



2 April 2014

The Chairperson
Legal Affairs and Community Safety
Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Chair,

Crime and Misconduct and Other Legislation Amendment Bill 2014

Introduction

The Association thanks the Committee for the opportunity to make a submission on this Bill.

The Association notes that the government has drawn upon the results of a review conducted by the Honourable Ian Callinan AC and Professor Nicholas Aroney¹ (“the Callinan Aroney Review”) and a further administrative review conducted by Michael Keely². The government has also relied upon an implementation committee of senior government officers.³

The Association commends the government for engaging in a process of obtaining expert assistance both in developing policy and in developing legislative proposals. Some of the policy directions evident from a reading of the Bill can be seen to derive from the two reviews.

The More Serious Complaints of Misconduct

The Association notes a concern of the Callinan Aroney Review to avoid circumstances where large amounts of Commission resources were directed to dealing with complaints about comparatively trivial transgressions. The change from “misconduct” to “corruption” as the second task of the Commission with a new name and new definitions is designed to achieve this policy aim. The use of the Commission’s resources where they will be most effective in achieving integrity in the public sector is a laudable objective.

The Association considers that it is an appropriate means of achieving this objective to restore an onus on public service leaders including Department heads and the

¹ The report of those authors is at
<http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2447.pdf>

² The report may be found at
<http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T4088.pdf>

³ See the government’s response to Callinan Aroney at:
<http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2923.pdf>.

Public Service Commission to prevent misconduct and to promote integrity within their spheres of responsibility.

But the Association is concerned that the Bill may send signals that promoting integrity and prevention of misconduct or corruption in the public sector are of reduced importance both in the mind of the government and in the law as it is written. In this regard, the Association is concerned by the following proposed changes:

- (a) The amendment to s. 4 of the Act by which continuous improvement of integrity and reduction of misconduct is changed to simply the reduction of the incidence of corruption and;
- (b) The expression of the amended objective, now in the new subs. 4(1A), as a secondary (rather than a main) objective of the Act;⁴
- (c) The amendment to s. 23 where the preventive function of the commission now only relates to major crime and no longer relates to misconduct or corruption, as such, in the public sector;⁵ and
- (d) The amendment to s. 34 where paragraph (b) which deals with capacity building to prevent and deal with misconduct is deleted and changes to paragraphs (c) and (d) where the prevention of misconduct/corruption is similarly downgraded.⁶

Criminalising Complaints

The policy of ensuring that Commission resources are directed to the most serious matters is pursued in the existing legislation by s. 216 which relates to complaints which concern frivolous or vexatious matter. Section 216 has a two strike policy where a second complaint on the same subject matter may amount to a criminal offence.

The Bill seeks to reinforce this by deleting vexatious from s. 216 and including it in the new offence provision, s. 217A. Section 217A makes it an offence to make a complaint in any of the following manners: vexatiously; not in good faith; for a mischievous purpose; recklessly; or maliciously.

The Association is concerned that this is a heavy handed means of saving Commission resources. The Association is concerned that the provision in this form may intimidate potential complainants a number of whom may be able to provide some evidence of serious corruption. Non-lawyers, in the Association's experience, do have knowledge of matters that are very useful to law enforcement agencies. Laypersons with such information may not always be able to conduct the analysis as to how far their information goes in proving the matters about which their suspicions have been raised. If the public generally have the perception that a mistake on their part may land them a year in jail, many may choose to keep silent. Some of these are likely to have important information that may have triggered successful corruption investigations.

The Association is strengthened in its view that the new s. 216A is too heavy handed by the terms of the existing ss. 217 and 218 which criminalise the provision of material that is false or misleading to the Commission as part of a complaint.

⁴ Clause 6 of the Bill

⁵ Clause 10 of the Bill

⁶ Clause 13 of the Bill

Non-gender specific language

The Association is somewhat puzzled to find that, throughout the Act, the term of “chairperson” has been changed to “chairman”.

The Association has a strong policy and important track record in promoting equal opportunities within the bar, itself; within the Association; and in government appointments to institutions that are of importance to administration of the law and the maintenance of the rule of law.

The use of non-gender specific language in legislation and in government publications is important in both reflecting and promoting a mind set in favour of equal opportunity values. The use of such language has been a bi-partisan policy at most levels of government in Australia for several decades. The Association perceives it to have very wide support in the community not just but particularly among women.

The Association strongly recommends that the use of gender specific language be removed from the amending Bill.

Loss of Independence and Authoritarian Structure

The Report of a Commission of Inquiry pursuant to Certain Orders in Council which was received on 3 July 1989 stressed the exclusion of party political considerations and processes from the decision making concerning criminal justice as an important factor in recommending what has become the present Commission.

That was reflected in the legislation which established the Criminal Justice Commission and remains in the Act as it presently stands. The most important element of this is seen in subs. 228(3) which requires that the appointment of any commissioner, including the Chairperson, involve consultation with the Parliamentary Committee and bipartisan support of that Committee.

The Association is concerned with two tendencies reflected in the Bill.

The Bill deletes several of those safeguards placed in the Act to achieve the Commission’s independence from partisan considerations and influence that were placed in the Act in the wake of the 1989 report. The deletion of these provisions is the first of the concerning tendencies referred to.

Second, the internal structure of the Commission is changed by the Bill to place increased influence and authority in the Chairman, the Chief Executive Officer (a new position) and in the Minister.

The two developments cause the Association much concern.

Removing the Safeguards

Sections 233-225 in the Act provide for a chairperson and four part-time community representatives. The chairperson must be an experienced lawyer. One of the community representatives must be an experienced lawyer with a demonstrated interest in civil liberties⁷ and must be appointed from four persons nominated two each by this Association and the Queensland Law Society⁸. The others must come either from a relevant social science background or a community service background.⁹

⁷ Paragraph 225(1)(a) of the Act

⁸ Subsection 227(3) of the Act

⁹ See ss. 225 and 230 of the Act

At least one part time commissioner must be a woman.¹⁰

The part time community qualification requirements are deleted including the requirement that one part-time commissioner be a woman. The new structure has a full-time chief executive officer (presumably of a management or financial management background) as well as the full-time chairman. There are three part-time commissioner positions whose background qualifications are undefined. One of these is to be deputy commissioner.¹¹

These structural changes take away the informed community expertise input into the Commission's operation. The two full-time positions are likely to weight discussions along pre-ordained lines and limit the questioning and testing of decisions that might have occurred under the previous structure.

The Association supports the creation of a statutory CEO position for the Commission to share the Chairperson's workload and to deal with human resources and budgetary matters in the first instance. However, the inclusion of that position in the Commission as a voting member at the expense of a community position is not supported.

The removal of the community requirements, including the civil liberties position, takes away one important safeguard against the appointment of people (by a government) who are less independent and less questioning of government partisan outlook than the previous structure provided.

Of most concern to the Association is the removal of the requirement that the appointment of all commissioners must be with the bipartisan support of the parliamentary committee.¹² This requirement was both the symbol that the Queensland Parliament was committed to a Commission that was independent of partisan opinion and the single most effective means of achieving that independence.

Authoritarian Structure

The Association notes that some provisions tend to limit the independence of staff of the Commission in going about their role either as lawyers providing advice or police officers exercising the discretions of a constable at common law. In this category falls the new s. 35A¹³ which allows the chief executive officer to issue directions as to how officers are to identify serious cases of corruption. It does not seem that this direction is required to be made public, falling outside those matters in s. 35B (which must be published).

A wholly new division 9 of part 1 of chapter 6 of the Act¹⁴ hands full disciplinary powers of commission staff to the chief executive officer. The provisions are similar to the discipline provisions in the *Public Service Act 2008* ("the Public Service Act"). The chief executive officer is required to provide natural justice in exercising these powers.¹⁵ However, there seems to be no equivalent to the appeal provisions in ss. 193-194 of the PSA.

The research function of the Commission has been an important part of its role providing an independent expert voice on matters going to law enforcement. The new s. 52¹⁶ now requires that

¹⁰ Subsection 230(4) of the Act

¹¹ Clause 34 of the Bill amending or replacing ss. 223-225

¹² Subsection 228(3) of the Act

¹³ Clause 15 of the Bill

¹⁴ Clause 62 of the Bill

¹⁵ Subsection 273F

¹⁶ Clause 21 of the Bill

the Commission's research plan must be approved by the Minister. This is a significant loss of independence.

It is noted that Callinan Aroney were critical of the Commission's research performance in recent years. Such a view affords no justification, however, for subjecting this function to ministerial veto. The Association considers that some statutory indicators as to matters that should be covered in the Commission's research may have been appropriate. The requirement of ministerial approval is not supported.

Callinan Aroney were very critical of senior officers of the Commission staying in their roles for long periods. It was said to create a potential for corruption to develop among other things.

Against that background, the Association is surprised that the maximum limit on the time that Commissioners can serve (over more than one term) is lifted from five to ten years.¹⁷ The change is not supported.

The handing of increased power within the Commission to the chairman is brought about by changes to ss. 251¹⁸ and 269¹⁹ of the Act. The new s. 69 delegates the bulk of the Commission's functions to the Chairman²⁰ and a number to the chief executive officer.²¹ Section 251 gives the Commission a strategic leadership role²² and responsibility for certain planning and reporting documents²³.

Cumulatively, these provisions provide for a more authoritarian structure of the Commission. Combined with the government's ability to appoint Commissioner's as it seems fit without the need to obtain bipartisan support through the Committee, the changes identified create the danger that a future government might appoint pliable supporters to key positions on the Commission and be able to control the way in which the extraordinary powers of the Commission are to be exercised.

In those circumstances, the danger of corruption, may return.

Reviews

Changes to the timing of reviews by the parliamentary committee of the activities of the Commission are effected by amendments to paragraph 292(1)(f) of the Act.²⁴ The changes appear both to push out the next review and make reviews, thereafter, less frequent.

These changes are not supported.

Meetings of the Parliamentary Committee in Public

The new s. 302A²⁵ provides that the meetings of the parliamentary committee should be in public unless the Committee, for cause set out in the section, decides otherwise.

Although this maintains in practice the status quo, the Association supports the principle that the Committee's hearings and deliberations should be, as far as possible, in public.

¹⁷ Clause 39 inserting a new s. 231

¹⁸ Clause 52 of the Bill

¹⁹ Clause 58 of the Bill

²⁰ Paragraph 269(1)(b)

²¹ Paragraph 269(1)(a)

²² Subsection 251(1)

²³ Subsection 251(3)

²⁴ Clause 67 of the Bill

²⁵ Clause 69 of the Bill

Power to the Parliamentary Commissioner

An amendment to s. 318²⁶ allows the Parliamentary Commissioner to hold a hearing when its auditing of documents powers fall short of solving the issues under consideration.

The Association supports this mild extension of powers to the Commissioner.

The system of governance set up under the Act involves a balance of powers between three institutions. That balance might be inhibited if the Commissioner was dependent on permission from the Committee to be able to hold a hearing.

Reasonable Suspicion

The new s. 329²⁷ requires certain designated people on the Commission to refer to the Parliamentary Committee certain incidents of suspected improper conduct.

The Association suggests that the obligation to refer should be based on reasonable suspicion not suspicion per se.²⁸

The Dr. Levy Clause

Sections 397 and 402²⁹ seek to confirm the appointment of the present Acting Chairperson, firstly, up to the commencement of the legislation and then until 31 October 2014³⁰ unless an appointment of a chairman under the new provisions is made before then.

The Association considers that, since certain aspects of Dr Levy's conduct while in office, including his evidence to the Parliamentary Committee, are under scrutiny, this legislative appointment guarantee is inappropriate.

The Association urges that a fresh acting chairperson be appointed with bi-partisan support of the Parliamentary Committee and that the Dr Levy transitional clauses be deleted from the Bill.

Conclusion

The Association repeats its gratitude for the opportunity to comment on the draft legislation.

The Association would request an opportunity to give evidence before the Committee in person.

Yours faithfully,



Peter J Davis QC
President

²⁶ Clause 75 of the Act

²⁷ Clause 77 of the Bill

²⁸ The Bill makes a similar change to section 38 of the Act. See clause 17 of the Bill.

²⁹ Part of the transitional provisions of the Bill. See clause 80.

³⁰ The new paragraph 402(2)(b)