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Patron: The Honourable James Thomas AM QC

Crime & Misconduct & OLAB 2014
Submission 028

The Research Director
Legal Affairs & Community Safety Committee
Parliament House

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

Dear Research Director

Re: Crime and Misconduct and Other Legislation Amendment Bill 2014

Please find attached a submission from the Institute.

Yours faithfully



Louisa Pink
Secretary
Law & Justice Institute (Qld) Inc.

11/4/14.

LTR LEGAL AFF CTTEE 140411 ATT SUBMISSION CMC AMD BILL LCP

SUBMISSION OF THE LAW AND JUSTICE INSTITUTE (QUEENSLAND)

Introduction

1. The Crime and Misconduct Commission is Queensland's most visible embodiment of a lengthy and ongoing commitment to the anti-corruption reforms recommended by the Hon. Tony Fitzgerald in his landmark 1989 report.
2. For a quarter of a century, the Commission has been a vital element in the protection of our State from the corruption that thrives when power is abused.
3. The Hon. Russell Cooper, Premier of Queensland, recognised that bipartisan support was a cornerstone of the Fitzgerald reforms, which included the Commission, when he introduced the Criminal Justice Bill¹ to establish it:

*“This Government is committed to providing total support to the reforms which have been recommended and is committed to depoliticising the reform process to ensure that it does not fail for party-political reasons or by reason of any lack of political will. It will at all times be willing to cooperate and consult with the opposition parties in the Parliament to ensure that they are duly consulted and properly involved in the reform process”.*²

4. The *Criminal Justice Act 1989* safeguarded the Commission's independence through a meticulous process. It was designed to secure bipartisan support. The process of appointing the Chairman required the minister to consult with the Parliamentary Criminal Justice Committee and stipulated that, “a person shall not be recommended for appointment as Chairman unless his appointment is supported by the members of the Committee, unanimously or by a majority thereof, other than a majority consisting wholly of members of the political party or parties in Government in the Assembly.”³
5. The appointment process was subsequently amended to require only the bipartisan support of the parliamentary committee, however bipartisanship, as a principle, was retained.
6. The proposal to remove the need for bipartisan support for the appointment of the Chair of the Commission will dismantle a cornerstone of the Commission's independence that has stood since its inception. For the reasons that follow it cannot be supported.

¹ Criminal Justice Bill 1989 (Qld).

² Queensland, *Parliamentary Debates*, Legislative Assembly, 5 October 1989, 1383 (Russell Cooper, Premier).

³ *Criminal Justice Act 1989* (Qld) s 2.5(3).

7. Part 2 of the Explanatory Notes explains the purpose for the amendments to the *Crime and Misconduct Act 2001*. The “refocus of the objectives of the Commission”⁴ is two-fold: (1) to combat and reduce the incidence of major crime and (2) to reduce the incidence of corruption in the public sector. The objectives are worthy and all Queenslanders would support policies that are genuinely aimed at strengthening the integrity of the public sector. This Bill will not achieve these objectives.

Proposal to raise threshold from misconduct to corruption, and to refocus the role of the Commission

8. The re-branding of ‘official misconduct’ to ‘corrupt conduct’ (Objectives No 2 and No 3) *narrows* the scope of the Commission’s functions. The result is that various types of misconduct previously investigated by the CMC (CCC) will no longer be subject to the monitoring, investigation and actions of this specialist body. In raising the threshold for matters captured within the definition of ‘corrupt conduct’ the corruption function of the CCC, individual government departments will be left to investigate and act on complaints that do not meet the narrowed definition. This will force misconduct and corruption complaints to be handled internally in the public sector, by departments unable or incapable of effectively responding to such issues.
9. It is proposed to improve the complaints management system by reducing the number of complaints the Commission is to deal with and investigate. The direct manner in which this is to be achieved is for the Commission to focus on ‘more serious’ cases of corruption. This approach is problematic for two reasons: firstly the lack of specificity as to what constitutes ‘serious’ and second the cases that do not amount to ‘serious’ corruption must be dealt with by other means.
10. The proposed complaints management system is to be improved by the Commission investigating, particularly, more serious cases of corrupt conduct (s 5 and s 35). No definition of ‘serious’ corruption is found in the Bill. Nor is it found in the Explanatory Notes. If the intention is to raise the threshold for what constitutes ‘serious’ corrupt conduct and to reduce complaints received, a clear definition would be essential to those who have to investigate such matters, those alleged to have committed serious corruption and those advising and / or defending clients in relation to such allegations. In other words, without a clear definition, the provision fails a fundamental test of legal adequacy.
11. This also means that those on the ‘front line’, who investigate matters and deal directly with complaints, are not assisted with a legislated definition of ‘serious’ corruption.
12. Although the Explanatory Notes state that the Commission is to publish information about the systems and procedure for dealing with complaints about corruption and standard

⁴ Explanatory Notes, Crime and Misconduct and Other Legislation Amendment Bill 2014 (Qld) 17.

benchmarks for completing investigations⁵ there does not appear to be specific reference to serious or systemic corruption investigations. If transparency is to be achieved the publication requirements should clearly apply to both types of investigations.

13. The Bill proposes also that the definition of 'official misconduct' be amended to raise the threshold for what matters are captured within that definition. The Institute does not support this change. The changes will mean that misconduct that the Commission could previously investigate will not be able to be investigated. This is inimical to the purpose of the Commission and inconsistent with the recommendations made by the Fitzgerald Report.
14. As noted above, this change will leave the task of investigating misconduct and acting on complaints to government departments. Most departments are ill-equipped to do this, and the independence of departmental investigations cannot be guaranteed. There is also a risk that this approach could give rise to a reasonable apprehension of bias should an investigation exonerate participants in alleged misconduct.
15. As noted above, the Commission is a specialist body with special powers as well as expertise in interrogation and for these reasons can be expected to do a satisfactory job of investigating corruption and misconduct complaints.

Proposals to reform the upper governance structure of the Commission

16. The first policy objective of the Bill is to:

“reform the upper governance structure of the CMC (which will be renamed the Crime and Corruption Commission and generally referred to from this point in the Explanatory Notes as the commission)”.

17. Whatever the view of the proposed changes to the Commission's misconduct function and the way in which complaints are made to the Commission, the proposed changes to the disciplinary system for dealing with alleged “improper conduct” of CMC staff are concerning. When coupled with the proposed “reforms” to the upper governance structure of the Commission, these proposals give cause for alarm.
18. It is also alarming that the true nature and extent of the amendments is not explained in the First Reading speech or the Explanatory Notes. Nor is any justification or basis for the proposed changes set out.
19. The proposed changes were not recommended by the Committee's review of April 2013, nor by the Callinan/Aroney report of March 2013. To assert otherwise is incorrect. It is incorrect to suggest that the changes are even “based on” the recommendations in either

⁵ Ibid 5.

of those reviews since they are inconsistent with those recommendations, inconsistent with the purposes of the Act, and inconsistent with the recommendations contained in the Fitzgerald report.

20. The proposed changes are also inconsistent with the stated objectives of the Bill, to such an extent, and in such a way, that they cannot properly be described as “reforms”. Indeed, the proposed changes appear to be calculated to undermine the functions and integrity of the Commission.
21. In short, the proposed changes would render the Commission and its staff vulnerable to influence by the Government of the day, even if that Government was subsequently voted out of office.

The indispensability of bipartisan appointments

22. In the First Reading speech, the Attorney-General said the Bill “seeks to implement Government accepted recommendations to the Callinan/Aroney and Parliamentary Crime and Misconduct Committee reports”.⁶ It is difficult to see how that can be the case since neither report recommended removal of the requirement for bipartisan support for appointments.
23. On a proper reading of the reports it is plain that the recommendations that were made stem from an appreciation of the existing practice of bipartisan appointments to ensure independence from Government, that being a fundamental underlying principle of the CMC, and the CJC before it. The fact that the reports do not expressly or impliedly recommend a departure from that practice can only be because the authors had an expectation that it would continue.
24. Removing the requirement for bipartisan appointments compounds the mischief embedded in the recommendations made in relation to changing the governance of the Commission.
25. For example, Recommendation 19 of the Committee report simply says:

“The [Committee] recommends that the [Act] be amended before the appointment of the next Chairperson to cause structural separation of the role of the Chairperson and CEO”.⁷

⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 2014, 702 (Jarrod Bleijie, Attorney-General and Minister for Justice) 702.

⁷ Parliamentary Crime and Misconduct Committee, Legislative Assembly, *Inquiry into the Crime and Misconduct Commission’s release and destruction of Fitzgerald Inquiry documents* (2013) 80.

26. No mention is made of the Act being amended to provide for partisan appointments. Likewise, there is no call for the introduction of partisan appointments in the Callinan/Aroney report.
27. This fact is noted by The Hon. G E (Tony) Fitzgerald AC, QC.⁸ Mr Fitzgerald also observes that by these changes the Bill “takes the final step needed to remove the Commission’s independence entirely and bring it completely under government control”.⁹ With respect, we are of the view that Mr Fitzgerald’s remarks display restraint. It could have been added that, by bringing the Commission under Government control, it is converted into a grotesque parody of anything imagined by him in the first place.
28. It might be noted that while the Bill removes the requirement for bipartisan support for appointments, the requirement for bipartisan support for removal of a Commissioner or the Parliamentary Commissioner is left in place.¹⁰ There is, potentially, a sinister aspect to this provision. The Bill enables the Government to make appointments for a period of five years with a five-year extension. In the event of a change of Government within either of those five-year periods, the new government would be unable to remove the appointees of the previous Government without the support of the previous Government/new Opposition.
29. Thus, the move to end bipartisan appointments not only gives the current Government control of the Commission during its time in office, it also preserves that control beyond an election loss – or two. Concerns about this provision are heightened by the nature of the proposed changes to the powers of the Parliamentary Commissioner and the disciplinary process, which also dispense with bipartisan controls.

The role of the Parliamentary Commissioner

30. The seventh stated objective of the Bill is to:

“strengthen the transparency and accountability of the commission by expanding the role of the Parliamentary Crime and Corruption Commissioner (parliamentary commissioner) in his oversight of the commission, and requiring meetings between the commission and the Parliamentary Crime and Corruption Committee (the parliamentary committee) to be held in public as much as possible”.

31. Recommendation 21 of the Committee report calls for removal of certain perceived impediments to the Parliamentary Commissioner’s powers to conduct investigations at the

⁸ Hon. G E Fitzgerald AC, QC, Submission No 4 to Legal Affairs and Community Safety Committee, *Crime and Misconduct and Other Legislation Amendment Bill 2014*, 24 March 2014, 5 at [14].

⁹ *Ibid* 4 at [7(g)].

¹⁰ *Crime and Misconduct Act 2001* (Qld) ss 236, 312.

request of the Committee.¹¹ Recommendation 11 of the Callinan/Aroney report calls for the Parliamentary Commissioner to be given powers to commence investigations and conduct inquiries on his or her own initiative.¹² Unsurprisingly, neither report makes any proposal for abolishing the independence of the Parliamentary Commissioner. The Callinan/Aroney report clearly contemplated that it would continue.¹³

32. The desirability of extending new powers to the Parliamentary Commissioner should be reconsidered in light of proposed changes to the disciplinary process that applies to Commission staff. The Law and Justice Institute has had the advantage of reading Mr Needham's submission on the Parliamentary Commissioner and we support that submission.

The disciplinary process

33. The eighth stated objective of the Bill is to:

“clarify the grounds for discipline and what disciplinary action may be taken by the commission in relation to conduct of commission officers”.

34. The proposed expansion of the disciplinary process to require mandatory reporting of suspected conduct that may involve “improper conduct” is extraordinary. The proposed changes should be considered in combination. The Bill:
- a. gives the Government power to make partisan appointments to the offices of the various Commissioners, and leaves the Government with power to block the removal of those persons, even when in opposition;¹⁴
 - b. empowers the CEO to issue binding directions to Commission officers about whether or not complaints should be investigated by directing “how commission officers are to decide whether a complaint involves, or may involve, a more serious case of corrupt conduct or a case of systemic corrupt conduct”;¹⁵
 - c. expands the definition of “improper conduct” to include “noncompliance with a policy or procedural guideline set by the commission, whether inadvertently or deliberately”;¹⁶

¹¹ Parliamentary Crime and Misconduct Committee, Legislative Assembly, *Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Inquiry documents* (2013) 90-92.

¹² Hon. Ian Callinan AC and Professor Nicholas Aroney, 'Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel', 28 March 2013, 218.

¹³ *Ibid* 197.

¹⁴ Crime and Misconduct and Other Legislation Amendment Bill 2014 (Qld) cl 38; *Crime and Misconduct Act 2001* s 236.

¹⁵ Crime and Misconduct and Other Legislation Amendment Bill 2014 (Qld) cl 15.

¹⁶ *Ibid* cl 77.

- d. requires the Chair, Deputy Chair or CEO to notify the Parliamentary Commissioner of conduct by a Commission officer that is “suspected to involve, or may involve improper conduct”;¹⁷
- e. empowers the Parliamentary Commissioner to conduct inquiries of his or her own motion; and to conduct hearings, including in private; and to provide a report on those proceedings to the CEO for disciplinary purposes; and
- f. extends the protection conferred on the Parliamentary Commissioner to provide that, in a proceeding for defamation, “there is a defence of absolute privilege for a publication to or by the Parliamentary Commissioner made for the purpose of performing the Parliamentary Commissioner’s functions under this Act”.¹⁸

35. Thus the Bill enables the Government to make partisan appointments of a CEO who is empowered to direct Commission staff in relation to whether investigations are to be commenced; and a Chair, Deputy Chair and CEO who are obliged to report on staff who are merely suspected of inadvertent noncompliance with such direction; and empowers the Parliamentary Commissioner to unilaterally commence secret investigations of staff and report his or her findings to the CEO for disciplinary purposes on a privileged basis.

36. When the Bill even goes so far as to allow disciplinary action on the basis of a reasonable suspicion that work has been performed inefficiently,¹⁹ the effect must be to give *de facto* control of Commission staff to the Government, with a real risk that such control would survive the Government losing office.

37. The proposed process by which an investigation may be commenced in relation to a staff member should be contrasted with the proposed new process for making complaints to the Commission. One requires a statutory declaration and provides for prosecution if the complaint is not genuine and proper²⁰. The other requires nothing more than a suspicion that improper conduct may be involved and extends a defence against defamation action to persons giving evidence of such allegations.²¹ This is an extraordinary double standard.

38. Callinan/Aroney recommended statutory declarations for complaints [Recommendation 3B] and the criminalisation of *baseless* complaints [Recommendations 3D and 3F] as a method for reducing the number of *baseless* complaints.²² It is not clear whether Queensland is the only jurisdiction that experiences this perceived problem, but no other jurisdiction has

¹⁷ Ibid cl 77.

¹⁸ Ibid cl 79.

¹⁹ Ibid cl 62.

²⁰ Ibid cl 29.

²¹ Ibid cl 79.

²² Hon. Ian Callinan AC and Professor Nicholas Aroney, 'Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel', 28 March 2013, 213-215.

measures of the kind Callinan/Aroney recommend. The Parliamentary Committee Briefing Note submitted by the Department of Justice and Attorney-General confirms at page 16 that, "No interstate jurisdiction with a similar integrity body as the CMC imposes a statutory declaration requirement for complaints or has any limit on the form or manner in which a complaint can be made to their respective integrity body; apart from Victoria, which requires a complaint to be written unless IBAC determines there are exceptional circumstances; and Tasmania, which requires a written complaint but allows anonymity".

39. It is not fanciful to imagine a situation where a Commission officer who has received a complaint in relation to a member of the Government could be given a direction by the Government-appointed CEO about how he or she is to determine whether or not that complaint should be investigated. The officer may then find him or herself being investigated by the Parliamentary Commissioner on the basis of a mere suspicion that he or she has inadvertently failed to strictly comply with that direction.
40. Neither is it fanciful to imagine a situation where an officer has received a complaint about a member of the Opposition shortly after a change of government. The officer may find him or herself subject to a direction from the CEO appointed by the former Government/now Opposition, and thereafter subjected to disciplinary action by the CEO, who only be removed from office with the support of that former Government/now Opposition.
41. This Bill destroys not only the independence of the Commission but also the independence of Commission officers.

Public Confidence in the Commission

42. The Attorney-General said in the First Reading speech for the Bill that:

*"The bill when enacted will, together with administrative changes at the Crime and Misconduct Commission and across the public service, lead to improvements in public confidence in the CMC..."*²³
43. This assertion is unsupported by a scintilla of rational thought or independent evidence.
44. By destroying the independence of the Commission and threatening the independence of the Commission staff, the Bill necessarily undermines public confidence in the Commission and its work. This conclusion is inescapable. A simple example can be given.

²³ Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 2014, 702 (Jarrod Bleijie, Attorney-General and Minister for Justice) 702.

45. In any case where the Commission dismisses a complaint against a member of the Government or an associate of the Government, the public will be unable to be confident that the dismissal was properly made by an independent Commission.
46. Alternatively, consider the investigation of a complaint against a former Government member by a Commission that is controlled by a Chair, a CEO and other Commissioners who were partisan appointments by that Government before it lost office. If that investigation were to lead to the complaint being dismissed, how could the public have confidence in such a finding? Independence of the Commission is absolutely crucial to public confidence. There is something Orwellian about the Attorney's assertion.

Ministerial direction of the Commission's research function

47. The sixth policy objective of the Bill is to:

"ensure the Commission's research function is more focused and relevant to its functions".

48. The Bill purports to achieve this objective by replacing the existing Research functions provision of the Act²⁴ with proposed clause 21.²⁵
49. The proposal to limit the Commission's research function to research approved by the Attorney-General is yet another incursion on the independence of the Commission. It politicises the research function. It is difficult to imagine the Attorney-General approving research on topics that could in any way be interpreted as critical of Government.
50. It is imperative that policy be developed from evidence-based research; research which is conducted rigorously and independently. Without the ability to prioritise and conduct research itself, there is a real risk that the Commission's research function will be subjugated to the whim of the Government.
51. The Institute believes that the Commission should enjoy an independent power to conduct research and report on criminal justice policy, akin to the functions undertaken by the Australian Institute of Criminology and the New South Wales Bureau of Crime Statistics and Research.

Amendments to CM Act to implement recommendations of public reports: amendment to section 58

52. The Commission's authority to investigate the conduct of judicial officers is restricted to an investigation of misconduct that would warrant that judicial officer's removal from office.²⁶

²⁴ *Crime and Misconduct Act 2001 (Qld) s 52.*

²⁵ *Crime and Misconduct and Other Legislation Amendment Bill 2014 (Qld) cl 21.*

The Bill proposes to remove this restriction and give the commission the authority to investigate the conduct of judicial officers when acting as a member or representative of a decision-making body in a unit of public administration (excluding acts in their capacity as judicial officers).²⁷

53. This amendment is a response to the following recommendation made by the Parliamentary Crime and Misconduct Committee:

"The Committee recommends that the Attorney-General and Minister for Justice amend section 58 of the Crime and Misconduct Act 2001 to reflect both the need to protect judicial officers from frivolous, baseless and vexatious complaints along with the expectation that judicial officers are held accountable when acting in a non-judicial capacity in units of public administration."²⁸

54. The Law & Justice Institute agrees judges may require protection from frivolous, baseless or vexatious complaints. Measures to effect this objective may help maintain public confidence in the judiciary and the administration of justice.²⁹ This appears to be the primary objective of section 58.³⁰

55. However the proposed amendment may not adequately reflect the need to protect judicial officers from these complaints, and the primary objective of section 58 is not reflected in it. It adopts the second half of the Committee's recommendation, that judicial officers be held accountable, but does nothing to balance this against the need to protect judicial officers from frivolous, baseless and vexatious complaints. Clarification of the Bill's intention would be useful.

Gender bias

56. No explanation has been offered for a change effected by clause 94, namely the removal of "chairperson" in favour of "chairman".

57. The Explanatory Notes only specifically refer to the change under "miscellaneous", and only mechanically. Otherwise there is simply the fact of the cessation of "chairperson" in the Act coupled with the introduction of "chairman" in the new form of the Act. Does the Government intend to legislate that only a man may be appointed to chair the Commission?

²⁶ *Crime and Misconduct Act 2001* (Qld) s 58(2)(a).

²⁷ Crime and Misconduct and Other Legislation Amendment Bill 2014 (Qld) cl 22.

²⁸ Parliamentary Crime and Misconduct Committee, Parliament of Queensland, *Complaint about the CMC investigation into the University of Queensland* (2013) 11.

²⁹ Diana Karamicov, 'Judicial complaints and the complaints procedure: Is it time for an independent judicial commission in Victoria?' (2010) 19 *Journal of Judicial Administration* 232, 235-236.

³⁰ Parliamentary Crime and Misconduct Committee, Parliament of Queensland, *Complaint about the CMC investigation into the University of Queensland* (2013) 64.

Or does the Government no longer concern itself with the need for gender-neutral language? Clarification is required.

58. The term “chair” has been used since the 1500s to refer to the party who chairs a board or meeting.³¹ Does “chairperson” suddenly present some unspecified difficulty after 21 years? Even if it could, why not revert to “chair”?

Submitted on behalf of the
Law & Justice Institute (Qld) Inc
11 April 2014

³¹ Merriam-Webster’s Dictionary online; the Oxford English Dictionary.