CRIME AND MISCONDUCT AND OTHER LEGISLATION AMENDMENT BILL

SUBMISSION

To the Legal Affairs Community Safety Committee

From: The Accountability Round Table (ART)

1. The Amendment Bill proposes to amend the *Crime and Misconduct Act* 2001 (the Principal Act) by inserting a new section 36(3) which will require –

> "A complaint about corruption under sub-section (1) must be made by way of statutory declaration unless the Commission decides, because of exceptional circumstances, that it need not be made by statutory declaration.
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> Examples of exceptional circumstances –
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> The person making the complaint –
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> - fears retaliation for making the complaint in relation to the person's employment, property, personal safety or well being
> - is illiterate, or not literate in English
> - has a disability or impairment that affects the person's ability to make the complaint by statutory declaration."

2. The proposal obviously follows the Review submitted by the Hon. Ian Callinan AC and Professor Aroney (the Review Panel) on 28 March 2013 which suggested that a statutory declaration should be required for the making of a complaint to the Crime and Misconduct Commission (CMC) and contemplated that the complainant should declare that he has read and understands the relevant sections of the Principal Act, that the complaint is not baseless and that he will keep confidential the subject of the complaint.

3. The ART submits that the proposal to require that a complaint be made by statutory declaration will seriously undermine the process by which complaints are presently made and that it should not be implemented.

4. The Review Panel reasoned that –

   (a) there are in effect far too many complaints being made to the CMC, in numbers far larger in Queensland than in other States, and that the number of complaints is so high that a serious waste of public money is involved in assessing them and that that number must be reduced;

   (b) there are some 39 CMC staff tasked with assessing complaints, and this number must be reduced;

   (c) a substantial number of complaints are frivolous, vexatious and contain minor or incoherent matter, and are trivial;

   (d) very few of the complaints involve official misconduct, let alone serious or systemic corruption;

   (e) the cost of the triage process is unjustifiable.

   The Government was also concerned that the CMC was being called upon to investigate complaints which were inappropriately made for political purposes.

5. The ART on 7 February 2014 submitted to a Brisbane seminar a paper dealing with these contentions, and that paper is annexed to this submission. Among the points made, (paras 3-6) the ART contended that on close examination, the figures for complaints made to the CMC are not substantially greater than those made to like bodies such as the NSW ICAC, in other states, and indeed the numbers of complaints in Queensland are already declining. The CMC has never complained of the number of complaints being made to it.

6. The ART submits that it is very important that all citizens should be able to air their concerns about possible misconduct by government officials, and that it is very much in the public interest that they not be intimidated from doing so. As the Review Panel said in their report, “the system can tolerate some of these”. But it is clear, as was the Review Panel’s intention, that the requirement to make a complaint only by way of statutory declaration would

inevitably prevent many genuine persons from making complaints to the CMC. Given the hidden nature of corruption, the ART contends that the seemingly insignificant allegation which leads to the uncovering of serious corruption would under the proposed regime usually not be made the subject of complaint because of the changes proposed, in particular the necessity for the suspicious or inquisitive member of the public to make a statutory declaration. Inevitably serious corruption will be left undisclosed because of the unwillingness of public officials and members of the public to take the risk of making the necessary statutory declaration.

7. And there can be no guarantee of real time or cost savings. For many of those who are intimidated by the proposed statutory declaration may go elsewhere and thereby take up some other agency's time – and what will be its responsibility and experience in matters of corruption?. And if their only alternative is the agency where the conduct of concern occurred what do they do then? If the complaint is taken up by another person or agency, and they find there is substance, they will have to refer it back to the Commission?. The model which maximised the prospects of the State having current information available about the corruption risk, minimised the frequency of "handpassing" complaints and ensured there is one body with the ultimate responsibility for addressing the corruption risk, will no longer exist.

8. The next question is whether the proposal for the making of a statutory declaration is sufficiently in the public interest to justify so serious an intimidation of potential complainants. The Review Panel relied on a sample of 60 complaints which were provided by the CMC, and accepted by the Panel as a fair representation of the more than 5,300 complaints made to the CMC in one financial year. On examination of those 60 it is immediately apparent that many "are on their face trivial" – i.e. without the benefit of the sort of additional material that investigations can reveal. The ART accepts that the probabilities are that it will be a small percentage of complaints that will reveal on investigation major corruption. Equally, however, most of them could be rapidly referred on or dismissed as petty or trivial, and only the small proportion remaining ought to fill the available time of the CMC workforce.

9. Turning to the proposed s36(3) exceptions, if statutory declarations are required, such exceptions are necessary. But what will be the consequences for the cost and efficiency of the Commission's operation? ART submits that the amending legislation must result in many would-be complainants seeking to rely on exceptional circumstances as a basis for not making a statutory declaration. It should also be borne in mind that the examples given under the amending section 36 are not exhaustive. It would seem highly likely that it will be necessary for another large group of CMC personnel to examine the circumstances of each putative complainant to assess whether they can be classified as sufficiently exceptional to justify that person's complaint not being made by statutory declaration. If that is not done and done correctly, a legal challenge will be available to those investigated to try to stop any subsequent investigation. How does the proposal for a statutory declaration serve the public interest?

10. A final concern in this area is that the Review Committee made recommendations about the matters to be sworn to in the proposed statutory declaration. The ART view on them is that they would significantly add to the pressure on people, with matters worthy of raising, to pull out and should not be required. But we have been unable to find any indication that this issue is being dealt with in the Bill.

11. It is very important that, if it is intended to specify the matters to be dealt with, that that be done in the Bill so that the full impact of the proposal can be assessed before the Bill is passed and so that there can at least be some public consideration and discussion of their selection.

12. We seek clarification of the government's intention on this matter and the opportunity to make further submissions to the Committee whent that is available.

13. We turn to the provisions that affect the investigatory role of the CMC. The Amendment Bill is plainly intended to take the concept of Misconduct in Public Office out of the purview of the legislation and instead to permit the CMC only to investigate corruption. This results from Recommendation 3A (and the discussion leading to it by the Review Panel), which was intended to raise the threshold of what conduct constitutes "official misconduct".

14. The Review Panel in its examination of other anti-corruption bodies in Australia commented approvingly of the IBAC legislation in Victoria, while dismissing generally the criticisms of the IBAC legislation. One basis for so doing is the assertion (p. 61 of the Report) that the Victorian critics were under a misapprehension as to the way in which all anti-corruption agencies must conduct their enquiries, "in that they unavoidably must undertake a preliminary assessment of all complaints and form a view about which ones ought to be investigated, referred or dismissed." That was not the issue and misses the point – for the Obeid matter demonstrates (see below) that the reality is that even a most detailed preliminary assessment will not provide the facts needed to enable the Victorian threshold for "investigation" to be satisfied, The issue was, and remains, the extent of the operation of any specified threshold for investigation. The Review Panel considered that a similar standard (to that of Victoria) ought to be introduced in Queensland.

15. The major criticism of Victoria's IBAC legislation in this regard, is that the threshold standard is set so high that it would almost certainly have prevented the investigation of matters relevant to the Obeid family by the ICAC in New South Wales even allowing for the most extensive of "preliminary assessments". *Operation Jasper* is the title given to the recent investigation by the ICAC into the activities of the NSW Minister for Primary Industries and the Obeid family. It is perfectly clear from counsel's opening at the ICAC public hearing on 12 November 2012, that, at the outset of the investigation, the ICAC merely had suspicions that some unidentified corruption might have occurred. It was alleged that the Obeid family had deliberately organised their business affairs so as to disguise their involvement, including through multiple layers of discretionary trusts and $2 shelf companies, the names of which were repeatedly changed. The ICAC had investigated these matters for many months, during which more than 100 witnesses had been interviewed, search warrants had been executed, computer hard-drives seized and downloaded, and tens of thousands of documents seized and assessed for relevance. Counsel in his opening conceded that on one view, even after all this preliminary investigation, the Minister's decisions might be explained solely by bad governing; but continued that the public inquiry would investigate whether the decisions might also be explained by corruption. He continued that "If it is corruption then it is corruption on a scale probably unexceeded since the days of the Rum Corps". The allegation was that the

decisions taken or influenced by Minister MacDonald may have enabled Mr Obeid and his family to acquire profits in the order of $100 million. Given the steps which the Obeid family were alleged to have taken to disguise their involvement in the mining area in the Bylong Valley which was opened up for coal exploration, and the use of shelf companies and multiple layers of discretionary trusts, on what basis could any inquisitive or suspicious members of the public have reached a reasonable view that the complaint was not baseless, that the Minister's decisions were not merely bad government? Similarly, on what basis could any person proposing to complain have reached a reasonable view that an identifiable crime had been committed or that there were reasonable grounds for dismissing any person from office?

16. The standard imposed by the Victorian legislation, which the Review Panel thought should be introduced in Queensland, has apparently prevented the IBAC from conducting any serious investigation of corruption in Victoria. Although the Commissioner has made no public statement to this effect, it is generally accepted that whenever the IBAC investigators meet to consider whether a complaint should be investigated, the first question put to them is that they must consider what is the indictable offence. As the previous paragraph shows, any similar question asked of the ICAC investigators in *Operation Jasper* would probably have brought that investigation to a halt at its very outset. The fact that corruption investigators will inevitably conduct a preliminary assessment is meaningless unless they are also in a position to use the enormous powers that anti-corruption bodies are usually given, enabling them to enter offices and seize files and computer hard-drives, examine witnesses *in camera*, and monitor telephone and internet communications. All relevant parties in Victoria appear now to be in agreement that the Victorian body is completely stultified by its inability to use its enormous powers unless it can, at the outset, identify an indictable offence which it should investigate. Unless and until an indictable offence can be identified, any such investigation must grind to a halt and be open to challenge in the courts on the ground that the use of any of the investigative powers in the IBAC legislation would not be within the jurisdiction of IBAC. Both major parties have indicated recently, with an eye to the election approaching in November this year, that they will contemplate amendments to the IBAC legislation to make the IBAC more effective.

17. The ART submits that the Amending Bill will, if enacted, produce similar consequences for the Queensland Commission. The scheme of the Amending Bill is to remove, as far as possible, the word "misconduct" from the legislation, substituting "corruption" and also severely limiting its operation. The Bill definition of that key term in Clause 82 is "Corruption means corrupt conduct or police misconduct". Then "corrupt conduct" is defined by Section 15(d) in such a way as to require that the relevant conduct being investigated "would, if proved, be a criminal offence; or a disciplinary breach providing reasonable grounds for terminating the person's services." Conduct of such a kind is then stated to include a number of instances including abuse of public office.

18. Next, the key definition of "corruption function". It is also defined (Clause 18)

> "33. Commission's corruption function
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> The commission has the function (the corruption function) to ensure a complaint about, or information or matter involving, corruption is dealt with in an appropriate way, having regard to the principles set out in section 34".

The use of the word corruption necessarily brings in the concept "corrupt conduct" and the requirements referred to above. So to be able to perform its corruption functions the complaint, information or matter must meet the elements specified in the definition of "corrupt conduct" including "would, if proved be a criminal offence; or a disciplinary breach providing reasonable grounds for terminating the person's services." This appears to be carried into s35 which states how the Commission is to perform its "Corruption function". In the list of defined activities, references are generally made to "corruption" or "corrupt conduct" which appear to limit the authorised activities by reference to the above definitions. In particular, s35(1) (f) defines the investigating function by limiting it to "particular cases of "corruption" – again bringing into consideration all the elements required to satisfy the definition of "corrupt conduct" including that of S 15(d) referred to above. S35(3) then imposes a further statutory obligation on the Commission, that in performing its corruption function, it

> "must focus on more serious cases of corrupt conduct and cases of systemic corrupt conduct within a unit of public administration."

To these sections should be added proposed section 5(3), which requires the Commission "to investigate cases of corrupt conduct, particularly more serious cases of corrupt conduct."

19. The result of these proposed complex amending provisions is, among other things, to set a threshold for investigation which will seriously limit the ability of the Commission to investigate, let alone focus on corrupt conduct and provide arguments that can be seized upon by any person suspected of corruption, as soon as that person became aware of an investigation, or that the Commission's statutory powers of search, seizure and investigation were to be used against him. It will be contended that unless the Commission can identify a criminal offence or facts which would provide reasonable grounds for termination, the Commission has no right to investigate and that its attempts to do so should be restrained by injunction. There is now a long history in other States of attempts being made by those suspected of corruption to impede or halt an investigation by a corruption agency, on the ground that no basis has been shown for the body to commence investigation.

20. There has not been sufficient time to examine the effect of the above provisions on the other permitted activities of the Commission

21. In conclusion, may we draw attention to the fact that for some time Queensland has provided leadership and best practice reforms in Australia for securing open and accountable government, and addressing the risks of corruption. Our members have been very conscious of that. In recent times that has included the provision of the Queensland Integrity Commissioner and the Right to Know and Public Interest Disclosure legislation. And Queensland needed the measures that were taken, in part because, while it had a functioning parliamentary committee system to assist it to hold the Executive to account, it lacked an Upper House of Review.

22. We submit that in doing so Queensland was remembering the lessons of its history. One of those lessons, identified in the Fitzgerald Report, was the danger of corruption occurring where there is the concentration of executive power in a few hands, particularly where traditional accountability

mechanisms are not operating. That was also identified in the WA Inc Report as a major danger.[1]

23. Since their creation, the CMC and its predecessors have played a key role in safeguarding the integrity of Queensland's parliamentary democracy. We submit that if the changes we have discussed are made, it will be denied an effective role. This would be serious enough but is made more serious by the changes that were made in the last Parliament by the then Government and Opposition that have seriously weakened the roles and effectiveness of the Parliamentary Committees and the Speaker and formally increased the powers of the leadership group of the Government to control their functioning. Thus we find ourselves considering plans to significantly reduce further the government integrity systems of Queensland not long after other key parts of that system were significantly weakened. To contemplate doing that is to ignore the lessons of history.

24. We submit that these realities need to be given considerable weight in the Committee's deliberations. We also submit that the Committee carries a particularly heavy responsibility where its decisions will have such a significant impact on the integrity of government. It is one we submit where guidance can be found in what Sir Gerard Brennan, the former Chief Justice of the High Court, said at the presentation of the Accountability Round Table Awards in Canberra last year.[2]

> "It is a privilege .... for a former judge to present Awards to members of the political branches of government commending their commitment to the public interest.
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> This notion of the public interest is not merely a rhetorical device – a shibboleth to be proclaimed in a feel-good piece of oratory. It has a profound practical significance in proposals for political action and in any subsequent assessment. It is derived from the fiduciary nature of political office: a fundamental conception which underpins a free democracy.
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> It has long been established legal principle that a member of Parliament holds "a fiduciary relation towards the public" ,,,, and "undertakes and has imposed upon him a public duty and a public trust"...

25. We submit that the onus should always lie on those seeking change. As to the changes proposed by the Bill that we have discussed in this submission, it

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[1] These issues were discussed in more detail in "Corruption" pp13-21, an essay written by the Chair of the ART for the Australian Collaboration in 2010 ; http://www.australiancollaboration.com.au/pdf/Essays/Corruption.pdf

[2] For the full text of the speech and footnote references see http://www.accountabilityrt.org/integrity-awards/sir-gerard-brennan-presentation-of-accountability-round-table-integrity-awards-dec-2013/ .

has not been demonstrated that the public interest will be served by making those changes. On the contrary, we submit that the effect of the proposed changes, separately and combined, are clearly contrary to the public interest and that the Committee's public fiduciary duty is clear. I should recommend their rejection.

11 April 2014