

11 April 2014

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

Dear Research Director

Crime and Misconduct and Other Legislation Amendment Bill 2014

Thank you for providing the Society with the opportunity to comment on the legislative proposal of the *Crime and Misconduct and Other Legislation Amendment Bill 2014* (the Bill).

We enclose the Society's submission, prepared with the assistance of the Queensland Law Society Criminal Law Committee.

Please note that in the time available to the Society and the commitments of our committee members, it is not suggested that this submission represents an exhaustive review of the Bill. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not identified.

Thank you for providing us with the opportunity to comment.

Yours faithfully



Ian Brown
President

Submission

Crime and Misconduct and Other Legislation Amendment Bill 2014

Queensland Parliamentary Legal Affairs and Community Safety Committee

*A Submission of the
Queensland Law Society*

11 April 2014

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2 Executive Summary

The Queensland Law Society supports initiatives to introduce a governance structure to the CMC (the Commission, including through introducing the office of CEO to manage the operational aspects of the Commission. The Society notes however that the Bill misses an opportunity to implement a best practice model of corporate governance best suited to oversight the operations of the Commission. The model that is implemented concentrates powers in the person of the Chair of the Commission, rather than in the Commission itself.

The Society urges that the opportunity be taken to undertake a full and comprehensive review of the governance of the Commission including:

- The creation of a board comprising Assistant Commissioners
- The creation of a position of Chair of the board (ie the Commissioner) who acts in accordance with best practice principles of governance
- The creation of the role of CEO which is an operational role only and not involved in the substantive investigative and related functions of the Commission
- Ensuring that the *Commission* exercises and discharges its core functions *through* the Chair and the board.

The Society, has serious concerns about a number of aspects of the Bill as drafted. Fundamentally, the Society considers it critically important to ensure that the Commission remains an independent, apolitical corruption watchdog.

The principal concerns of the Society are:

- The Commission's purpose should be *equally* focused on dealing with organised crime and corruption;
- The effect, and unintended consequences, that removing the Commission's preventative function in relation to corruption might result in;
- Restricting the research function of the Commission to require prior approval of the Minister for research undertakings may reduce the independence of the institution
- The delegation of the Chairperson's powers to senior executive officers, especially with respect to coercive hearings
- Ensuring that the Chairperson and commissioners are appointed in a way that is free from perceptions of political interference or influence
- The position of CEO of the Commission being a full time commissioner, the inconsistency of such an appointment with best practice governance principles and the lack of clarity and oversight this may bring
- The need for there to be a rights based commissioner in light of the extensive powers of the Commission
- Ensuring that the role of parliamentary commissioner is truly independent and affords procedural fairness in its investigations and actions.

3 Maintaining an independent corruption watchdog

Maintaining a strong and independent corruption watchdog is of utmost importance.

Corruption and misconduct in public office and administration has long been an unwanted, but persistent, feature of Queensland's political and public life. We have in Queensland tended to view the issue of corruption and misconduct through the lens of the events surrounding the Fitzgerald Inquiry and its aftermath. A view has developed in the intervening period that those events are somehow sufficiently distant and the landscape in Queensland so changed that crime and corruption on the scale revealed at that time could never happen again. It is

precisely to ensure that those corrupt and criminal practices cannot be repeated that Queensland has a Commission with appropriate powers, adequately resourced and properly funded. More importantly, it is critical that the opportunity presented by the current review is used to ensure a Commission equipped to deal with crime and corruption in the coming decade and beyond.

It is, in the view of the Society, critically important to appreciate the significant changes which have occurred in the 25 years since the CJC was first established. There was, at that time, no internet and a complete absence of the hyperconnectivity which marks our society. The Commission must be equipped to deal with the challenges posed by the enormous changes in technology and the consequent increase in sophistication of corrupt and criminal activity which will occur over the next decade and beyond.

The table below highlights the continuing problem of misconduct and corruption in Queensland and reinforces the need for an independent and apolitical anti-corruption function.

Date	Subject	Issue
November 2013	Mr Scott Driscoll Member of Parliament	The CMC is conducting a joint misconduct investigation with the Queensland Police Service. ¹ In November 2013, the Queensland Parliament Ethics Committee found Scott Driscoll guilty of 48 counts of contempt. ²
September 2013	Senior officers from the University of Queensland	The CMC investigation identified ways to manage conflict of interest and misconduct involved senior management officers. ³
December 2011	Mr Hohepa Morehu-Barlow (aka Joel Barlow) Queensland Health finance officer	Mr Barlow was charged with significant fraud charges and other offences against Queensland Health. ⁴
June 2011	Investigation of police officers- Operation Tesco	Matters arising out of Operation Tesco have been the subject of disciplinary and criminal proceedings against police officers. CMC identified systemic issues to be addressed. ⁵
December 2010	Former Ministerial Adviser	CMC investigation highlighted concerns with the relationship between ministerial advisers and public servants, including undue influence. ⁶

¹ CMC media release, 24 April 2013, <http://www.cmc.qld.gov.au/news-and-media/media-releases/cmc-statement-on-consideration-of-allegations-concerning-scott-driscoll-mp-2014-24.04.2013>

² Report No 139 found here: <http://www.parliament.qld.gov.au/documents/committees/ETHICS/2013/Matter-of-privilege19Mar2013/Report139.pdf>

³ Report and materials found here: <http://www.cmc.qld.gov.au/research-and-publications/publications/misconduct/ug/an-examination-of-suspected-official-misconduct-at-the-university-of-queensland>

⁴ Report and materials found here: <http://www.cmc.qld.gov.au/research-and-publications/publications/misconduct/qhealth/qhealth>

⁵ <http://www.cmc.qld.gov.au/topics/police-and-the-cmc/misconduct-by-police/investigations-of-police/2011-operation-tesco/investigation-police-misconduct-gold-coast>

⁶ <http://www.cmc.qld.gov.au/topics/misconduct/investigating-misconduct/public-hearings/cmc-public-hearings/public-money/2009-alleged-misuse-of-public-money-tutt>

Date	Subject	Issue
July 2009	Mr Gordon Nuttall Former Queensland Minister	Mr Nuttall found guilty of corruption. As a result of CMC investigation, Mr Nuttall was found guilty on a further five counts of official corruption and five counts of perjury. The Queensland Legislative Assembly also found Gordon Nuttall guilty of 41 instances of contempt in May 2011. ⁷
July 2009	Investigation of police officers- Operation Capri	The investigation resulted in disciplinary and criminal proceedings, as well as recommendations for procedural reform. ⁸
December 2008	Former Director-General of the Department of Employment and Training (DET)	The CMC referred matters to the DPP for possible criminal charges, and suggestions for reform were made on an offence of misconduct in public office and conflicts of interest. ⁹
May 2007	Ms Merri Rose Minister for Tourism and Racing	In May 2007, Ms Rose was sentenced to eighteen months gaol for attempting to blackmail then Premier Beattie.
May 2006	Various Gold Coast City councillors	CMC investigation highlighted concerns of secrecy, deceit and misinformation which affected the integrity of the Gold Coast City Council electoral process. ¹⁰
November 2003	Member of the Queensland Parliament	Evidence, but no finding of misconduct, of an interest in a prohibited business dealing by a member of parliament with state entities. ¹¹
March 2003	Investigation of police officers- The Volkens case	The investigation raised concerns about police and prosecution processes. ¹²
September 2000	Australian Labour Party Members	The Shepherdson Inquiry An investigation into electoral fraud by members of the Queensland branch Australian Labor Party. ¹³
June 1994	Complaints made against six Aboriginal and Island Councils	A CMC investigation identified conflict of interest concerns and recommended changes to improve financial accountability processes. ¹⁴

⁷ <http://www.parliament.qld.gov.au/documents/TableOffice/TabledPapers/2005/5105T5386.pdf>

⁸ <http://www.cmc.qld.gov.au/news-and-media/media-releases/media-releases-july-2009-june-2010/media-release-22.07.2009-cmc-releases-report-into-police-misconduct.asp-pgid-10814-cid-5201-id-1249>

⁹ <http://www.cmc.qld.gov.au/news-and-media/media-releases/media-releases-2014-6-august-2008-2013-23-june-2009/media-release-18.12.2008-operation-proxy-sparks-cmc-recommendations-for-change.asp-pgid-10814-cid-5201-id-1227>

¹⁰ <http://www.cmc.qld.gov.au/topics/misconduct/investigating-misconduct/public-hearings/cmc-public-hearings/2004-gold-coast-city-council-election-1/2004-gold-coast-city-council-election>

¹¹ <http://www.cmc.qld.gov.au/research-and-publications/publications/misconduct/an-investigation-of-matters-relating-to-the-conduct-of-the-hon.-ken-hayward-mp.pdf>

¹² <http://www.cmc.qld.gov.au/research-and-publications/publications/misconduct/the-volkens-case-examining-the-conduct-of-the-police-and-prosecution.pdf>

¹³ <http://www.cmc.qld.gov.au/topics/misconduct/investigating-misconduct/public-hearings/past-public-hearings/2000-01-the-shepherdson-inquiry-an-investigation-into-electoral-fraud-1/2000-01-the-shepherdson-inquiry-an-investigation-into-electoral-fraud>

¹⁴ <http://www.cmc.qld.gov.au/research-and-publications/publications/cjc/report-on-an-investigation-into-complaints-against-six-aboriginal-and-island-councils.pdf>

Date	Subject	Issue
May 1987	Former Queensland Ministers Former Police Commissioner	The Fitzgerald Inquiry 4 Ministers goaled and a number of police officers convicted. A former Police Commissioner convicted of corruption and a former Premier charged with perjury. ¹⁵

4 Implementation panel recommendations

The Society notes that an Implementation Panel “was established to oversee and direct the consideration and implementation of the accepted recommendations in the Government Response” to the Independent Advisory Panel (constituted by the Honourable Ian Callinan AC and Professor Nicholas Aroney) (the Callinan/Aroney Report) .¹⁶ The Explanatory Notes state that the Implementation Panel,

...has met on a regular basis and provided reports to the Premier and the Attorney-General and Minister for Justice on the progress of implementing the recommendations, including advice on how the recommendations’ intentions are best achieved. Legislative amendments are required to give effect to the accepted recommendations.

In the Society’s view, it would have been useful to have the benefit of Implementation Panel reports or for those reports to be referenced or their recommendations enumerated in the Explanatory Notes to the Bill.

QLS would be grateful if the Parliamentary Committee could make that material available to the public to improve understanding of the rationale for a number of the changes to the Act, and allow stakeholders to make further submissions in the light of their findings, evidence cited and recommendations.

5 Purpose

5.1 Purpose of the Act (clause 6-7)

Proposed s4(1) and (1A) will state:

- (1) The primary purpose of this Act is to combat and reduce the incidence of major crime.
- (1A) The secondary purpose of this Act is to reduce the incidence of corruption in the public sector.

The proposed amendment significantly alters the focus of the Act with the result that combatting and reducing the incidence of major crime becomes the primary focus of the Commission, whereas currently the Act does not provide for such prioritisation. This change has not been suggested in the Callinan/Aroney Report; nor is such prioritisation recommended in the Fitzgerald Report.

The Department of Justice and Attorney-General has provided a table showing that only Queensland and Western Australia have commissions with both crime and corruption

¹⁵ <http://www.cmc.qld.gov.au/about-the-cmc/the-fitzgerald-inquiry>

¹⁶ Explanatory Notes, page 1.

functions merged.¹⁷ This is, it is suggested, demonstrative of the inherent difficulties in terms of organisational structure, resourcing and prioritisation which exists with one organisation being responsible for both major crime investigation and corrupt conduct, which are equally important matters.

The Society considers that the corruption function is a fundamental check in our democratic system, operating to ensure appropriate oversight of our public institutions. Given this critical role, the reduction of corruption should continue to remain at least **as important** as the major crime function performed by the Commission. If legislatively enshrined as being of secondary importance, this function will always be a “poor cousin” for which resourcing will be limited. Such priorities must continue to be determined by the Commission with Parliamentary Committee oversight.

If adopted, the amendment would result in Queensland being the only jurisdiction in Australia to prioritise the major crime function above the corruption function.

We recommend that this clause be omitted from the Bill and the current section placing both functions on equal footing remain in place. To do otherwise would signal that Queensland places a reduced emphasis on the containment and elimination of corruption in public office - a position that can have an insidious effect on the health of our public institutions over the long term.

6 Corruption

There are a number of significant changes proposed to the operation of this function of the Commission, taken from the Explanatory Notes:

2. *change the definition of ‘official misconduct’ in the CM Act to raise the threshold for what matters are captured within that definition and rename the defined conduct as ‘corrupt conduct’;*
3. *rename the ‘misconduct function’ in the CM Act to ‘corruption function’; which will result in the following new titles: ‘Crime and Corruption Act 2001’; ‘Crime and Corruption Commission’; ‘Parliamentary Crime and Corruption Committee’ and ‘Parliamentary Crime and Corruption Commissioner’;*
4. *improve the complaints management system of the commission to refocus it on more serious cases of corruption and reduce the number of complaints the commission is to deal with and investigate;*
5. *remove the commission’s responsibilities for the ‘prevention’ of corruption in units of public administration.¹⁸*

6.1 **Clause 9 and 10 – removal of preventative function in relation to corrupt conduct**

The Society supports ongoing training and awareness to ensure prevention of corruption. We hold grave concerns about the apparent downgrading of proactive anti-corruption measures.

The Society understands that the Callinan/Aroney Report recommended that some of these preventative functions should be *transferred* to the Public Services Commission. Our reading of the amendments is that they will be removed from the Commission’s functions, but further explanation should be provided as to whether these functions will indeed be carried out in a

¹⁷ Table found here: <http://www.parliament.qld.gov.au/documents/committees/LACSC/2014/CMOLAB2014/cor-26Mar2014-attachment1.pdf>

¹⁸ Explanatory Notes, page 2

coordinated way by the Public Services Commission. This issue does not appear to be directly addressed by the Explanatory Notes. Unless such functions are properly and completely addressed elsewhere within the public sector, the removal of the preventative function from the CMC is a seriously retrograde step.

We particularly note the proposal to remove specific functions in current s24 relating to misconduct (now to be called corruption):

Without limiting the ways the commission may perform its prevention function, the commission performs the function by—

- (a) analysing the intelligence it gathers in support of its investigations into major crime ~~and misconduct~~; and
- (b) analysing the results of its investigations and the information it gathers in performing its functions; and
- ~~(c) analysing systems used within units of public administration to prevent misconduct; and~~
- (d) using information it gathers from any source in support of its prevention function; and
- ~~(e) providing information to, consulting with, and making recommendations to, units of public administration; and~~
- (f) providing information relevant to its prevention function to the general community; and
- (g) ensuring that in performing all of its functions it has regard to its prevention function; and
- ~~(h) generally increasing the capacity of units of public administration to prevent misconduct by providing advice and training to the units and, if asked, to other entities; and~~
- (i) reporting on ways to prevent major crime ~~and misconduct~~.

We note particularly the importance of the Commission’s ability to analyse intelligence and report on ways to prevent misconduct. The Fitzgerald Report stated in relation to the Official Misconduct Division that “The Division should also perform an educative or liaison role with other agencies and Departments and private institutions and auditors. It should give them advice and assistance in relation to preventing and detecting official misconduct, including how to improve their organizations and systems.”¹⁹ As the Commission is the central point for intelligence on corruption issues, the Commission may be best placed to perform this role (particularly for identifying ways to prevent corruption in future).

6.2 Clause 14 – How the Commission performs its misconduct function

Section 35 is to be amended to provide:

- (3) In performing its corruption function, the commission must focus on more serious cases of corrupt conduct and cases of systemic corrupt conduct within a unit of public administration.

The Society notes that the proposed amendments could in effect raise the threshold of what acts of corruption would be addressed by the Commission. The Society notes that it will be important to ensure that acts of corruption not falling within the Commission’s remit are still investigated. Public confidence in our public institutions can be as easily damaged by the accumulation of small abuses of office as it can by the ‘headline’ acts that now seem intended

¹⁹ Fitzgerald Report at page 314

to be the principal focus of the new Commission. It is vital that across the public service, there be no reduction in the overall scrutiny and attention given to alleged acts of improper conduct, whether they fall within the definition of 'corrupt conduct' or otherwise.

6.3 Clause 15 - CEO directing how officers investigate corruption and publication of information

This introduces a new function for the CEO to issue a direction about 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 within a unit of public administration. The CEO is subject to control and direction of the Chair.

The Society notes that these matters are directly relevant to threshold policies, with a direct operational impact, and do not appear to be merely managerial. The CEO's role is focussed upon the Commission's administration, not the operational achievement of its core aims. We suggest that consideration should be given to whether the Commission itself, or the Chair, is better placed to be issuing directions about complaint handling, as this role is central to the CMC's legislative functions. We also note that these directions must be published on the website to ensure that the public is kept informed of the Commission's processes. The Society requests clarification on whether this is intended to occur.

The Society is supportive of proposed s35B relating to the publication of a website explaining the Commission's systems and procedures, including guidance on timeframes for dealing with complaints. The CMC has an important role in informing the public of its functions and also in obtaining information from members of the public in an accessible way.

6.4 Clause 16 - Complaint must be by statutory declaration

The Society notes that the Bill contains a new requirement for a complaint about corruption to be made by way of statutory declaration unless in exceptional circumstances. The Society is strongly opposed to this amendment. New subsections 36(3) and (4) state:

(3) A complaint about corruption under subsection (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.

Examples of exceptional circumstances—

the person making the complaint—

- 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

(4) To remove any doubt, it is declared that subsection (3) does not apply to a person giving information or matter involving corruption to the commission under subsection (1).

The Callinan/Aroney report states at page 204:

Also obvious early was the very high number of complaints processed by the CMC. As we suspected, the vast majority of them were trivial, vexatious, or misdirected. The CMC employed, the Chairperson said, a system of triage, which usually resulted, in practice, in devolution. The reception and disposition of so many such complaints are functions that have to be performed by someone. That comes at a considerable public expense. We have concluded that ways should be found to deter baseless complaints,

*not least so that proper and sufficient attention can be given to the genuine and substantial ones.*²⁰

One of the proposed recommendations to address this issue was to introduce the requirement for statutory declarations. The Society's strong view is that mandating the complaint to begin by statutory declaration will be in many cases too onerous, and could affect the giving of anonymous "tip offs". The reality of fighting corruption means that in many instances, people will often not be prepared to come forward and swear to the information they wish to provide. Clearly enough, there is a proportion of such matters where that reluctance might reflect a lack of bona fides in the complaint. Often though, it will be a wish to maintain privacy, or fear of retribution, that will prevent people from publicly declaring their matter of complaint. This amendment, by placing the bar so high as to require every complaint to be sworn, could well mean that the CCC loses an important avenue of information and intelligence. At the very least, anonymous complaints can be important in identifying and recording trends which may indicate a deeper, more systemic problem.

We suggest that a more workable solution is to allow the Commission to make a policy to require statutory declarations to be made in certain cases where it would be appropriate (for example, where coercive hearings may be involved, or where matters may be high profile, or there is a concern a complaint may have been motivated by the desire to gain political advantage) This allows the Commission the flexibility to ensure that all relevant information is still being received and considered, and that a statutory declaration would not be required in every instance. If the Bill is to proceed as drafted, the Commission's resources would still be taken up in working out whether a person falls into an "exceptional circumstance" category and whether the person is exempt from providing the declaration. Making this a matter for Commission policy will allow for more specific guidance to the public and Commission staff about these issues.

If the Bill is to proceed as currently drafted, we suggest that the complainant's status as a child should be specifically included as an "exceptional circumstance" in consequence of which a complaint does not need to be verified by statutory declaration. Further, we suggest the examples of exceptional circumstances be widened to include not only illiteracy, but also persons suffering some other personal or physical disadvantage which might result in the making of a sworn complaint difficult or impossible. Take for example an elderly person living in a remote indigenous settlement. That person may be entirely literate and competent, but live in an area that is not serviced by the internet, or even reliable and regular postal services. Their most common means of external communication may be the telephone. To require that person, perhaps wishing to complain about the actions of a visiting police officer or public health official for example, to complete a statutory declaration, would be too onerous.

We note that it should be clarified whether the requirement for a statutory declaration is needed when a person makes a complaint to persons other than to the Commission in light of current s36(2).

6.5 Clause 17 - Duty to notify commission of corruption

This changes the threshold for mandatory notification to the Commission of corruption from "suspects" to "reasonably suspects."

Practically, it is difficult to envisage a scenario in which a person who suspected corruption would hold such a suspicion unreasonably. Indeed it would be difficult to establish that a belief was not, subjectively, held reasonably given that suspicion is by its very definition a subjective

²⁰ Callinan/Aroney report, page 204

state of mind. For the sake of clarity, it may be better to phrase this as a ‘suspicion based on reasonable grounds’. This not only imports an element of objectivity into the test, but it makes the need for objectivity far more obvious for the person with the relevant suspicion. Subsequent events might indicate that a suspicion was not reasonably held, but the grounds of the suspicion, and the subjective state of mind of the person, may well have been different at the relevant time. These factors will serve to discourage people from making mandatory notifications.

6.6 Clause 18 – Commission may issue directions about how notifications are to be made

The Commission will be able to issue directions about the kinds of complaints a public official must notify or need not notify the commission about. In the interests of transparency such directions should be made available for scrutiny, particularly by the public and the Parliamentary Committee which is tasked with monitoring the Commission’s activities.

6.7 Clause 19 – Dealing with complaints (commission)

This proposal expands the grounds on which the commission may dismiss or take no action on a complaint to when the complaint is:

- not made in good faith;
- made for a mischievous purpose;
- made recklessly or maliciously;
- not within the commission’s jurisdiction;
- not in the public interest or has been dealt with by another entity.

The Bill and Explanatory Notes do not give further detail on what is meant by “not in the public interest”. We suggest clarification whether this will be subject to a direction or guide to ensure the public is informed of what this will mean in practice.

6.8 Clause 29 – Other improper complaints

Proposed s216A will be a new offence for the making of a complaint that is made:

- vexatiously;
- not in good faith;
- primarily for a mischievous purpose; or
- recklessly or maliciously.

The Society notes that proposed s216A(2) defines “make”:

(2) In this section—

make, a complaint to the commission, means—

- (a) make a complaint, or give information or matter, to the commission under section 36; or
- (b) make a complaint, or give information or matter, to another entity that is under an obligation to refer the complaint, information or matter to the commission; or
- (c) cause a complaint, or information or matter, to be referred to the commission.

We consider that the offence should only relate to the making of a complaint, and should not extend to giving information or matters. We note that the offence provision in s216(3) appears to be limited to “complaint” only. We consider this should equally apply to the new offence being created.

Further we note that no notice will be provided to a person in the first instance in this new offence. Section 216 provides a process by which a person is given notice, and only then if they make the same or substantially the same complaint to the commission would the person commit an offence. We suggest this same process must be adopted for the new offence provision. The Explanatory Notes explaining why the notice provision has not been included state:

The notice requirement in section 216 (Frivolous complaint) is not included in the new offence provision because the new offence is dealing with complaints that are made vexatiously; not in good faith; primarily for a mischievous purpose; or recklessly or maliciously; as opposed to frivolous complaints.²¹

It is not clear from this statement exactly what distinguishes frivolous complaints from the other grounds stated. The Society is of the view that the notice provision should be included.

We also note that s216(4) provides a defence, which has not been replicated. Again, for consistency we consider that this defence provision should be equally applied to proposed s216A.

The Society is concerned that both offence sections may be applied unfairly where complainants are suffering from mental health issues such as paranoia, or schizophrenia, but falling short of insanity. We suggest that there should simply be a discretion for the Commissioner to dismiss or decline to investigate in these types of circumstances.

7 Research function

7.1 Clause 21 - Research plan must be approved by Minister

Clause 21 of the Bill proposes to amend section 52 of the Act to make significant changes to the research function of the Commission. This clause provides that a three year research plan must now be approved by the Minister. More prescriptively, this research plan may only include research to be undertaken by the Commission for the following reasons:

- (a) research to support the proper performance of its functions
- (b) research required to be undertaken by the commission under another Act
- (c) research into any other matter referred to the commission by the Minister.

The Explanatory Notes to the Bill state that the amendments are made to, “redefine and refocus the commission’s role in relation to research”.²² No further explanation is provided for the reason as to why Ministerial approval is required for research plans or for the restriction of the Commission’s research role. While the Society notes that the Callinan/Aroney Review was critical of the Commission’s research function and recommended changes, the Explanatory Notes fail to articulate the findings of the Implementation Panel.

The Society does not support Ministerial approval of research plans and changes to the research function as contemplated by clause 21. The Society considers that the Commission should maintain a broad, independent and unrestricted research role, free from Ministerial approval processes. We consider that this is essential to maintain the independence of the Commission’s research role. The scope and appropriateness of the research conduct by the Commission is properly a matter for the Commission. The Commission is required to act in a

²¹ <https://www.legislation.qld.gov.au/Bills/54PDF/2014/CrimeMisconductOLAB14E.pdf>

²² Explanatory Notes, page 20.

manner that meets the statutory objectives of the Act, and it should be able to direct its own research to that end. In circumstances where that research might sometimes involve a critique of the effectiveness of government policy, for example, it is inappropriate for the research function of the Commission to be subject to the Minister's approval.

The Society considers that the Commission prepares well researched publications on criminal law and law enforcement issues that play an important public education role. In the absence of government structures, such as the Sentencing Advisory Council, the Commission performs this valuable public education role. In this regard, we also note that the Commission for Children and Young People and Child Guardian role will soon be subsumed into the Public Guardian and the Commission's previous role in publishing public education documents will be dissolved. We also take this opportunity to note that interstate bodies, such as the New South Wales Independent Commission Against Corruption views that part of its role is to , "educate the community about NSW public sector corruption... through... investigation reports and other publications."²³

If the concerns in relation to the research functions of the Commission relate to inadequate resources and/or failure to best prioritise the use of resources to ensure that the Commission's core functions are properly carried out and not adversely impacted by research activities, this can be adequately addressed through:

- Improved governance practices, which include the proposed appointment of a CEO, to manage the use and prioritisation of resources; and
- Increased financial resourcing for the Commission.

The Society therefore does not support clause 21 and maintains that the Commission should retain independence over its research function.

8 Investigating judicial officers

8.1 Clause 22 - independence of holders of judicial office

Section 58 of the Act deals with the independence of holders of judicial office. Clause 22 seeks to amend section 58 of the Act, "to allow the commission to investigate a decision making body of an agency when a judicial officer is a member of that decision-making body."²⁴

A judicial officer is defined as:

- a) a judge of, or other person holding judicial office in, a State court; or
- b) a member of a tribunal that is a court of record.²⁵

The Act presently limits the powers of investigation of the Commission in relation to judicial officers to misconduct of a kind that, if established, would warrant the judicial officer's removal from office. Clause 22 proposes to extend the Commission's powers to include investigation of judicial conduct on "decision-making bodies". Decision-making bodies are deemed to include a governing body or a board of management by virtue of proposed section 58(2A). However, the term decision-making is not defined in the Dictionary. The Society is concerned about the lack of definition of "decision-making body" and the extension of the Commission's investigative powers. It appears that the proposed amendment is intended to empower the Commission to undertake investigations relating to decision making bodies of which a judicial

²³23 Independent Commission Against Corruption website.

²⁴24 Explanatory Notes, page 20.

²⁵25 *Crime and Misconduct Act 2001*, section 58(5).

officer is a member in circumstances where the potential misconduct of the judicial officer falls short of that which would warrant removal from office. We acknowledge that this has been the subject of comment from the PCMC in a recent report involving a tertiary institution. . The Society would appreciate clarification in this regard.

The Society's concern about the extension of the Commission's powers is increased by proposed section 58(4A). This provision states that:

- (4A) ... the chairman may delegate the chairman's functions and powers under this section, including the functions and powers mentioned in subsection (6), for a commission investigation mentioned in subsection (3) to a senior officer.

The Explanatory Notes states:

In particular, the chairman may delegate to a senior officer of the commission the investigation concerning a complaint involving a judicial officer who is a member of a decision making body. All other investigations or hearings concerning judicial officers are to be conducted by the chairman.²⁶

The Society is concerned with the delegation of these functions to a senior officer of the commission. In the Society's view, this is an undesirable delegation of power. In our view, the current provisions of section 58(2)(b) of the Act should be maintained, that is:

- (b) the investigation must be exercised in accordance with appropriate conditions and procedures settled in continuing consultations between the chairperson and the Chief Justice.

The Society does not support the proposed amendment.

The Society commends the Government for its consultation with the Chief Justice, Chief Judge, Chief Magistrate, President of the Court of Appeal and President of the Queensland Civil and Administrative Tribunal as noted in the Explanatory Notes.²⁷ The Explanatory Notes do not detail whether the judiciary generally supported the proposed amendments.

Until clarification of the issues raised herein, the Society reserves its position.

9 Coercive powers/hearings

9.1 Clause 25 - delegation of the chairperson's powers

Clause 25 purports to amend section 146ZU of the Act which deals with the delegation of the chairperson's powers. Currently, section 146ZU of the Act permits the chairperson to delegate his or her powers to an assistant commissioner.²⁸ The amendment proposed in clause 25 would change this delegation to allow the chairperson to delegate his or her powers to the *chief executive officer or a senior executive officer*.²⁹

The Society is concerned with this proposed amendment. This concern arises as a consequence of the chairperson's powers in relation to assumed identities which are detailed in Part 6B of the Act. Section 146O of the Act deals with the purpose of Part 6B and states

²⁶ Explanatory Notes, page 20.

²⁷ Explanatory Notes, page 16.

²⁸ Section 146ZU(1) of the Act.

²⁹ Explanatory Notes, page 20.

that the, “main purpose of this part is to facilitate investigations and intelligence gathering in relation to misconduct offences.” The powers in relation to assumed identities are therefore quite significant and the Society maintains that these powers are best placed with the chairperson. These powers should only be delegated to assistant commissioners in strictly controlled circumstances. The Society does not support the delegation of these broad powers to the chief executive officer or a senior executive officer.

9.2 Clause 26 – who must conduct hearings

Clause 26 proposes to amend section 178 which deals with who must conduct public and closed hearings.³⁰

With regard to public hearings, currently section 178 of the Act deems that the chairperson must conduct a public hearing or allow a hearing to be conducted by an assistant commissioner if the chairperson considers it necessary for the efficient operation of the commission. The amendment of section 178 as contemplated by clause 26(2) states, “... if the chairman considers it necessary for the efficient operation of the commission, a public hearing may be conducted by a *sessional commissioner or senior executive officer* as decided by the chairman.”

With regard to closed hearings, section 178(3) of the Act currently provides:

- (3) A closed hearing may be conducted by any of the following as decided by the chairperson—
 - (a) the chairperson;
 - (b) an assistant commissioner;
 - (c) another person qualified for appointment as the chairperson.

Clause 26(3) seeks to amend the above provision and states:

- (3) A closed hearing may be conducted by any of the following as decided by the chairman—
 - (a) the chairman;
 - (b) a sessional commissioner;
 - (c) a senior executive officer;
 - (d) another person qualified for appointment as the chairman.

The current section 178 of the Act allows assistant commissioners to conduct public and closed hearings. This is appropriate due to the current section 244(1) of the Act which deems that, “assistant commissioners are to be appointed on a full-time basis by the Governor in Council.” Clause 46 of the Bill seeks to remove section 244 of the Act. This will mean that the role of assistant commissioner will not require the approval of the Governor in Council. The Society does not support the removal of this approval process for assistant commissioners. Due to the proposed removal of section 244 of the Act and the fact that senior executive officers do not have to be appointed by the Governor in Council, the Society does not consider that it is appropriate for these officers to undertake these sensitive roles and responsibilities.

The Society is concerned with the proposal to permit senior executive officers to conduct hearings, as contemplated by clause 26. These roles are essentially staff appointments by the chairperson that do not require any further approvals by persons who are external to the

³⁰ Explanatory Notes, page 20.

Commission. The appointment of staff to conduct hearings is a significant change which, in our view, may diminish the accountability and independence of these hearings and will certainly have the potential to impact upon public perceptions in this regard. This is especially concerning due to the nature of closed hearings and the expansive powers that may be used against people who appear before the Commission. The Society does not support the proposed amendment.

The *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* is also relevant to the issue of hearings conducted by the Commission. The *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* amended the Act and introduced a mandatory sentencing regime for the punishment of contempt for commission hearings. The Society has maintained its strong opposition to any form of mandatory sentencing. This position has been well publicised and has resulted in the Society publishing a publicly available mandatory sentencing laws policy position paper. The use of mandatory sentencing for the punishment of contempt is especially concerning in relation to closed hearings where, “the presiding officer conducting a closed hearing may give a direction about who may be present at the hearing.”³¹ The Society notes that this situation has the potential for serious abuse and might also function to reduce the public’s confidence in the commission. The Society submits that this provision be repealed.

10 Governance issues

10.1 Clause 38 - Appointment process for commissioners

Clause 38 of the Bill replaces sections 228 and 229 of the Act. With the removal of s228(3) there is no longer a requirement that bipartisan support of the parliamentary committee must be obtained before the Minister may nominate a person for appointment as a commissioner (including the Chair).

The Society’s strong view is that the Commission must be an independent and apolitical anti-corruption institution and that to be otherwise is to detract from Queensland’s democratic institutions.

The Society is significantly concerned about the effect of this proposed change, as it has the potential for the senior positions in the Commission to become:

- at worst - overtly politicised, or
- at the least - open to the suggestion of political interference.

Justification for proposed change

The Explanatory Notes do not justify or explain the need for this change, stating at page 3:

The requirement for bipartisan approval by the parliamentary committee of the appointment of a commissioner is removed by the Bill. However, the Minister is required to consult with the parliamentary committee prior to the appointment or reappointment of any of the commissioners.

The Society notes that the publicly available portion of the review by the Callinan/Aroney Report does not propose that the requirements for the appointment of commissioners be changed.

³¹ Section 179 of the Act.

In introducing the Bill to Parliament the Attorney-General did not address the issue of why the appointment requirements needed to be changed. The Attorney-General said³²:

Although the Parliamentary Crime and Misconduct Committee is to be consulted about commissioner appointments, the bill removes the current requirement for the PCMC's bipartisan support for these appointments.

However the Attorney-General went on to say:

As I indicated earlier, the government genuinely welcomes suggestions and comments on the commission's upper governance structure, as reflected during the consideration of the bill by the committee. We have looked at other jurisdictions, and all jurisdictions in Australia, when we are dealing with corruption watchdogs, deal with these governance structures differently.

The Society would urge that, given the important role that the Commission currently plays in our democratic system, changes are evidence based or at least consistent with the fundamental independence of such a pivotal institution.

An alternate approach

The Society does not equate the appointment of the Chair or commissioners to the appointment of judicial officers. There are a number of fundamental structural differences between judicial and Commission appointments which distinguish them from perspective of independence:

- there exists a doctrine of separation of powers between the judiciary, parliament and executive in the Westminster system, but there is no similar inherent separation for the State's corruption watchdog
- judges are appointed by commission until retirement age, while commissioners and Chairs of the Commission will be appointed for five years and be eligible for reappointment at the discretion of the Government under the proposed changes
- judges swear an oath to apply the laws without fear or affection
- judicial decision-making is bound by precedent and subject to review by superior courts
- judges do not undertake investigations of members of the executive government, but rather determine matters brought before them on the basis of the evidence presented.

Historically, the Society notes that the requirement for bipartisan support was not a recommendation in the Fitzgerald report. The appointment of the Chair and commissioners to the Commission must however be apolitical and independent.

The Society is open to consideration of alternate processes which better achieve the goal of apolitical and independent appointments. It is suggested that these crucial appointments might be removed from the political process altogether to ensure that the Commission remains independent.

The Society advocates that serious consideration be given to an alternate appointment process. The Society proposes that an independent panel should be set up to oversee and implement the appointment process. This would include:

- advertising positions in accordance with appropriate position descriptions and candidate pre-requisites;

³² Record of Proceedings, 19 Mar 2014, page 703

- receiving and considering applications against appropriate criteria;
- interviewing applicants in accordance with appropriate guidelines;
- make determinations in accordance with appropriate processes and guidelines as to suitable candidates;
- advise government of suitable candidates.

Given the nature and requirements for the position of Chair and commissioners it is suggested that a selection panel comprised of the following would be appropriately skilled and independent:

- The Chief Justice or his/her nominee
- The Attorney-General or his/her nominee
- The leader of the Opposition or his/her nominee
- The President of the Bar Association of Queensland or his/her nominee
- The President of the Queensland Law Society or his/her nominee
- 2 non-legal members chosen jointly by the Attorney-General and the leader of the Opposition.

A process such as this would divorce those holding these key positions from any allegation of political patronage or favouritism and would be more truly independent.

The table in Section 3 above demonstrates that it is of critical importance that Queensland has an independent corruption body, removed from politics and political interference.

10.2 Clause 39 - Reappointment of commissioners

The Society notes that proposed new s231(2) provides that a commissioner may be reappointed for a further term of up to five years, but no longer than 10 years in aggregate.

The Fitzgerald Report proposed that³³:

Upon the expiration of his or her term of office, each member of the CJC should be eligible for re-appointment, except for the initial Chairman who should not be re-appointed. No Chairman should be eligible to serve any term or terms of office which aggregate to more than five years.

The Society has often raised concern that reappointment can create a potential tension and opportunity for political influence of appointed individuals. Under the proposals in the Bill, there is a significant risk of a perception if not the reality that a commissioner could be inclined to take action favourable to an incumbent Government in order to maximise chances of reappointment. The independent panel appointment process proposed above would obviate this concern.

10.3 Clause 38 - Removal of civil liberties commissioner

The Society notes that the position of the civil liberties commissioner "has been omitted. This position was proposed in the original Fitzgerald Report as a means of ensuring that the significant powers of the CJC (as it was then called) would be oversighted by a lawyer with the interests of the civil liberties of Queenslanders in mind³⁴:

The community appointees to the CJC should be as follows:-

³³ Report Of A Commission Of Inquiry Pursuant To Orders In Council, Page 310

³⁴ Report Of A Commission Of Inquiry Pursuant To Orders In Council, Page 310

- (a) *A practising lawyer with demonstrated interest in civil liberties, to be drawn from a panel of four; two to be nominated by each of the Bar Association of Queensland and the Queensland Law Society. The appointment need not be of a specialist in criminal law. Nor need the appointee be a member of the Queensland Council of Civil Liberties.*

Given now the significantly extended powers of the Commission to hold private hearings and have individuals incarcerated for refusing to answer a question, rights-based oversight is essential to ensure that the Commission does not become a weapon of oppression in the course of its worthwhile goal of combatting organised crime and corruption.

The Society strongly suggests that a rights-focused commissioner position is retained for an individual appointed by the independent panel referred to above. This commissioner should be a lawyer with a particular experience of rights-based advocacy.

10.4 Clauses 38 – removal of requirement for at least 1 part-time commissioner to be female

The Society is concerned with the removal of the requirement in current s230 for at least 1 of the part-time commissioners to be female without adequate justification being provided in the Bill materials. We suggest an amendment to proposed s223 dealing with the membership of the Commission to include a subsection stating that “at least 1 of the commissioners must be a woman.”

10.5 Clauses 34 & 36 - The position of CEO

Subject to the matters referred to *post* the Society welcomes the introduction of a position of CEO to the Commission and sees this as a significant positive advancement in the structural reform of the institution and steps toward the introduction of best practice corporate governance principles.

Qualification

The Society notes that proposed s225(1) sets out the qualifications for the position:

- (1) A person is qualified for appointment as the chief executive officer if the person has qualifications, experience or standing appropriate to perform the functions of the chief executive officer.

This drafting does not appear to contribute materially to deciding whether any particular individual is suitable to hold the position of CEO, and should be reconsidered.

CEO as full time commissioner

Proposed s223 provides that the commission is to be comprised by, amongst other appointments, a full-time commissioner who is the chief executive officer.

The Society has significant concerns at the CEO being themselves a commissioner of the Commission. It is understood that the position of CEO is to manage the operational affairs of the Commission and is:

*responsible to the commission for the administration of the commission.*³⁵

QLS is concerned that the role of CEO and commissioner may be confused by that individual holding two positions. From a corporate governance perspective it is not best practice to have a CEO who is charged with operational management and is responsible to the Commission, as a member of the body that oversees their conduct. The Society is well aware that there are in industry managing directors of private companies, but those positions are subject to significant external regulatory regimes through the *Corporations Act 2001* (Cwth) and the Australian Securities and Investment Commission, the courts and a well-established body of law relating to conflict of interest and fiduciary duty.

The role of CEO of the Commission appears to be inconsistent with being a full time commissioner.

A further concern with the CEO being a full time commissioner is that it may also be uncertain in many circumstances who is leading the organisation, the CEO or Chair, depending on whether the issue of the day is characterised as 'operational'. This is an unsatisfactory result for a pivotal institution such as the Commission. There must be clear lines of authority and responsibility to promote transparency and independence.

There should also be a full and comprehensive position description developed for the CEO position and clear policies and procedures detailing the powers and responsibilities of the CEO.

10.6 Clause 44 – Appointment of “sessional commissioners”

The Society is pleased to note that sessional commissioners can be appointed if qualified if the person has served as, or is qualified for appointment as, a judge. We consider this imports a high standard befitting the important tasks being performed by sessional commissioners.

10.7 Clauses 45- 49 – Senior executive officers

The Explanatory Notes state that:

*“The role and powers of assistant commissioners in the CM Act have been transferred to ‘senior executive officers’, who are senior officers appointed by the commission, and not the Governor in Council.”*³⁶

Under the current Act assistant commissioners can only be appointed if the person is qualified to be appointed as the chairperson (s240). There must also be a process for advertising, consultation and consultation (s242-244). This imports a high standard for the role, recognising the essential and sensitive tasks that a person in this position will undertake. The Society notes concern that this process appears to be removed and discretion is placed solely in the hands of the Commission to appoint senior executive officers.

The Society notes the breadth of duties that the role of assistant commissioner can play under the Bill, including delegation of the chairperson’s duties (such as conducting public hearings under s178). The Society considers that, given the importance of this role, a process is required to ensure scrutiny of the appointment. We recommend that this should remain an appointment made by the Governor in Council, with the qualifications and appointment process outlined in the legislation.

³⁵ Explanatory Notes to the Bill, page 3

³⁶ Explanatory Notes, page 3

10.8 Clause 58 - Delegation of Commission's powers

The Society notes that proposed s269(5) provides that:

- (5) The chairman may sub-delegate a function or power of the commission delegated to the chairman under subsection (1) to an appropriately qualified commission officer.

The powers of the Chair which may be delegated include most powers of the Commission. The Society is concerned that such delegation can take place without the ratification or agreement of the commission as a whole. We suggest this be reconsidered.

10.9 Clause 62 - Discipline of commission staff

We note that clause 62 prescribes wide powers for the chief executive officer to discipline a current or former commission officer.

Substance

We note that the majority of clause 62 mirrors the *Public Service Act 2008* (Qld). Our comments in relation to clause 62 can be attributed to the provisions of the *Public Service Act 2008* (Qld).

Proposed s273B(1)(e) of the Bill³⁷ provides that “the chief executive officer may discipline a relevant commission officer if the chief executive is reasonably satisfied that the officer has:

- “(e) used, without reasonable excuse, a substance to an extent that has adversely affected the competent performance of the officer’s duties...”

There may be many legal substances a person may use that may adversely affect their performance, for example:

- The use of antihistamines may make a person drowsy
- The use of headache medication for migraines
- A glass of wine at a work function.

We recommend that the clause give an example of the types of substances which if used, may invoke this section.

Private capacity

Proposed s237B(4)(b) of the Bill defines misconduct as “... inappropriate conduct in a private capacity that reflects seriously and adversely on the commission.” Similarly we recommend that the Bill set out examples of the types of conduct which takes place in a private capacity that reflects seriously and adversely on the Commission. For example:

- being convicted of a criminal offence?
- defaming the commission on social media?

Retrospective application and double jeopardy

We are concerned that proposed s273D(3)³⁸ is retrospective in nature and may have unintended consequences. Proposed ss273B(2) and 273D set out that a formerly employed Commission officer may have findings or actions taken against them “within a period of 2

³⁷ Together with s187(1)(e) of the *Public Service Act 2008* (Qld).

³⁸ Together with s188A(4) of the *Public Service Act 2008* (Qld).

years after the end of the relevant commission's officer's employment." The clause is also silent on whether the former employee had been previously disciplined, which raises issues of fairness with the proposed retrospective application

The clause is unnecessarily punitive and we recommend that the clause and the corresponding section in the *Public Service Act 2008* be removed and repealed from the Bill and Act respectively.

Denial of natural justice

We note that proposed s273F(2)³⁹ sets out natural justice is not required if a person is suspended on normal remuneration. We do not consider "normal remuneration" as an adequate basis of denying a person natural justice and due process and recommend for its removal and removed and repeal from the Bill and Act respectively.

11 Parliamentary Committee/Commissioner

11.1 Clause 67 - Changes to the PCMC

Clause 67 sets out that the activities of the Commission are to be reviewed by 30 June 2016 and then at the end of each five year period. The Society submits that as there have been substantial changes to the Act, a 3 year review period will be more appropriate in analysing the changes.

We therefore recommend the 5 year period in clause 67 be revised to a 3 year period.

11.2 Clause 72 - Appointment of an acting parliamentary commissioner

Clause 72 sets out that it is the discretion of the Speaker to appoint an acting parliamentary commissioner. For consistency we recommend that the same requirements for appointing a parliamentary commissioner apply for appointing an acting parliamentary commissioner. We recommend reconsidering clause 72.

11.3 Clause 63 - Membership of the reference committee

Clause 63 sets out that there is no longer a requirement for the Minister to consult with the Leader of the Opposition prior to nominating a person to the reference committee. We consider, to ensure the independence and objectivity of the reference committee that an independent panel be tasked with membership, comprising of:

- The Chief Justice or his/her nominee
- The Attorney-General or his/her nominee
- The leader of the Opposition or his/her nominee
- The President of the Bar Association of Queensland or his/her nominee
- The President of the Queensland Law Society or his/her nominee
- 2 non-legal members chosen jointly by the Attorney-General and the leader of the Opposition.

³⁹ Together with s190(2) of the *Public Service Act 2008* (Qld).

11.4 Clause 73 - Powers of the parliamentary commissioner

Clause 73 widens the powers of the parliamentary commissioner to investigate matters on his or her own initiative, to provide notice to the parliamentary committee and to report to the parliamentary committee. The Society has long advocated for this to be the position, and commends this proposed change. The parliamentary commissioner's role should involve an independent discretion to investigate, and not be bound by only those matters referred to it by the parliamentary committee. The Society considers that all investigations undertaken by the parliamentary commissioner should adhere to the principles of natural justice and furthermore that all decisions made by the parliamentary commissioner be subject to judicial review. This will ensure that the parliamentary commissioner remains independent and transparent.

We further suggest that in order to reinforce the independence of the role of the parliamentary commissioner, that person is appointed by the Speaker on recommendation of the selection panel referred to above and comprised of the following:

- The Chief Justice or his/her nominee
- The Attorney-General or his/her nominee
- The leader of the Opposition or his/her nominee
- The President of the Bar Association of Queensland or his/her nominee
- The President of the Queensland Law Society or his/her nominee
- 2 non-legal members chosen jointly by the Attorney-General and the leader of the Opposition.

12 Use of gendered language

The Society notes the change of the word “chairperson” to “chairman” throughout the Bill. No reason has been provided in the materials as to why this change has been included, nor was it suggested in the Callinan/Aroney Report.

This issue has already been the subject of concern from stakeholders who have submitted on this Bill. We note specifically that s25 of the *Reprints Act 1992* states:

25 References to gender specific offices

(1) If the name of an office established by a law uses a word indicating a gender or that could be taken to indicate a gender, the name of the office may be changed, and any reference in a law to the office may be changed or given, in a way that is consistent with current legislative drafting practice.

Example 1—

‘chairperson’ may replace ‘chairman’.

Example 2—

‘deputy chairperson’ may replace ‘deputy chairman’.

Example 3—

‘councillor’ or a similar word may replace ‘alderman’.

(2) A change in the name of an office does not otherwise affect the office or the holding of the office by the office holder.

Given that this provision of the *Reprints Act 1992* makes reference to being consistent with current legislative drafting practice (and the word “chairperson” is specifically noted as being consistent), we query the changes made in this Bill. “Current legislative drafting practice” is defined in Schedule 1 as current Queensland legislative drafting practice.

We consider that the references to “chairman” should be omitted from the Bill and the current reference to “chairperson” should remain. If the references to “chairman” remain in the Bill, the Office of Parliamentary Counsel may revert to using “chairperson” to ensure consistency with the *Reprints Act 1992 Act*.