GPO Box 3123
Brisbane QLD 4001

Level 2
North Tower Green Square
515 St Pauls Terrace
Fortitude Valley QLD 4006

Tel.: **07 3360 6060**
Toll-free: 1800 061 611
(in Queensland outside Brisbane)

Fax: 07 3360 6333

mailbox@ccc.qld.gov.au
www.ccc.qld.gov.au

ABN 32 164 714 360

Crime and Corruption Commission
QUEENSLAND

Our Reference: AD-17-0268 / 17/062009
Contact Officer: [redacted]

20 April 2017

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

Via email: lacsc@parliament.qld.gov.au

Dear Sir/Madam

Re: Crime and Corruption and Other Legislation Amendment Bill 2017

I refer to the public briefing and public hearing concerning the Crime and Corruption and Other Legislation Amendment Bill 2017 (the Bill) held by the Legal Affairs and Community Safety Committee (the Committee) on 18 April 2017.

At the hearing several views were presented regarding the effect of certain amendments proposed by the Bill. The Crime and Corruption Commission (CCC) is responsible for achieving the purposes of the *Crime and Corruption Act 2001* (CC Act)[1]. Accordingly it is appropriate to advise the Committee about the CCC's interpretation of these proposed amendments in the context of the comments of various submitters, the Act as a whole and in the light of current practice.

Submission by the Queensland Law Society (QLS)

Clause 5 and the s. 15 definition of corrupt conduct

In the CCC's submission, and contrary to the views of the QLS proffered at the public hearing, the current definition of 'corrupt conduct' provided by s. 15 of the CC Act and the amendments proposed to that definition by clause 5 of the Bill do not create a criminal offence. The definition establishes a core element of the CCC's corruption function. Namely, to ensure that a complaint about, information, or matter involving corruption ('corrupt conduct' or 'police misconduct') is dealt with in an appropriate way[2].

The 'corrupt conduct' definition is essential to the CCC's jurisdiction but does not amount to a criminal offence. The CCC endorses the comments made by the Officers

[1] s. 5(1), CC Act.
[2] s. 33((b), CC Act.

of the Department of Justice and Attorney-General in the public briefing and also the Bill's Explanatory Notes regarding the purpose and effect of clause 5.

There is no doubt that the current 'corrupt conduct' definition and the proposed amendments may result in the CCC having jurisdiction to investigate the conduct of private individuals and the holders of an appointment in a unit of public administration. Whilst the CCC agrees that the criminal offence provisions should be drafted with precision, s. 15 is not such a provision and the breadth of its current inclusive drafting is necessary to cater for the multifarious scenarios which may amount to corruption.

Fundamental legislative principles continued to be protected because any person who claims that the CCC is conducting a corrupt conduct investigation unfairly (this includes grounds that no investigation is warranted or that the CCC does not have jurisdiction) has a right to seek review before the Supreme Court.

Clause 13 and s. 50 — Commission prosecution of corrupt conduct

It was put to the Committee that in the view of the QLS that there is not a sufficiently clear and unambiguous legislative statement that goes to the issue of disclosure where the CCC is in a prosecutorial function.

Essentially the CCC has no prosecutorial function other than to commence disciplinary proceedings in the original QCAT jurisdiction for an allegation of corrupt conduct under ss. 50 and 219F of the CC Act. But such proceedings are disciplinary in nature, not criminal.

Before such disciplinary proceedings can be commenced in the original QCAT jurisdiction the CCC must have first provided the relevant public official with a report under s. 49(2)(f). That report must contain all relevant information[3] other than confidential information for which the CCC considers should be strictly maintained[4]. The report under s. 49(2)(f) must contain or be accompanied by all, relevant information known to the CCC that -

(a) supports a charge that may be brought against any person as a result of the report; or

(b) supports a defence that may be available to any person liable to be charged as a result of the report; or

(c) supports the start of a proceeding under section 219F or 219G against any person as a result of the report; or

(d) supports a defence that may be available to any person subject to a proceeding under section 219F or 219G as a result of the report.

The CCC's disclosure requirements in the course of the disciplinary proceedings are determined by direction of the QCAT. The QCAT may require the CCC to disclose documents, matters or things, which the QCAT considers necessary for it to properly hear and determine a prosecution started as a result of a CCC investigation[5]. The CCC is subject to model litigant obligations. Any claim of confidentiality regarding information relevant to the proceedings on grounds of public interest immunity are properly for determination at the discretion of the QCAT.

The prosecution of criminal offences resulting from CCC investigations also first require the relevant law enforcement authority to be provided with a report that contains all relevant information[6]. If prosecution proceedings are subsequently commenced, Criminal Code, Chapter 62, Division 3, imposes

[3] S. 49(4), CC Act.
[4] s. 66(1), CC Act.
[5] s. 213(4)(b), CC act.
[6] Ss. 49(2)(a) and (4) and 66.

disclosure obligations on the relevant prosecutor. The relevant court can compel the CCC to provide necessary information to properly hear and determine the prosecution started as a result of the relevant CCC investigation[7].

Clause 18 and s. 197 — derivative use

Clause 18 of the Bill seeks to amend section 197 of the CC Act to provide express authorisation for the derivative use of compelled evidence obtained under the Act. This does no more than to confirm the position under common law that the evidence of a compelled witness cannot be used directly against them in a civil, criminal or administrative proceeding [except in the circumstances referred to in s197 (3)] — but may be used indirectly or derivatively against them in relation to any of the above proceedings[8]. This clause is consistent with the historical and continuing practice of investigations under the CC Act which have not been successfully challenged. The question of the use or weight to be given to the information coercively obtained and derivatively used will be determined at the discretion of the relevant tribunal of fact.

The CCC endorses the comments made by the Officers of the Department of Justice and Attorney-General in the public briefing and also the Bill's Explanatory Notes regarding the purpose and effect of clause 18.

Submissions of the Queensland Police Union of Employees

Clauses 14, 15, 16 and 25 — Disclosure

The CC Act does not give public officials[9] power to use evidence seized under the authority of a search warrant issued under the *Police Powers and Responsibility Act 2000* or another Act in disciplinary proceedings. This reflects the principle recently expressed in *Flori v Commissioner of Police* [2015] 2 Qd R 497 stated earlier by the High Court in *Johns v Australian Securities Commission* (1993) 178 CLR 408, 423-424.

In *Flori*, Atkinson J concluded that[10]:

> The material obtained pursuant to the compulsion of a search warrant may only be used for the statutory purpose for which the warrant was granted, that is to obtain evidence of the commission of an offence. The evidence seized pursuant to the warrant may be used in the investigation and prosecution of criminal offences to which the seized things relate but cannot be used as evidence in disciplinary proceedings against Sergeant Flori.

The current disclosure provisions under the CC Act and the Bill's proposed amendments do not:

- alter the law as stated in *Flori*, or
- give public officials powers to use the evidence seized other than for investigation and prosecution of criminal offences to which the seized things relate.

This must be distinguished from the permitted use of evidence seized under the authority of a search warrant issued under the CC Act as evidence of corruption investigated by the CCC[11]. The CCC has power to seize evidence of corruption to which the warrant relates[12]. The CC Act authorises the CCC to give this evidence, if appropriate, to public officials to further investigate 'corrupt conduct' or 'police misconduct' with a view to prosecuting criminal offences or commencing disciplinary proceedings to

[7] s. 213(4)(b), CC act.
[8] *R v McDonnell, exparte Attorney-General* [1988] 2 Qd R 189; per Macrossan CJ at 191; McPherson J at 195; and Derrington J at 199.
[9] The term 'public official' is defined by CC Act, Schedule 2, Dictionary.
[10] *Flori v Commissioner of Police* [2015] 2 Qd R 497 at [30].
[11] ss. 86(1)(a), 87 and 92, CC Act.
[12] s. 92(1)(h) and (4), CC Act.

which the seized things relate as the public official considers appropriate, subject to the CCC's monitoring role[13].

PCCC Report No. 97 Recommendations

The CCC's submission to the Committee stated that Clause 13 seeks to implement one component of a suite of related reforms recommended by the PCCC Report No. 97[14]. In the CCC's view that suite of reforms is appropriate to be dealt with concurrently in order to effectively address continuing structural inadequacies in the integrity system and its legislative framework enabling the CCC to commence disciplinary prosecutions of corrupt conduct and other disciplinary proceedings related to police misconduct before the Queensland Civil and Administrative Tribunal (QCAT)[15]. These recommended reforms called upon:

- the CCC to review court judgments that could have a bearing on the operation of the CCC, the QPS and that relevant departments, including DJAG, should ensure that any amendments considered necessary are dealt with expeditiously[16];

- that the definition of 'reviewable decision' in section 219BA of the *Crime and Corruption Act 2001* be amended to specify that the Commission may apply to QCAT for the review of a decision by the QPS not to initiate disciplinary proceedings against an officer for police misconduct[17];

- that section 50 of the *Crime and Corruption Act 2001* be amended to enable the Commission to initiate disciplinary proceedings in QCAT's original jurisdiction in respect of police misconduct[18]; and

- that section 50 of the *Crime and Corruption Act 2001* be amended to deem units of public administration and appointments therein to be within the jurisdiction of QCAT for the purpose of making findings of corrupt conduct against former public sector employees[19].

The CCC considers that the implementation of these recommendations is critical to its role in ensuring high standards of integrity and a robust integrity system for public administration in Queensland. The implementation of these recommendations will remedy the well documented flaw that the CCC is unable to seek QCAT review for police misconduct in circumstances where the Police Service took no disciplinary action at all (e.g. the Palm Island matter). This flaw plainly extends to proceedings for a breach of discipline where no formal finding of police misconduct is made despite the fact that the conduct may in substance be capable of being proved to be police misconduct or corrupt conduct. The recent matter of the *Crime and Corruption Commission v Dawes [2017] QCAT* demonstrates the ongoing concern about the absence of CCC oversight available under the CC Act.

In the matter of *Crime and Corruption Commission v Dawes [2017] QCAT*

The CCC does not seek power to review breaches of discipline.

The CCC agrees with the proposition that matters properly falling within the definition of a breach of discipline do not warrant review by the CCC. However, the CCC's review capability must include matters which in substance would amount to misconduct under the *Police Service Administration Act 1990*. The CCC's submission in this regard goes to the *mis-classification* by the QPS of conduct which *should* be police misconduct, but is *treated as a less serious breach of discipline.*

[13] ss. 35, 42, 45, 46, 47 and 48, CC Act.
[14] PCCC Report No. 97, Recommendations 4, 15, 16 and 23.
[15] PCCC Report No. 97, Recommendations 4, 15, 16 and 23.
[16] PCCC Report No. 97, Recommendation 4.
[17] PCCC Report No. 97, Recommendation 15.
[18] PCCC Report No. 97, Recommendation 16.
[19] PCCC Report No. 97, Recommendation 23.

The legal impediments to appropriate CCC review in this regard have been recently demonstrated in the matter of *Dawes*. At the public hearing, the CCC provided a brief overview of the *Dawes* matter. A more detailed summary of the case follows.

Summary of the facts in *Dawes*

In March 2015 a triple-0 call was received at Crow's Nest Police Station in relation to an 83 year old missing man. He was considered to be at high risk because of his age.

The call was relayed to Sergeant Dawes who was the officer in charge but was not on duty at the time. He told the senior constable who took the call to check local hospitals and medical centres. He did not offer any further advice or check on the progress of the investigation. Those enquiries were made during the day by the senior constable but no-one else was notified. Importantly, Mr Dawes did not notify the on-call inspector or search and rescue personnel with the consequence no search was undertaken in relation the high-risk missing person.

The next day, a member of the public approached both the senior constable and Mr Dawes and again informed them about the missing man. Again, no action was taken. Instead, Mr Dawes and the senior constable attended their scheduled firearms training until about midday. Upon returning to the station, they notified the relevant search and rescue coordinator whereupon the missing person was located deceased in the nearby National Park.

An internal disciplinary investigation ensued. The prescribed officer, Superintendent Kelly, provided Mr Dawes with a Notice under ss 7.2 and 7.4 of the *Police Service Administration Act 1990* and s.4 of the *Police Service (Discipline) Regulations 1980.* The notice stated that it was the Superintendent's duty to take such action in relation to the stated matters that he considered, if substantiated, constitute *breaches of discipline.*

Following a disciplinary hearing, Mr Kelly found the disciplinary allegation to be substantiated, found the conduct was a *breach of discipline*, and imposed a sanction of two penalty units ($243.80).

CCC involvement

This matter originally came to the CCC's attention as a s.40 CC Act referral on 14 April 2015. This means it had reached the threshold for referral under either s.37 (police misconduct) or s.38 CC Act (corrupt conduct). The referral indicated that the Commissioner of Police held a reasonable suspicion that the conduct was police misconduct or corrupt conduct. This matter was not investigated by the CCC at the time. The reason for this is that pursuant to the s.40 directions issued to the QPS, when a matter is referred to the CCC under either ss.37 or 38 CC Act, the QPS continues to deal with the matter. This is because:

- The devolution principle (s.34(c) CC Act) requires it; and
- The statutory command on the CCC is to focus on more serious or systemic cases of corrupt conduct (s.35(3)).

It appears that, following notification to the CCC, the matter was re-classified as a breach of discipline by the Prescribed Officer. For reasons unknown, the CCC was notified on 10 August 2016 of the disciplinary outcome.

Proposed reform

The PCCC Report No. 97 recommendation 15 provides the logical remedy to promote public confidence.

In light of the current definition of 'reviewable decision' in the CC Act, *Dawes* and other authorities mean the CCC is effectively deprived of its ability under the CC Act to review decisions that concern misconduct simply because the Prescribed Officer has categorised, and found, the conduct was a breach of discipline. Put simply, if disciplinary proceeding takes the form of *breach of discipline* under the PSA Act without a finding of *corruption* (*police misconduct* or *corrupt conduct*) the QCAT considers that the CCC has no standing to bring a review application which QCAT has jurisdiction to hear.

The CCC considers it unacceptable that the form of the proceeding rather than the substance of the conduct in question continues to prevent the CCC from using an important tool to bring effective independent and transparent oversight of the way the Police Service deals with corruption. It appears that this concern is shared by the QCAT as evidence from Member Michelle Howard's statements at [45]- [48] which were set out in the CCC's submission delivered to the Committee on 12 April 2017.

The significance of the *Dawes* issue to the ongoing efficacy of the CCC's oversight function and public confidence generally warrant urgent action on it. In the circumstances I consider legislative amendment is the appropriate and justified course. With the greatest respect, this is entirely separate from any ongoing informal review process of the QPS disciplinary system between the CCC, QPS and the relevant police unions.

The CCC would be grateful to receive the Committee's support for this important initiative.

Finally, the CCC would like to suggest one manner in which the process adopted by the Committee could be made more efficient. In order to best assist Committee members to understand the issues, the CCC would appreciate the opportunity to consider a written submission from each person or entity invited to speak. In addition, it may make for a more comprehensive discussion of the submissions if the CCC could be heard last, so there is an opportunity to usefully comment on the submissions made during the course of the hearing and thereby assist Committee deliberations.

Yours faithfully

A J MacSporran QC
Chairperson