Crime & Misconduct & OLAB 2014
Submission 005

[redacted]

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
Brisbane Qld 4000
30/3/2014

Dear Sir/Madam,

Submission on Crime and Misconduct and Other Legislation Amendment Bill 2014

Attached is a submission I would like to make on the Crime and Misconduct and Other Legislation Amendment Bill 2014.

Yours faithfully,

Craig Myatt

[redacted]

Submission to the Legal Affairs and Community Safety Committee, on the Crime and Misconduct and Other Legislation Amendment Bill 2014

Craig Myatt

30/3/2014

I have been a user of the Queensland justice system and also the Crime and Misconduct Commission (CMC) complaint system over time, and from that perspective and as a concerned citizen I would make these observations about the proposed changes to the CMC, via this Bill:

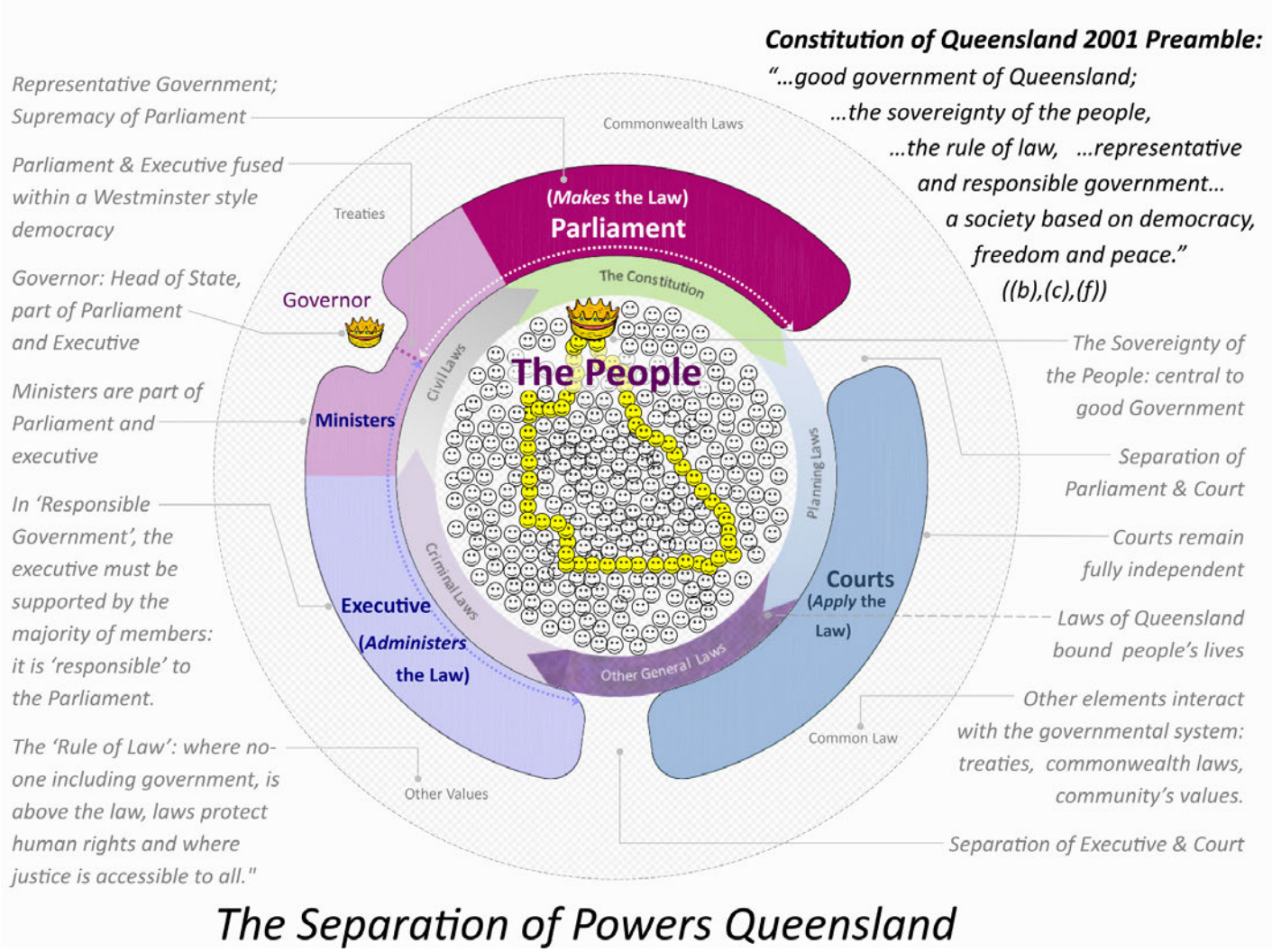
1. Increasing the threshold for misconduct and removal of the requirement for bipartisan support within the PCMC for the CMC Chair are inconsistent with the Legislative Standards Act, indicating that government powers should be balanced with appropriate oversight;
2. These changes are also inconsistent with the principles of open justice, the separation of powers and the Sovereignty of the People of Queensland;
3. Changing the term "Chairperson" back to "Chairman" is mildly unlawful sex discrimination;
4. There is merit to changing the term "misconduct" to "corruption" but retaining the scope of the CMC's powers;
5. It would not be unreasonable to require verified complaint statements to manage the risk of vexatious complaints.

1. Change to the governance structure of the CMC

The Premier Mr Newman himself expressed the following idea to me in a letter of 4/3/2013:

> *"One of the most important aspects of our legal system is the clear separation of powers between lawmakers (the Government) and those that apply the law." (Letter from Premier Newman to Craig Myatt, 4/3/2013)*

I note that Mr Campbell Newman was technically in error there: it is the ***Parliament*** (legislature) that makes the law, not the executive government, (which I will refer to as the "government") as the following diagram illustrates:



The Separation of Powers Queensland

As you can see from my diagram of the separation of powers, under our Westminster parliamentary system, the executive is fused with the legislature via the government's 19 ministers. This means that we do not, as Mr Newman indicated, have a "clear" separation of powers, but a somewhat con*fused* one. But we accept that as a historical choice and work within this constraint. I readily acknowledge that one of the implications of this well accepted fact is that it could appear that the government "makes the law", rather than submitting those changes to the great "council of the state" which is our Parliament. In truth, under section 2 of our Constitution Act 1867 and section 2 of the Australia Act 1986 (C'wealth), it is the Parliament, representing the sovereignty (or ultimate authority) of the People, which makes the law, *not* the government.

The supremacy of the Parliament over the government of the day is an important distinction in respect to this proposed law. A humble government, deferent to the Parliament and so the People of Queensland, will recognise that dissipation of governmental review powers to an organisation like the CMC, is not a hindrance to good government but an aid to it. It is also consistent with the separation of powers, and the rule of law.

So where the proposed Bill indicates the governance structure of the CMC will change, that the threshold for triggering the involvement of the CMC will raise and the chair of the CMC will no

longer be required to have bipartisan support of the Parliamentary Crime and Misconduct Committee, this indicates a degradation in the community support and perception of the independence of the head of the Crime and Misconduct Commission. If we degrade the independence of the head of the CMC and so the organisation, tending to cause the organisation to favour the government of the day, then this in turn can destroy the authority of the People, (our Sovereignty) where it tends to lessen the control we exert over the government via Parliament, which is the supreme power in our Westminster democracy.

It has been well accepted that the CMC must operate independently from the government of the day, centrally because the CMC often has to act directly in contradiction to the government's political or other interests. For example the CMC acted against the interests of the Beattie government when it acted against former Minister Gordon Nuttall. The Fitzgerald judicial inquiry which led to the formation of the CMC acted against the Bjelke-Petersen government when it acted against assistant police commissioner Parker and later Commissioner Terry Lewis and ultimately Mr Bjelke-Petersen himself. Clearly it must be both independent and be seen to be independent, in order to maintain the trust of the People of Queensland and to legitimately do its work, which is to hold the government or its servants accountable to the Rule of Law.

While keeping the requirement of bipartisan support within the PCMC for the CMC chair assumes a longer process of arriving at a suitable chair for the CMC, it provides to the electors of Queensland, remembering they also hold ultimate authority, a confidence that the state has not been compromised by the exercise of government power that suffers from a lack of "appropriate review". Under the Legislative Standards Act 1992, *Section 4 Meaning of fundamental legislative principles*:

(1) For the purposes of this Act, fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.
(2) The principles include requiring that legislation has sufficient regard to—
(a) rights and liberties of individuals; and
(b) the institution of Parliament.
(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—
*(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and **subject to appropriate review**; and*

As you can clearly see, section 4 of the Legislative Standards Act 1992 indicates laws such as the proposed amendment to the CM Act, should follow the principle that new laws have "*sufficient regard to rights and liberties of individuals",* even before having regard to the Parliament, by ensuring that government power affecting these rights and liberties is "*sufficiently defined and **subject to appropriate review".*** For example ensuring that police powers are subject to administrative review by the CMC where police inherently affect citizens' liberties, (for example the power of arrest which removes freedom) *is a statutory requirement* of new laws such as the proposed changes to the CM Act. That is, Queenslanders need police power to be "*subject to appropriate review"*, by an independent CMC, a basic approach which appears to be watered down by the proposed changes to the scope of the CMC's powers in this Bill.

The alternative I would propose is to leave the current legislative provisions for scope of the CMC's powers and for bipartisan support untouched. I also believe that the full implications of alterations to the governance structure of the CMC should be examined by this committee, ensuring we are not left with a less independent CMC, but a ***more independent*** CMC.

2. Public confidence in the CMC and the appearance of justice

The Explanatory notes for the *Crime and misconduct and other Legislation amendment bill 2014,* indicate that the proposed Bill arises to implement into law recommendations of a recent review into the CMC by the Independent Advisory Panel, in order to, among other things improve "public confidence in the CMC".

My view is that public confidence in the CMC is significantly undermined by aspects of the Bill, in particular the change to the threshold for misconduct offences and the removal of the need for bipartisan support to elect the Chair. Governance structure changes also represent a risk to the CMC's independence. I believe that these changes should be eliminated, or extensive independent public consultation should be conducted through marketing firm research into these changes, to accurately capture and implement the views of Queensland electors.

Under section 10 of the Constitution of Queensland 2001, given that the Legislature, as the supreme power in Queensland is elected by Queenslanders, then it must be these electors who have authority and say over matters affecting their freedoms. In reality, the constitution of the CMC which is proposed to be changed, may indirectly affect civil rights and freedoms, given that the CMC is often asked to counter the exercise of government powers, which have unlawfully impacted on personal freedoms, for example police powers.

The early existence of the Criminal Justice Commission (CJC), later reformed into the CMC was brought about partly by these very issues: the need to have a body independent of the government of the day, to act against a culture of corruption within the then government and the police service, which truly degraded rights and civil liberties, often in unacceptable and extreme ways. The CMC as it is, forms an important barrier against the incursion by government into the area of citizens' and electors' civil rights and freedoms. I note the person partly responsible for the formation of the CJC, Mr Fitzgerald has also made a submission to the Legal Affairs and Community Safety Committee on this Bill.

Recently, Queensland's Solicitor General Mr Walter Sofronoff, the architect of some of the current LNP government's passed laws, for example the controversial anti-gang and other laws, resigned. Those laws also appear to directly breach section 4 of the Legislative Standards Act. In a letter he wrote to the Courier Mail, he candidly expressed his conclusion that Mr Bleijie is insufficiently trained or experienced to administer the justice system as the Attorney General. While I do not express a view on Mr Bleijie's competence, I do share Mr Sofronoff's view about the risks attendant with breaking a confidence, for example the proposed scope of CMC powers and constitution changes in the Bill which tend to provide electors the appearance that fairness and high quality public administration are not the principal consideration in these proposed

changes to the Crime and Misconduct Act. The changes appear designed to provide political freedom for a party in government, *specifically* by degrading the independence of the CMC.

For example, limiting of the scope of the CMC's activities around misconduct in public administration and the appearance that political pressure could be applied in appointing the CMC chair, will limit the citizens' will to complain. These changes could give rise to a sense of administrative inertia, where even if a citizen formed the view that they had observed corruption or misconduct, because of the raised thresholds or underlying perception that the CMC lacked visible independence from government, they may fear that a complaint will be falling on deaf ears, so choose not to complain.

For example, the changes to the scope of the CMC's activities imply that each public sector organisation would then be the first port of call for complaints against that organisation, (eg Police) yet making an organisation investigate itself, as we have seen over the years, can be akin to putting the fox in charge of the henhouse, where they have a conflict of interests and strong motive to do little or nothing. That would then lead to injustice and a presumption that there was no problem, thus exacerbating corruption. We need to bear firmly in mind Queensland's recent history, particularly related to the formation of the CMC and the involvement of the National Party, and understand that such inherent conflicts are the point of having the CMC at all: we need this organisation to be powerful and independent.

The idea that appearances affect a person's confidence in a state of affairs was fundamental to Mr Sofronoff's claims about the lack of genuine ability of the Attorney General to administer the Justice system. Appositely, but more fundamentally, as Lord Hewart said in *Rex v Sussex Justices; Ex parte McCarthy*:

> *"… it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done." Lord Hewart in Rex v Sussex Justices; Ex parte McCarthy 1924*

Therefore confidence and appearances in the justice area are *"of fundamental importance"*. The changes proposed by the Bill degrade this public confidence, and go directly against the expressed intention of the Bill, so should simply be removed, or heavily researched, so that the confidence of electors is maintained, we know exactly what we are getting within the legislation, and have the final say on changes.

As an alternative to the changes proposed within the Bill, the law could remain as it is, leaving provisions for changes to scope of powers and bipartisan support within the PCMC for the chair, untouched. Changes which present clear risks to the authority of the People of Queensland, for example governance structure alterations which could provide for greater influence over the CMC by the government of the day must be fully understood through the committee process, and passed into law only when the risks are clearly understood and weighed against the historical risks which presented conditions for the very formation of the original CJC.

3. Gender neutral wording

I note that one of the apparently unnecessary changes proposed by this Bill is to change the word "Chairperson" back to "Chairman", rather than simply leave the current adequate wording in place. While I understand the pervasive push for gender equality can give rise to perhaps nuanced changes such as gender inclusive language, I think it is hard to argue against the idea that generally speaking, equality of the sexes has been beneficial for our society.

The current university level advice on high quality writing is that gender inclusive language should be used. The term "Chairperson" is a good word in that it is gender inclusive and is a sign to women who now enjoy full equality with men, that they can equally seek and take up the role of head of the CMC if they so choose. Using the old term "Chairman" is a subtle but important block to this equality, and a sign to women that they are seen as less appropriate, or inadequate for the role of CMC chair. Ensuring that all members of the group of citizens we know as Queensland are included, is consistent with the principle of democracy and various statute laws and international conventions.

Equality of sexes is also a basic human right, which is outlined in Article 3 of the International Covenant on Civil and Political Rights (ICCPR). It was the Liberal National Fraser government who ratified the ICCPR in 1980. One of its ministers, Kevin Newman was the father of Queensland's current premier, Mr Campbell Newman. The principle is also enacted through federal law, in the Sex Discrimination Act 1986, which indicates that even having implied rules arising from the use of the term "Chairman" could illegally indirectly discriminate against one sex, in this case females. Under section 109 of the federal Constitution, where federal laws are inconsistent with state laws, the federal Act will prevail. It therefore goes without saying that any law change should maintain compliance with superior legislation, such as the Sex Discrimination Act 1986 (C'wealth).

I would propose that as an alternative, the Bill simply leave the terminology of Chairperson as it is.

Point 4. The change from "misconduct" to "corruption

I generally agree that the term "misconduct" should be changed to that of "corruption", however I believe strongly that the scope of the CMC's activities should remain as it is now, and not be limited by using such a term. I also note that even what is now classed as misconduct, while it can appear somewhat less serious, has the potential to "taint" or corrupt the purpose of a public servant, or other person. That is, I believe that the terms can be interchangeable, and this requires only a paradigm change in the way we see public sector misconduct.

Point 5. The use of Statutory Declarations for complaints

I would agree that the use of verified or sworn statements is a reasonable shift to maintain accountability on the complainant, and at least notionally limit vexatious complaints. However, I believe that the Parliament should consult with the CMC on the issue of flexibility in respect to

complaint form, for example allowing some discretion in complaint making, noting that no other jurisdiction appears to require verified statements for complaint making.

Defining my perspective

I have made this submission because I have reasonably specialised information about government which arises from my dealings as a citizen outside both the justice system and government. As such, I believe I am particularly well placed to comment upon the proposed law changes from the point of view of the electors of Queensland, in a way that almost all citizens would find impossible. I also refer to the High Court's decisions over time, that all people have freedom of political discussion, including for state issues, arising from sections 7 and 24 of the federal Constitution, which allow for the election of the federal House of Representatives and the Senate.

It would be easy for members of political parties who read this submission to presume that I have a certain bias toward or against their political party. I have no political affiliations. I have made the submission to influence public policy only, and I strongly believe that the remarks I have made in particular about Mr Newman and Mr Bleijie should be weighed against the quality of administration of government that they provide.

Craig Myatt

BAS, GDID, GDipTIM