspicions from within the public service and general public.

b. Whistleblower protection for the above - and in some cases witness protection.
c. Research into corruption and corruption networks as well as the identification of corruption risks and vulnerabilities.
d. Experience from earlier investigation and prosecutions.
e. Input from other integrity agencies (for example, identification by the Ombudsman of areas where maladministration may generate opportunities for corruption and other forms of official misconduct).
f. Use of the above to develop corruption prevention strategies within particular agencies (reflecting the particular corruption risks) and across agencies.
g. Education.
h. Ethics - identifying the highest standards to be sought and the temptations and dilemmas facing public servants in any particular agency.

It is sensible for a number of these functions to be co-ordinated and located in the CMC. I would suggest items 'a-f' but not necessarily 'g and h'. I do not think that the Public Service Commission is equipped to do items 'a-d' and 'f' at all and is not well equipped to do 'e'.

I hardly need emphasise the importance of prevention. Prevention is generally agreed to be better than cure and it is central to the police who perform similar roles to the CMC over most other areas of the criminal law. Those bodies who are receiving (a) and engaging in (c) and (d) would seem the natural body to engage in developing prevention strategies. Accordingly, I would recommend against the adoption of Sections 23 and 24 of the Bill, which remove the prevention of corruption (misconduct now read as corruption) function.

Research (c above) goes well with (a), (d), (e) and (f). However, this research should be applied and honed in the light of what is unearthed by these other functions and as part of the overall strategy of the CMC/CCC. The provision of three-year research plans approved by the Attorney General is the appropriate model for a Law Reform Commission but not for CMC/CCC. As indicated, CMC/CC should tailor its research into the strategies above - some of which is informed by matters that would not always be known to the Attorney (e.g. a, b, d) Accordingly, I would recommend against the adoption of section 52 of the Bill.

It is not entirely clear where the **ethics and education** functions of the CMC are intended to be performed. These functions would seem to be a part of the integrity/misconduct function that is to be abolished. I would argue that these functions are very important but I am not sure that the CMC is the appropriate body to perform this task. First, ethics is first and foremost about what we should do rather than what we should not do. The two are closely related. If power should be used for publicly justified and officially endorsed reasons (i.e. with integrity), this clearly excludes the use of that power for private gain (i.e. corruptly). The CMC rightly concentrates on preventing wrongdoing. But this means that the CMC will tend to emphasise the negative aspects of ethics and will not be the best body for promoting the predominantly positive message of ethics.

However, I am not at all sure that this function should be pursued by the Public Service Commission. It did not do a good job in the late 1990s (when it reduced the ethics function to half a staff member) and it has tended to opt for a generalist approach, abandoning one of the most globally admired elements of the 1990s Queensland reforms. In 1994, the *Public Sector Ethics Act* set out values and general principles for the conduct of appointed officials in a wide range of agencies and institutions (including universities). However, it did not mandate a general enforceable code of conduct. It required the CEOs of agencies to organise the drafting of an agency specific code of conduct which applied those values and principles to the work of the agency. This allowed a contextualisation of what were very general principles. It encouraged agencies to think how those values and principles applied to them - asking not 'what is a good public servant' but 'what is a good fireman, teacher etc.'. Most importantly, it allowed agencies to consider the temptations and dilemmas that might present themselves and to think through what their responses might be. Our research indicated that there was much variability in the performance of this function. One of the reasons was that Directors-General and other heads of agencies (DGs) were given a large number of responsibilities (from fiscal prudence to whistleblower protection) with little guidance on how to do them, let alone how to integrate them into the operations of the agency. The second was that they received little

external help in performing the ethics function - least of all from the Public Service Commission. During the late 1990s, there was officially a half-time position in the Public Service Commission allocated for this function.

DGs could have been greatly assisted in each if the government had adopted the EARC recommendation for an ethics office, building and improving on US, Canadian and Western Australian models. These functions could be taken on by an expanded Integrity Commission. Instead the ethics function was performed, in part, by CMC and, in part, by the Public Service Commission. In 2009, the latter pressed for a system wide code of ethics, casting aside one of the signal EARC reforms.

Employment conditions for managers

I have no problem with the recommendation of the Review included in s219A that it is a condition of employment for managers that they take reasonable steps to prevent official misconduct and corruption. However, as the 1990s experience demonstrates, just giving a busy senior officer another responsibility is not, by itself, an answer. If they have a significant responsibility, they will delegate most of the relevant work to an individual or a unit within his or her agency with time and expertise (such as an internal audit group or an ethical standards unit). If all managers have such a responsibility, it is even more important to provide support. Where the responsibility is given to all DGs, it is particularly helpful to have a system wide unit to assist them in this task and in integrating that task with the rest of their duties. As indicated above, this support was what was missing in the 1990s.

The existence of an internal and an external ethics unit is not duplication any more than the presence of internal and external auditors. Each performs complementary functions and makes it easier for the other to fulfil their functions. I would argue that the ethics function be carefully reviewed to ensure it operates effectively within the integrity system.

Bipartisan Support/consultation on appointments to the CMC/CCC.

Removing the requirement for bi-partisan support of appointment to the Commission abandons a very important innovation in Queensland's integrity system of which we should be proud.

I am naturally aware that appointments to other highly responsible positions are made by the government of the day - particularly judicial office. This could be an argument for the improvement of other appointment procedures rather than changing those for the CMC. But in any case, I would distinguish judicial appointments in that:

- Judges do not have as much discretion.
- With few exceptions they play their role in open court.
- They have to give reasons for their decision.
- They are subject to appeal.
- They are generally appointed one at a time and enter a very strong culture.
- They have much longer tenure.

I am very aware that many great appointments have been made by governments without securing the support of oppositions - including quite a few Royal Commissioners, many judges and, as I understand it, the first appointees to EARC.[18]

I am also aware that bipartisan appointment was agreed by the major parties after Fitzgerald reported. This decision merely indicates how good ideas can come out of bi-partisan discussion and that such bi-partisan discussion can lead to improvements on Fitzgerald's recommendations. We should celebrate those party leaders in 1989 who came up with this very important innovation.

Anti-corruption commissions are very powerful bodies. There is a temptation to appoint commissioners who will go much harder on the opposition than the government. In other jurisdictions, governments have succumbed to this temptation and anti-corruption commissions have been used as a way to entrench power. This temptation creates

[18] As I understand it, these were appointed before the first PCEAR sat.

a serious governance risk that has materialised. Recognising that risk and 'insuring' against it by requiring bi-partisan support for commissioners is an excellent risk management strategy. One does not have to suspect, let alone accuse, a government of harbouring such intentions. One does not even have to suspect that a particular government is likely to give in to that temptation. The question is whether it is wise to create a temptation where none has been present for a quarter of a century.

The simple question is whether MLAs from both sides of politics would trust a future government led by their political opponents to put this temptation behind them. If they do not so trust their opponents, then they should opt to retain the current requirement of bi-partisan support. If they do trust them - then why not share that power of appointment with such trustworthy adversaries? It will certainly increase the trust of the public in this critical institution that lies at the centre of our integrity system.

To put it less rhetorically: if key integrity institutions become partisan, the integrity system is at great risk. Risks will not always materialize but that is no reason for ignoring such risk. The best way to avoid that risk and secure non-partisan integrity institutions is through bi-partisan appointment processes bolstered by consultation with non-partisan.