[redacted]

11 April 2014

Legal Affairs and Community Safety Committee

Parliament House

George St

Dear Mr Berry,

Thank you for your invitation to make submissions about the proposed *Crime and Misconduct and Other Legislation Amendment Bill* 2014 (the Bill). For reasons of which I am not aware, I did not receive your letter of 20 March until the evening of 2 April 2014. That and competing commitments have meant that I have not had time to deal with the issues as exhaustively as they deserve. I propose to deal as best I can with what seem to me to be key issues. The fact that I do not deal with an issue should not be taken to imply either support or opposition. I have not used the letterhead of Griffith University in compiling this submission, but I have given my work address there for convenience. The views expressed herein are my own and do not necessarily represent the views of Griffith University.

Unless and until the proposed Bill is passed, it seems to me appropriate to use the language of the extant legislation, the *Crime and Misconduct Act* 2001 (the Act) unless context demands otherwise.

Removal of the necessity of bipartisanship in appointment of Commissioners.

Others have detailed the reduction in independence arising from this step. I join in advising against the removal of the need for bipartisan support as it presently arises. I would add some observations.

The need for bipartisan support (different in terms but similar in practical effect to the present language in the Act) was inserted in the *Criminal Justice Act* 1989 from the very beginning. It was inserted by Parliament under a National Party government in 1989 (prior to the December 1989 election of the Goss government). It was assented to on 31 October 1989 during the period of the Cooper government, but the timing of events indicates that it was necessarily substantially prepared under the Ahern government.

This went further than Fitzgerald's recommendations on the topic. Perhaps it was recognised that in matters of this sort, it is important to remember that no party is in government forever. A rule such as that which presently obtains provides a protective function to the benefit of an incumbent government against the day when it is no longer in power.

There are other potentially contentious positions (such as judicial positions) the appointment to which does not require bipartisan support. Comparison of those positions with the Chairperson of the CMC is unhelpful, however; the differences for present purposes are greater than the similarities.

The CMC is an investigative body which rightly has wide, invasive, proactive powers it can use of its own motion in a way that courts do not. The CMC initiates, courts adjudicate. Courts only decide cases that are brought before them, and they decide them in public. A failure by the CMC to be proactively courageous in initiating investigations against people in power would be disastrous, as would a mere perception of such failure. Decisions by the CMC not to investigate or prosecute are typically taken in private. The key tactic of the corrupt is to make their best efforts to ensure that their conduct never sees the light of day. That moment has passed once the matter is before a court. But if there is suspicion that a body like the CMC is not as independent of the executive as human ingenuity can make it, cynicism about its willingness to expose the corrupt in the first place will fester, to the calamitous detriment of its mission.

Picking up and expanding the point about protection I mentioned earlier, one of the less obvious functions of the requirement of bipartisan support is a protective one. If the appointment of the Chairperson and commissioners has bipartisan support, then that that blunts the capacity of political parties to attack each other or the CMC, because each party has "ownership" of the appointment. This serves to temper potentially acrimonious debate.

Further, corruption is not the vice of any particular political party or philosophy. All governments are prey to it, and it seems that if any government is in power for long enough (and all governments aspire to longevity) there will be a corruption scandal. When that happens, a government that is

seen to have acted to reduce the effectiveness of the CMC will necessarily carry a greater burden of disapproval than otherwise.

Finally, it is difficult to understand what problem this change was intended to solve. It has always been difficult to attract people to serve as commissioners or chairpersons at the CMC, but the need for bipartisan support is not, as I apprehend things, the reason for that.

Research

The research section of the CMC is a substantial State asset. It is independent of the police service in particular but also of the executive in general. It can provide an empirical basis to drive policy debate and it does so on an ongoing basis, with respect to such things as police use of force, use of Tasers, use of firearms, high speed chases, and so on. Government departments have policy officers, but they do not have the numbers of staff, time or training that the CMC's research section does to undertake work of the type done by the CMC. Policy officers within departments are, in my experience, people of integrity, but they are not visibly and manifestly independent of government.

The research section can also provide research in areas that may be potentially politically fraught. Examples include political donations, licensing laws, gambling, and prostitution.

Research outcomes on politically sensitive matters may from time to time conflict with the view of the executive. Should the executive have the power to shut down or prevent *ab initio* such research from taking place? Such a power is completely inconsistent with the independence of the CMC. I note that there is no provision in the Bill for the Attorney-General's refusal of applications for research to be publicised (so that they can be politically defended) nor is there any provision requiring the Attorney-General to furnish reasons.

The better approach is for a government to blunt whatever political problem it might perceive by, where appropriate, asking for research at the outset of policy development, and then agreeing or disagreeing at the end on an informed and principled basis rather than stifling empirical examination at birth.

In all of this, I agree with the proposition that the research section should not have the unfettered charter to roam curiously through any issue that strikes its fancy. It should not have the freedom of inquiry that university academics enjoy, for example.

And in practice, it does not. In my time as chairperson, I took steps in an endeavour to prevent research pieces from being large, broadly based ruminations and to keep them tightly focussed, issue-specific, actionable items of work as free from value judgements as was possible consistent with the CMC's role. This type of management is necessary; it can't really be done at the level of abstraction where the Attorney-General engages the blunt instrument of rejecting proposed research altogether.

Research needs to be supervised first at the level of the Commission, and above that at the level of the PCMC. Subject to matters or topics that are investigatively sensitive (as opposed to politically sensitive), there is no reason in principle why the CMC should not make its research program public unless there are reasons why doing so would defeat its value. This way, the program can be the subject of scrutiny and defence as required.

One of the criticisms of the research function is that is said to be a "distraction". Distraction to whom? Unless one conceives of organisations like the CMC as monolithic single minds, I find it difficult to respond to this. I was not distracted by the research function. Substantial organisations like the CMC can do more than one thing at once. The research work was done by other people and I fitted such supervision of it into my program as was necessary, which was not a great call on my time, and practically no call at all on the time of investigators. If what is meant is a distraction of resources (which seems unlikely), then removing the resources from the research division will not necessarily result in more resources going to investigations, etc. The orthodox public service response to removing a function is to remove the funding that supported it, meaning that no more resources would be available to other functions without express Executive intervention, which can be done anyway.

Prevention

The idea that corruption prevention can be treated substantially as a management issue is uncompelling. The fact is that a management failure is present almost by definition when corruption occurs, but it doesn't follow that there is a model of management that will guarantee the absence of corruption. Nor does it follow that the management failure was the "cause" of the corruption. The

corrupt follow the path of least resistance and take advantage of gaps in the system, and it is impossible to plug all gaps. The corrupt are often deceptive and cunning in concealing their activities; a more intrusive style of micromanagement that might pick up such deception is also expensive, and can make for a decline in morale and productivity.

Further, corruption (to anthropomorphise it) lies about itself to itself. A secret commission can be rationalised as "a private arrangement", or a perk to be winked at, or as a "joke", or a bit of larrikinism. Corruption emerges when standards slide over time, and the "frog in hot water" analogy is apposite. Notwithstanding its damaging impact on society, corruption is still thankfully relatively uncommon (although history indicates that constant vigilance is required). Most managers at a level where they are not involved don't have experience in knowing what red flags to look for, or to be able to distinguish, for example, "grooming" from ordinary friendliness. And corruption falls hard on the young; young people who are exposed to a workplace environment for the first time may not know that what is occurring is not normal until they have become hopelessly compromised, and they then continue to perpetuate the sick workplace culture, moving up the ranks.

The point I make is that relying on management alone to do this work of preventing corruption is a large part of why things got to the point they did by the late 1980s. Having managers merely earnestly command staff to be honest and diligent is unlikely to be successful. A manager may never have come across corruption in his or her career; accordingly, diverting energy and resources into managerial corruption prevention can seem, to the manager, like a priority that can be left down the list of things to do or overlooked. In times of financial austerity which arise from time to time, resources to deal with integrity issues are frequently high on the list of things that are sacrificed.

Management needs specific support in this area, and that specific support has to come from outside the organisation in which the management exists. This does not mean that an organisation or department should not be responsible for its own workplace integrity culture, merely that it can't do it alone. And the support has to be constructive, not hostile or investigative or punitive. There is a place for being investigative and punitive, naturally, but not in the routine process of ensuring that a workplace's culture and processes are as good as they can be made to be, and that dishonesty is held in aggressive contempt.

Where that outside support comes from is, in principle, of no particular concern. It might come from the Public Service Commission or some other body as well as the CMC, but not doing it comes at a cost. It is presently done by the CMC, and moving the relevant positions involved from the CMC to the PSC (or whatever other body is chosen) seems somewhat pointless. It would also seem that prevention is a good fit within the CMC, given that corruption is one of its key areas of concern.

The idea that prevention can be assessed as a failure if any examples at all of corruption emerge must be rejected. A function of the police is to prevent crime, but no-one says the police have failed

just because crime continues to exist. It is impossible to reliably measure the success of prevention initiatives in this field because offences of this sort are relatively uncommon (how do you count crimes that didn't happen?). But that doesn't mean the effort should be abandoned.

Mandatory Complaints

The effect of the Bill[1] is to raise the threshold of mandatory reporting by public officials. On this topic, I think reasonable minds can differ. The reason the very low threshold presently exists is to prevent matters being swept under the carpet. At the moment, departmental heads have almost no flexibility in the decision about whether to report something to the CMC because the threshold is so low. This serves to protect CEOs from pressure to hide things, or to use contrived rationalisations to convince themselves that a matter is not reportable.

The effect of the changes is to put into the hands of the departmental heads power to decide whether their suspicion is "reasonable" or whether something "would" amount to corrupt conduct, thus allowing a malleable departmental head considerable flexibility to decide (or to be pressured into deciding) that there is a defensible basis not to report a matter.

Further, there is no reference to the potential *seriousness* of the allegations as justifying a mandatory report to the CMC, only to the level of evidence then existing in support of it. An allegation that a public servant is stealing pencils may have exactly the same initial level of evidentiary support as an allegation that a Minister is taking bribes, but clearly the latter should in principle be referred even if the former is not. Corruption hides in such nooks and crannies. It may be that a power inserted[2] elsewhere serves as a corrective to this problem, but that is not certain.

Moreover, it is undesirable that departments muddy the waters of investigations before the CMC uses its resources to undertake an investigation. A clumsy investigation to decide if there is enough basis to refer a matter to the CMC might, for example, tip off an offender and put him on his guard, thereby defeating later investigations, or unduly "friendly" interviews of the suspect or witnesses might compromise any subsequent case brought.

The question that then emerges is the size of these risks, measured against the cost of the CMC's being exposed to large numbers of low level complaints. That is a matter for judgment. The cost is relatively low, and it may be that the cost of dealing with complaints about public officials is simply a price of being a democracy. The assessment of these matters by the CMC can be done very quickly,

[1] Particularly cl 9, which inserts s15 and a definition of "corrupt conduct", and clause 17 which amends s38.
[2] By cl18 of the Bill, modifying s40 of the Act.

at relatively little cost, simply on the face of the complaint. In the vast majority of referred cases, there is no need for elaborate investigation by the CMC. But while the cost per unit item might be low, the thousands of complaints received does make the expense add up.

Against the advantages of the present system is the disadvantage that in a deluge of low grade matters, the gold is sometimes missed. Human nature is subject to concentration fatigue, and to falling into the trap of assuming that the next file across the desk will be just like all the dozens of unremarkable ones which came before. There is no empirical evidence that a low threshold for mandatory reporting uncovers any *more* corruption than the threshold proposed. But it is true that sometimes unpromising, low grade complaints turn out to be very serious indeed.

On balance, for my part I would prefer to retain the present reporting arrangements while reducing the burden on the CMC by administratively refining the process by which referred cases are dealt with. I accept, for the reasons given above, that other views are open on this point.

Complaints from the public

The Bill would require complaints to be given in the form of statutory declarations[3]. Some of the other, more extravagant, proposals on this topic have not found their way into the Bill, to the Bill's advantage. Nevertheless I am not sure what is gained by this requirement in the end; s217 of the Act always made it an offence to state something to the Commission that was false or misleading.

The idea seems to be that it will discourage baseless complaints.

The difficulty in that view is that it overlooks the nature of corruption itself, and hence the character of complaints about it. In mainstream crimes such as assaults, thefts, rapes, etc, the complainant has a very clear idea of what happened to him or her, and can usually give direct evidence of it. Corruption, on the other hand, is a crime of complicity and secrecy. No-one who is the victim of it (for example, a tenderer who lost an opportunity for business) is an "insider" and no-one other than insiders can give direct evidence of what is going on, absent a full CMC investigation. To a complainant, corruption looks like a puzzlingly odd decision that was made by an official in favour of the complainant's competitor. They cannot see the bribe payments or the background relationships or meetings that drove the decision.

[3] Cl 16, amending s36

Of course, people in the position of the notional complainant mentioned above can also get carried away by their own suspiciousness, or have an inflated view of the merits of their tender for business, and so on. It is not always easy to determine at first viewing whether a given complaint falls in the class of corruption, or of sour grapes.

Even so, a statutory declaration will not stop complaints that turn out to be ill-founded. If a complainant of either of the sorts exemplified above swears in a statutory declaration to what they know directly and believe by inference, those things are not prosecutable lies, even if the belief that there was corruption turns out to be baseless – it was the complainant's belief.

Moreover, this process will not deter the fixated but misguided people who are convinced (through mental illness or merely overvalued ideas) that they have uncovered a nest of corruption but no-one will believe them, and who keep writing and writing to try to find someone who will listen.

Generally, I am not in favour of erecting barriers to complaints. The simple reason is that some valuable investigations have come from unpromising material, including anonymous complaints. The investigation against Nuttall started from unpromising material. It was only when, in the course of dealing with that, someone noticed some curious regular deposits into a bank account that Nuttall's offending came to light. The costs, it seems to me, are outweighed by the successes.

The costs can be reduced by more robust internal guidelines rather than risk throwing the baby out with the bathwater.

Chief Executive Officer

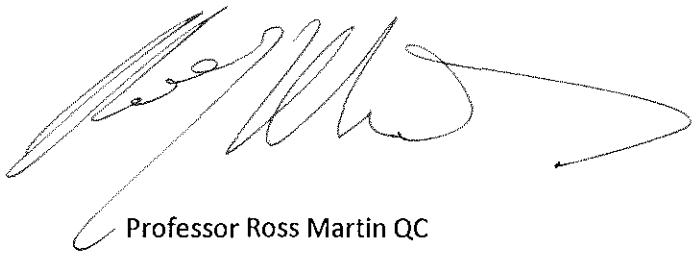
It is obvious that a leader of the CMC requires administrative support. There is enormous technical detail in the management of an organisation; the preparation of internal policy documents; the preparation of budget documents; human resources issues, etc. These require the attention of specialist career professionals. At the moment, the ultimate provider of that support (the Executive Director) answers to the Chairperson who answers to the Commission.

There is no one right way for such arrangements to be set up, and there is no reason in principle why the CEO may not be a Commissioner.

I found administrative matters of that sort burdensome in the sense that I bore responsibility for them and so had to give them significant attention.

I have no problem with a CEO having the legislative responsibilities proposed. In the case of conflict between the CEO and the Chairman, the Bill[4] reposes power in the commission to resolve it.

Yours sincerely,



Professor Ross Martin QC

[4] By cl 52 inserting s253(3) into the Act.