



PO Box A147
Sydney South
NSW 1235
DX 585 Sydney
alhr@alhr.asn.au
www.alhr.asn.au

11 April 2014

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

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

Dear Sir/Madam

**Submission in relation to the Crime and Misconduct and Other Legislation
Amendment Bill 2014**

1. Australian Lawyers for Human Rights ('ALHR') thanks the Committee for the opportunity to make a submission on the Bill.
2. The below submission comments on some specific matters only rather than comprehensively addressing the range of proposed amendments.
3. The policy objectives of the Bill as indicated in the Explanatory Notes are praiseworthy. The improving of public confidence in the CMC, governance structures and culture of the CMC are laudable goals.
4. Professor John McMillan, then Commonwealth Ombudsman noted at the 2006 United Nations Conference on Anti-Corruption Measures that "Public trust is more easily won if an accountability agency can demonstrate that it observes standards of good governance and human rights."¹

¹ Australia, Commonwealth Ombudsman, Professor John McMillan, *Speaking notes for the United Nations Conference on Anti-Corruption Measures, Good Governance and Human Rights, Poland, 8-9 November 2006*
http://www.ombudsman.gov.au/files/8_November_2006_Fighting_corruption_while_safeguarding_human_rights.pdf at 6 April 2014.

Human Rights and Corruption

5. Australia lays claim to global leadership in combating corruption, and is a key member of the G20 Anti-Corruption Working Group and has participated in the negotiation and development of the G20 Anti-Corruption Action Plan.²
6. Australia ratified the United Nations Convention against Corruption ('UNCAC') on 7 December 2005.³
7. There is arguably a mutually reinforcing relationship between good governance and human rights.⁴
8. The United Nations argues that "Human rights principles provide a set of values to guide the work of Governments and other political and social actors ... Moreover, human rights principles inform the content of good governance efforts: they may inform the development of legislative frameworks, policies, programmes, budgetary allocations and other measures. However, without good governance, human rights cannot be respected and protected in a sustainable manner."⁵
9. The UNCAC advances foundational principles and guidance on how human rights can be incorporated into State responses to corruption.
10. Article 5(1) attaches weight to the principles of the rule of law, integrity, transparency and accountability.

"Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability."
11. Article 19 addresses the criminalisation of corruption.

"Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity."
12. Article 36 emphasises that necessity of independence of corruption fighting bodies, and the need for such bodies to be able to function without undue influence.

"Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence."

² Australia, Attorney-General's Department, *Global leadership in combatting corruption* <http://www.ag.gov.au/CrimeAndCorruption/AntiCorruption/Pages/Globalleadershipincombattingcorruption.aspx> at 8 April 2014.

³ *United Nations Convention against Corruption*, 7 December 2005, [2006] ATS 2.

⁴ Refer e.g. to United Nations General Assembly, *Summary report of the Human Rights Council panel discussion on the negative impact of corruption on the enjoyment of human rights*, 18 April 2013, A/HRC/23/26.

⁵ United Nations, *Good Governance Practices for the Protection of Human Rights* (United Nations publication, Sales No. E.07.XIV.10), 3.

Ongoing Relevance of the Fitzgerald Report

13. The Fitzgerald Inquiry uncovered widespread police corruption, bribery of parliamentary Ministers, the use various mechanisms for the crushing of political dissent, cronyism, and deeply ingrained abuses of process and power for example in relation to the awarding of government contracts,⁶ the undermining of civil liberties, threats to the independence of the judiciary,⁷ and a politicised public service characterised by a culture of fear and silence,⁸ and a corrupted electoral distribution system.
14. The Fitzgerald Report⁹ made over 100 recommendations to address these issues. The Report recommended the establishment of an independent body, free from Executive control, called the Criminal Justice Commission.¹⁰ Amongst other functions the CJC was to be tasked with responsibility for conducting “independent investigations into any suspected official misconduct.”¹¹ A complaints branch was to be set up “to receive complaints of misconduct or suspected misconduct by public officials, including police...”¹²
15. The last two decades has witnessed “an overall retreat from the Fitzgerald vision of open and accountable government.”¹³ Tony Fitzgerald has strenuously objected to the Crime and Misconduct and Other Legislation Amendment Bill 2014, calling it the “final step needed to remove the Commission’s independence and bring it completely under government control.”¹⁴
16. Since November last year Tony Fitzgerald QC has made a number of public comments reflecting an increasing community disquiet, for example in relation to the state government’s attacks upon the judiciary and its attempted demagogic use of law and order.¹⁵
17. Mr Fitzgerald has expressed concern that the government is turning the CMC from “watchdog to lapdog”¹⁶ warning that “Arrogant, ill-informed politicians who cynically misuse the power of the state for personal or political benefit are a far greater threat to democracy than criminals, even organised gangs.”¹⁷

⁶ Queensland Government, *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 28 March 2013, 28 (‘Callinan Aroney Report’).

⁷ *Ibid* 29.

⁸ *Ibid*.

⁹ Queensland, Crime and Misconduct Commission, *Report of a Commission of Inquiry Pursuant to Orders in Council*, 29 June 1989 (‘Fitzgerald Report’).

¹⁰ Queensland, Parliamentary Crime and Misconduct Committee, A report of a review of the activities of the Criminal Justice Commission pursuant to s.118(1)(f) of the Criminal Justice Act 1989, tabled 10 June 1989 6 (‘Report 45’).

¹¹ Fitzgerald Report 373.

¹² Fitzgerald Report 374.

¹³ Tim Prenzler, Reform in Politics, Criminal Justice and the Police in Post-Fitzgerald Queensland, (2009) *Griffith Law Review* Vol 18 No3 576.

¹⁴ Amy Remeikis, ‘Tony Fitzgerald slams Queensland government’s CMC reform plans’, *Brisbane Times*, 28 March 2014 <http://www.brisbanetimes.com.au/queensland/tony-fitzgerald-slams-queensland-governments-cmc-reform-plans-20140328-35oi9.html> at 4 April 2014.

¹⁵ ‘OPINION: Tony Fitzgerald’s verdict on the tough Newman Government law and order crackdown’, *The Courier-Mail*, 28 October 2013 <http://www.couriermail.com.au/news/opinion/opinion-tony-fitzgeralds-verdict-on-the-tough-newman-government-law-and-order-crackdown/story-fnihsr9v-1226747871408> at 9 April 2014; and Amy Remeikis, ‘Tony Fitzgerald slams Queensland government’s CMC reform plans’, *Brisbane Times*, 28 March 2014 <http://www.brisbanetimes.com.au/queensland/tony-fitzgerald-slams-queensland-governments-cmc-reform-plans-20140328-35oi9.html> at 7 April 2014.

¹⁶ ‘Tony Fitzgerald attacks bikie laws, accusing Campbell Newman, Jarrod Bleijie and magistrate Tim Carmody of weakening the CMC’, *News Ltd*, 4 February 2014 <http://www.news.com.au/national/queensland/tony-fitzgerald-attacks-bikie-laws-accusing-campbell-newman-jarrod-bleijie-and-magistrate-tim-carmody-of-weakening-the-cmc/story-fnij5v6w-1226817115291> at 6 April 2014.

¹⁷ *Ibid*.

18. Mr Fitzgerald's warning relates to lawmaking and the electoral process, suggesting that the opportunity for the electorate to change governing parties is diminished by laws which provide political advantages to the party in power and strengthen its hold on power.
19. Allegations of corruption have continued to dog the government,¹⁸ including allegations involving the Premier.¹⁹
20. ALHR argues that it is not appropriate in the circumstances to retreat from the values associated with the Fitzgerald reforms, such as transparency and accountability in governance, and the independence of the CMC.

Bipartisan Appointment of Commissioners

21. The Act requires that "the Minister may nominate a person for appointment as a commissioner only if the nomination is made with the bipartisan support of the parliamentary committee."²⁰
22. Clause 38 omits the requirement of bipartisan support for the appointment of nominated commissioners.
23. The Parliamentary Criminal Justice Commission Report 45 noted that "The involvement of the Committee provides a level of accountability and impartiality to what may otherwise be a process somewhat lacking in transparency. Consequently, the Committee believes that it is essential that it have effective input into the selection of members to be appointed to the Commission."²¹
24. ALHR concurs with this view. The omission of the requirement for bipartisan support of nominees is of crucial importance as such a measure is destructive of the commission's independence from the Executive.
25. Tony Fitzgerald recommended that the CJC be an independent body – "independent from the police, the judiciary, the government, and the Opposition but reporting to a parliamentary committee."²² PCJC Report 45 notes the Fitzgerald Report's recommendation that the CJC be an independent body free from Executive control.²³

¹⁸ 'MP for Redcliffe Scott Driscoll faces investigation by CMC and police over allegations of fraud and misconduct', *News Ltd*, 24 April 2013

<http://www.news.com.au/national/mp-for-redcliffe-scott-driscoll-faces-investigation-by-crime-and-misconduct-commission-cmc-and-queensland-police-over-allegations-of-fraud-and-misconduct/story-e6frfkp9-1226627408440> at 9 April 2014;

Owen Jacques, 'CMC investigating Bruce Flegg's alleged secret recordings', *Sunshine Coast Daily*, 14 June 2013

<http://www.sunshinecoastdaily.com.au/news/cmc-investigate-bruce-flegg-secret-recordings/1907914/> at 9 April 2014.

¹⁹ Andrew Glennell, 'Campbell Newman campaign wanted \$5k donation for water meeting, ICAC told', *The Daily Telegraph*, 7 April 2014

<http://www.dailytelegraph.com.au/news/nsw/campbell-newman-campaign-wanted-5k-donation-for-water-meeting-icac-told/story-fni0cx12-1226876742805> at 5 April 2014;

'Not since the era of Joh Bjelke Petersen', *The WestEnder*, 21 November 2013

<http://westender.com.au/since-era-joh-bjelke-petersen/> at 5 April 2014.

²⁰ *Crime and Misconduct Act 2001* (Qld) s 228(3).

²¹ Report 45 31.

²² Charles Sampford 'From deep North to global governance exemplar: Fitzgerald's impact on the International Anti-corruption Movement', Australian Public Sector Anti-corruption Conference: Taking responsibility Fighting Corruption

http://www.griffith.edu.au/_data/assets/pdf_file/0006/246282/From-Deep-North-to-International-Governance-Exemplar-Nov-22_V2.pdf at 6 April 2014.

²³ Report 45 6.

Recommendation:

26. That the Bill be amended so as to retain the existing requirement of bipartisan support for the appointment of commissioners.

Length of Term of Appointment of Commissioners

27. Clause 39 increases the maximum length of appointment of commissioners from one 5 year term to two 5 year terms.
28. ALHR notes that the current requirement of limiting the length of appointment to one 5 year term acts as a safeguard against corruption.

Recommendation:

29. Clause 39 be deleted from the Bill.

Clause 80

30. Under Clause 80 of the Bill the person who is acting chairperson is to be reappointed as acting chairperson up until the commencement day,²⁴ and that upon commencement the acting chairperson will remain in that role until 31 October 2014 or until the appointment of a permanent chairperson is made, whichever is earlier.²⁵
31. Dr Levy has been questioned by the PCMC following his publication in the Courier Mail of an opinion piece supportive of the Government's bikie legislation. Dr Levy had given evidence contradicted by Mr Lee Anderson, Director of the Queensland Government Media Unit.
32. The subsequent sacking of the PCMC saw further questioning of both Dr Levy's integrity and the probity of the Government's actions.²⁶ QUT politics lecturer Mary Crawford, for example, said the Government was showing that it was not interested in transparency or accountability.²⁷
33. The Select Committee on Ethics has yet to comment on the conduct of the Acting Chairperson.
34. The Government has twice circumvented the statutory requirement to obtain the bipartisan support of the Parliamentary Crime and Misconduct Committee by appointing Dr Levy as Acting Chairperson, rather than seeking to nominate Dr Levy for appointment to the office of Chairperson.

²⁴ Crime and Misconduct and Other Legislation Amendment Bill 2014 ('The Bill'), cl 80, s 397.

²⁵ The Bill cl 80, s 402.

²⁶ For example see 'Campbell Newman stacks Queensland parliamentary committee overseeing CMC', *The Australian*, 22 November 2013 <http://www.theaustralian.com.au/national-affairs/state-politics/campbell-newman-sacks-qld-parliamentary-committee-overseeing-corruption-watchdog-cmc/story-e6frgczx-1226765767563> at 6 April 2014; and Stephanie Smail, Brad Ryan and staff 'Call for judicial inquiry after Qld Government sacks PCMC members', *Australian Broadcasting Commission*, 22 November 2013 <http://www.abc.net.au/news/2013-11-22/call-for-judicial-inquiry-after-qld-government-sacks-pcmc/5109756> at 6 April 2014.

²⁷ Stephanie Smail, Brad Ryan and staff 'Call for judicial inquiry after Qld Government sacks PCMC members', *Australian Broadcasting Commission*, 22 November 2013 <http://www.abc.net.au/news/2013-11-22/call-for-judicial-inquiry-after-qld-government-sacks-pcmc/5109756> at 6 April 2014.

35. Tony Fitzgerald QC has commented in relation to the acting appointment of Dr Levy claiming “The Crime and Misconduct Commission will have outlived its usefulness if it loses its independence.”²⁸
36. Continued public confidence in the independence of the CMC and Clause 80 are incompatible.

Recommendation:

37. That sections 397 and 402 be deleted from the Bill and that a new acting chairperson be appointed pursuant to section 228.

Clause 29 and the Deterrence of Genuine Complaints

38. The Callinan/Aroney report stated that a high number of trivial, vexatious or misdirected complaints were processed by the CMC.²⁹
39. One response in the Bill to this claim is the creation of a new offence in section 216A.
40. Under the existing provisions a person who appears to make a complaint deemed to be vexatious or about a frivolous matter may be provided with a notice by the commission that advises the person that the person commits an offence, punishable by a fine or imprisonment, if the person makes the same complaint again to the commission.³⁰
41. The proposed section 216A makes it a punishable offence for a person to make a complaint to the commission that is vexatious; not in good faith; for a mischievous purpose; or recklessly.
42. ALHR opposes this provision as it will have the effect of deterring complainants, from lodging what may be genuine complaints about corruption, because of fear of prosecution.
43. Many whistle-blowers and others who lodge complaints about maladministration and misconduct have experienced retaliation. The prospect of prosecution will be sufficient to deter many already apprehensive about reprisals.
44. The Parliamentary Criminal Justice Committee noted in 2001 that “Much information given to the CJC comes from ‘whistle-blowers’ who make public interest disclosures. It is important that such people feel safe in providing information to the CJC and, for this reason, whistle-blower support is vital to the CJC in receiving information about official misconduct.”³¹
45. The Human Rights Council has noted that “The act of whistle-blowing also plays an important role in ensuring accountability for human rights violations. If people who expose illegal conduct or misconduct in public service administration are not

²⁸ ‘Queensland bikie laws a bid for redneck support, says Tony Fitzgerald’, *The Australian*, 31 October 2013 <http://www.theaustralian.com.au/national-affairs/state-politics/queensland-bikie-laws-a-bid-for-redneck-support-says-tony-fitzgerald/story-e6frqczx-1226750635225> at 5 April 2014.

²⁹ Callinan Aroney Report (n6 above).

³⁰ *Crime and Misconduct Act 2001* (Qld) s 216.

³¹ Queensland, Parliamentary Crime and Misconduct Committee, Three Yearly Review of the Criminal Justice Commission, tabled 19 March 2001 (‘Report 55’) 137.

protected by law, they are less likely to disclose information that might be of significant public interest.³²

46. Members of the community must not be discouraged from coming forward to make complaints about perceived corruption.

Recommendation:

47. That section 216A be deleted from the Bill.

Change from ‘chairperson’ to ‘chairman’

48. Clause 35 and other provisions in the Bill would result in the replacement of the word ‘chairperson’ by the word ‘chairman’.

49. No explanation is offered in the Explanatory Notes for this change.

50. Dr Mary Crawford, in explaining the move towards gender neutral nomenclature such as ‘chairperson’, has argued that language has power. “For the last 20 or 30 years we have changed those definitions to be more inclusive because as a society we recognise we need all the talents of all the people we have and hence, those changes by language,” she said. “After all language defines the way in which things are done, who does them and how they are done. “It is a very important indicator of the values we hold.”³³

51. ALHR argues that the proposed change is politically regressive and sexist.

Recommendation:

52. That all provisions in the Bill replacing the term ‘chairperson’ with ‘chairman’ be deleted.

Female Commissioner

53. The current provisions require that at least one part time commissioner be a woman.³⁴ Clause 38 of the Bill has the effect of omitting this requirement.

54. Much has been written about systemic sex discrimination in the legal profession.³⁵

55. Elizabeth Broderick, Sex Discrimination Commissioner, has argued that quota law has played a pivotal role in making women’s talent and experience visible, and citing Michael Lavarch, that such special measures “should be presented and understood as an expression of equality rather than an exception to it.”³⁶

³² United Nations General Assembly, *Report of the United Nations High Commissioner for Human Rights on the role of the public service as an essential component of good governance in the promotion and protection of human rights*, 23 December, A/HRC/25/27 6.

³³ Amy Remeikis, ‘Chairman replaces chairperson in legislation’, *Brisbane Times*, 8 April 2014, <http://www.brisbanetimes.com.au/queensland/chairman-replaces-chairperson-in-legislation-20140407-36971.html> at 8 April 2014.

³⁴ *Crime and Misconduct Act 2001* (Qld) s 230(4).

³⁵ For example see: Kate Eastman, *Sex Discrimination in the Legal Profession*, (2004) 2 7(3) *UNSW Law Journal*.

³⁶ Australian Human Rights Commission, Elizabeth Broderick, Sex Discrimination Commissioner, *Getting on board: Quotas and Gender Equality (2011)*, 29 April 2011, <https://www.humanrights.gov.au/news/speeches/getting-board-quotas-and-gender-equality-2011> at 7 April 2014.

56. ALHR argues that the requirement for at least one part time commissioner be a woman allows the merit principle to be applied in a manner consistent with opposition to gender inequality.

Recommendation:

57. That the Bill be amended so that the existing requirement that at least one part time commissioner be a woman be retained.

Reviews by Parliamentary Committee

58. Clause 67 has the effect of extending the interval at which the PCMC reviews the CMC's activities from the current 3 years to every 5 years.
59. The PCMC reviews are a mechanism that assists with transparency and accountability in relation to the CMC. The resulting reports facilitate public scrutiny and discussion.

Recommendation:

60. Clause 67 be deleted from the Bill.

Australian Lawyers for Human Rights

61. ALHR was established in 1993. ALHR is a network of Australian law students and lawyers active in practising and promoting awareness of international human rights. ALHR has a national membership of almost 3000 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.
62. If you have any questions in relation to this submission, please contact Nathan Kennedy who is ALHR's President, by e-mail <alhr.president@gmail.com>.

Yours faithfully,



Nathan Kennedy
President

Australian Lawyers for Human Rights