Crime and Misconduct and Other Legislation Amendment Bill 2014

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We thank the Committee for the opportunity to make this submission on the *Crime and Misconduct and Other Legislation Amendment Bill.*

As past commissioners of the CMC each one of us was appointed with the bipartisan support of the Parliamentary Committee (PCMC). In addition to service as CMC commissioners, two of us have acted in the position of CMC Chairperson for varying periods of time. Collectively we have expertise in the law, public administration and in corporate governance, and an understanding of and experience with the CMC.

1. Three Key Issues

We believe the proposed Bill will undermine the effectiveness and independence of the CMC and for that reason it should be withdrawn in its present form. In this submission we propose to discuss three major and inter-related problems with the Bill:

(i) The removal of the statutory requirement that all commissioners (including the Chairperson) must be appointed with the bipartisan agreement of the Parliamentary Committee (PCMC). The statutory requirement of bipartisan appointment is one of the fundamental provisions of the CM Act which is intended, as far as possible, to guarantee the independence of the CMC

(ii) The new governance provisions effectively strip the commission of its responsibility and capacity to hold management accountable for their performance. The new governance scheme is examined in the body of the submission as this argument is developed. The point can be made that, because of the extraordinary powers the CMC may exercise – in some respects the CMC is equipped with greater powers than a Royal Commission— it is particularly important that clear and effective governance arrangements are in place.

(iii) The proposed statutory provision which downgrades public sector corruption to secondary importance to the investigation of major crime. Together with other proposed changes this weakens the capacity of the CMC to identify and investigate corruption (misconduct).

2. Background

The examination of these proposals should be assessed against the following considerations and circumstances:

(i) The CMC exercises extraordinarily wide and intrusive powers. We believe it is inappropriate that the exercise of those powers is to be effectively placed in the hands of two government appointed officials (the new chairman and new chief executive officer) who may be dependent upon the goodwill of the Attorney-General for their continued employment. Under the present Act (CM Act) the powers are vested in a five person commission each of whom is appointed with bipartisan agreement. The commissioners who constitute the commission both give a voice to the wider community within the CMC and are ultimately responsible for the proper exercise of its statutory powers;

(ii) The CMC is an anti-corruption agency[1] which was brought into existence as a legislative response to widespread corruption uncovered by the Fitzgerald Royal Commission. Because the CMC's anti-corruption mandate lies in the investigation of misconduct by public officials, including misconduct by executive government, it is essential that the CMC is independent of the executive it may be required to investigate. It is of critical importance to understand that when it is said the government wants a strong and independent CMC, what is meant by independent is independence *from* executive government. We observe that if the Bill is enacted in its present form it will not be possible for executive government, or anyone else, to credibly claim the CMC (or CCC) is independent of government.

3. Three Major Principles of the CMC Act

The three key principles that are written into the CM Act, and which, we believe, enjoy the support of the community, are:

I. The Independence Principle. The CMC is an independent body that is at arms-length from and operates, as far as possible, independently of the government of the day. So when the Attorney-General says that he wants to see a strong and independent CMC what he means is that he wants a CMC that is independent of executive government. Independence is achieved by those parts of the CM Act which require bi-partisan support for the appointment of the Chairperson and the part time Commissioners, and by:

II. The Accountability-Oversight Principle. The CMC is accountable to Parliament through a bi-partisan committee of Parliament, the PCMC. Conversely, the PCMC has responsibility for oversight of the CMC.

III. The Governance Principle. The five person Commission is responsible for setting the strategic direction of, and for monitoring and assessing the performance of, the CMC.

These three principles are not beyond the reach of parliament's legislative powers; however, when executive-government proposes legislation that affects these principles, then that legislation should be subjected to close and rigorous scrutiny. To the extent that these three fundamental principles are diminished or removed, the CMC will lose the support of the community. And, in the long term, the community's confidence in the integrity of government at all levels, including the political level, will be weakened. The experience of many anti-corruption agencies overseas is that when these guarantees are removed the

[1] With a concurrent jurisdiction to investigate and combat major crime.

agency not only loses its effectiveness, but the door is left ajar for it to be used by an unscrupulous government to harass its political opponents[2].

4. Issue #1: Removing the requirement for bipartisan support. (s. 228(3))

The bill proposes to amend s. 228(3) of the CM Act (2001), which requires "bipartisan support" for the appointment of Commissioners, including the appointment of the Chairperson. Not one of the three recent reviews of the CMC—the Callinan-Aroney Review, the Keelty Review, and the PCMC's Report— nor the Queensland Government's response to those reviews raises, discusses or recommends changes to s. 228 in general, or to the "bipartisan support" requirement of s. 228(3).

In all the discussion, we can find no reference to a problem, deficiency or shortcoming in the current appointment procedure that the proposed amendment is designed to address or remedy. Indeed, we know of no body or person who has explicitly advocated for the abrogation of the requirement for bipartisan agreement or argued the CMC, in performing its functions, should not be independent of executive government. We note that the Attorney-General has said, on behalf of the government, that what the government wants is a strong and independent CMC. We infer this is the fundamental starting position of the government when considering the Bill[3].

The removal of a fundamental provision designed to guarantee, as far as possible, the independence of the CMC will compromise its independence. In the long term, the community's confidence in the integrity of government at all levels— including political levels— will be weakened. The provision removing the requirement that all commissioners (including the Chairperson) must be appointed with the bipartisan support of the Parliamentary Committee (PCMC) therefore is inconsistent with fundamental government policy[4] as it compromises the independence of the CMC.

Recently the Attorney-General is reported to have argued that if it is acceptable to appoint judges without bipartisan support, then it must be acceptable to appoint CMC commissioners without bipartisan support. The validity of the argument is dependent upon the validity of the analogy drawn between judges and CMC commissioners. The analogy however is not valid. Judges' independence flows from the nature of judicial tenure and the constitutional position of the courts in our system of government. Once appointed a judge enjoys life tenure[5] and is not otherwise dependent upon political favour[6]. By way of contrast, a CMC commissioner's independence under the CM Act flows primarily from the process of appointment (that is, the process of bipartisan appointment) and not from the

[2] *Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption?* By John R. Heilbrunn 2004 World Bank Institute.

[3] That is, we infer the words are not merely weasel words hiding an agenda to bring the CMC under the influence of executive government by placing people identified with the government into the key positions of power in the CMC.

[4] We note that currently, on the webpage of the LNP, it is highlighted that on 8 November 2011 following the resignation of Mr Martin Moynihan as Chairperson of the CMC, Mr Bleijie (who was then shadow AG) "called for the appointment process for his replacement to be more bipartisan, open and transparent".

[5] In Queensland until the age of 70 years.

[6] The judge can expect to qualify for a judicial pension for life.

nature of the position. While the position of CMC commissioner is a statutory appointment, unlike a judge a commissioner does not enjoy life tenure as the appointment is normally for 2 or 3 years with an option for extension by the government to an overall total of 5 years. The proposal to extend the tenure of commissioners to a total of 10 years (including the new chairman and new CEO) may tend to increase the dependency on executive government for continuous extensions to his or her appointment.

Mr Needham, in his submission, refers to an argument that the removal of the requirement for bipartisan agreement would "take politics out" of the appointment process[7]. As Mr Needham points out the truth is that so far from "taking politics out "of the appointment process, it would "take politics in" to the appointment process. Or more precisely it would create an opportunity for the government of the day to place people identified with the government into the key positions of power in the CMC[8].

We have had the opportunity of reading the submission from the Bar Association of Queensland. We agree generally with their submissions under the headings *Loss of Independence and Authoritarian Structure, Removing the Safeguards*, and *Authoritarian Structure*.

We note additionally that the removal of the requirement for bipartisan appointments is inconsistent with the declared position of the government that it wants a strong and independent CMC. There is absolutely no doubt that the removal of the safeguard will create an opportunity for the government of the day to place people identified with the government into the key positions of power in the CMC.

"Bi-Partisan Support" Requirement in the Australian States

The proposed amendment to the bi-partisan appointment of CMC commissioners, including the Chairman, is at odds with the legislative requirements for appointing the chief executive of the relevant misconduct / integrity agency in five other Australian states. The table below shows that In the relevant legislation of five of the six states there is an explicit "bi-partisan support" requirement. Only in Tasmania can the Premier make an appointment without satisfying this requirement. (The Tasmanian Integrity Commission is quite different in its size, scale and scope. It has a staff of about 15, including the Commission, whereas Queensland's CMC has a staff of about 300.)

[7] To quote from Mr Needham's submission page 2 "The only attempt at a rationale that I have heard was in a statement by Mr Bleijie in a television interview where he stated words to the effect that the removal would "take politics out" of the appointment process. This statement is either naive or disingenuous." The television interview may be a reference to a radio interview with Steve Austin.

[8] Steve Austin (ABC Radio 612) Interview with Jarrod Bleijie (20 March, 2014) http://blogs.abc.net.au/queensland/2014/03/attorney-general-jarrod-bleijie-and-opposition-leader-annastacia-palaszczuk-on-cmc-reforms.html?site=brisbane&program=612_morning

TABLE: ***Bi-partisan Support Requirement for the Appointment of the Chief Officer ("Chairman", "Commissioner", "Chief Commissioner)***

State	Bi-Partisan Requirement for Appointment	Section
Queensland, (CMC), *Crime and Misconduct Act (2001)*		
	Nominee must receive "bipartisan support of the parliamentary committee".	s. 228(3)
New South Wales, (ICAC), *Independent Commission Against Corruption Act (1988)*		
	Parliamentary committee (Joint Committee) has veto power over Ministerial nominee.	s. 5A, s. 64A
Victoria, (IBAC), *Independent Broad-based Anti-corruption Commission Act (2011)*		
	Parliamentary committee (IBAC Committee) has veto power over Ministerial nominee.	s. 20-21
South Australia, (ICAC), *Independent Commissioner Against Corruption Act (2012)*		
	Parliamentary committee (Statutory Officers Committee) has veto power over Attorney-General's nominee.	s. 8(5)
Western Australian, (CCC), *Corruption and Crime Commission Act (2003)*		
	The Premier's nominee must have the support of the majority of the [Joint] Standing Committee [on the Corruption and Crime Commission] and bipartisan support.	s. 9(3a), (3b), 4(a)
Tasmania, (IC), *Integrity Commission Act (2009)*		
	The Minister is to consult the Joint Standing Committee on Integrity. No bi-partisan support requirement.	s. 15(2)

5. Issue #2: The New Governance Structure in the Bill

There are well established standards of corporate governance for both the private and public sectors. The CMC governance framework draws from accepted standards[9]. In this section of the submission we sketch briefly the CMC's existing governance arrangements, looking closely at the roles and powers of the commission and management. Then we outline the changes to be introduced by the new Bill, before discussing the likely effects brought about by the new arrangements.

The existing governance arrangements

The CM Act generally speaking[10] vests the CMC's powers and functions in the commission (that is, the five-person commission). While the CEO (the Chairperson) is responsible for the administration of the CMC and the performance of its functions (s.251 CM Act) his/her authority is not uncontrolled. "If it were, that would conflict with the principle of proper corporate governance, which requires the extensive executive authority of the CEO be subject to appropriate checks and balances. The CM Act establishes such a check, in that the CEO's authority is exercised 'subject to … the Commission' [s.251(2)]. "[11]

The role of the commission is set out explicitly in the CMC's governance documents[12]. The two key components of its role, like any board of directors, are to give high-level and effective guidance to

[9] In particular from Uhrig, 2003, *Review of the corporate governance of statutory authorities and office holders*, Australian Government, Canberra; Australian Stock Exchange Corporate Governance Council 2003, *Principles of good corporate governance*, ASX, Canberra; and Australian Stock Exchange Corporate Governance Council, 2006, *Review of the principles of good corporate governance*, ASX, Canberra.

[10] Some powers are vested directly in particular officials: for example the power to conduct public hearings is vested in the Chairperson, as is the statutory obligation to notify the Parliamentary Committee of suspected misconduct.

[11] Governance and the CMC, p 7.

[12] The commission's role is to:

- set the strategic direction of the organisation and approve its strategic plan; this includes input into the development by management and final approval of the strategies (and policies to be followed by staff in implementing those strategies) that will best enable the Commission to fulfil its statutory functions and meet its portfolio performance indicators
- oversee and have input into the development by senior management of the CMC's budgetary activities, to ensure those activities reflect the strategic objectives and priorities set by the Commission
- oversee, have input into and approve significant initiatives involving human resources and their allocation
- oversee the development of, and monitor, risk management and business continuity arrangements across the CMC and regularly review the agency's corporate risks and corporate risk register
- monitor management performance and operational results and effectiveness
- establish a system for the appropriate delegation of its powers, and periodically review the continuing utility and effectiveness of these delegations
- establish, as part of its strategic activities, committees of the CMC, to consider committee reports, and periodically review the continuing utility and effectiveness of each committee
- establish a system by which management (and staff) report to the Commission the information necessary to enable the Commission to fulfil its role
- perform its non-delegable statutory duties.

the organisation's activities and to effectively supervise and monitor the performance of management. Those functions imply a separation between management and its overseer and guiding angel (the commission). In the case of the CMC the separation between the five-person commission and high-level management is blurred because the chairperson is both the chair of the board (the commission) and the CEO. This is the issue discussed by the Parliamentary Committee (PCMC) in its report on the Fitzgerald documents, by the commission internally over a longer period of time, and discussed in the commission's governance documents (the Jameson report).

In relation to this last observation it is noteworthy the CMC, as a statutory body exercising extraordinary powers, is subject to additional levels of scrutiny by a state official (the Parliamentary Commissioner) who is armed with statutory powers of investigation, and by the Parliamentary Committee (PCMC).

The governance arrangements in the Bill

The Bill changes the governance arrangements as follows:

(a) The position of Chairperson is split into two statutory positions: the chairman, and the CEO;

(b) Both the new chairman and the new CEO will sit as members of the 5 person commission, the chairman as the chair of the commission, so that the commission will be constituted by two full time members (the new chairman and the new CEO), a part time deputy chairman, and two part time commissioners[13];

(c) By the device of a series of statutory delegations powers and functions vested in the commission by the CM Act are transferred to and divided up between the new chairman and the new CEO[14];

(d) While the chairperson is subject to the commission under the existing arrangements (s. 251 CM Act), the new chairman will not be subject to direction by the commission, and the new CEO will be subject to direction only in respect of the 'administration' of the CMC. The 'administration' does not include the CMC's misconduct (corruption) or crime jurisdictions with the former assistant commissioners of misconduct and crime reporting to the chairman and not the commission[15];

(e) The two statutory positions of assistant commissioner misconduct and assistant commissioner crime are to be replaced by a senior executive misconduct and a senior executive crime respectively, appointed by the CEO pursuant to a statutory delegation of the commission's power, and responsible to the new chairman.

(f) The role of the commission is to be embedded in legislation. The new provision is set out in full below:

> **"251 Role of commission**
>
> (1) The commission is responsible for providing strategic leadership and direction for the performance of the commission's functions, and the exercise of the commission's powers, by the chairman, chief executive officer and commission staff.
>
> (2) The commission is also responsible for—(a) the preparation of the commission's strategic and business plans; and (b) the establishment of internal management committees and their

[13] Clause 34, Crime and Misconduct and Other Legislation Amendment Bill 2014
[14] Clause 58, Crime and Misconduct and Other Legislation Amendment Bill 2014
[15] Clause 47, Crime and Misconduct and Other Legislation Amendment Bill 2014

charters; and (c) the preparation of the internal audit charter prepared for the Financial Accountability Act 2009.

(3) If asked by the chairman, the commission may help the chairman in the performance of the commission's functions or exercise of the commission's powers delegated to the chairman under section 269."

Discussion

The first observation to be made is that the commission will become little more than an empty shell. The core function of any board of supervising and monitoring the performance of management is no part of the commission's role as it is set out in the Bill. Those functions have been substantially stripped from the commission. While it is true the commission retains the legal capacity to give directions to the CEO on 'administration' the statement of the commission's role (new s. 251) does not include any of the functions of supervision or performance management it possesses under the current governance arrangements. Apart from receiving reports from the chairman and CEO, there will be little for the commission to do once the internal governance committees are established. We anticipate that over time the commission will meet less and less frequently and become less and less relevant.

The second observation is that the newly constituted commission would, in any case, struggle to assert itself over management. The circumstances that the number 1 manager (the chairman) will lead the commission as its chair, and the number 2 manager (the CEO) will also sit on the commission, make it difficult to see how the remaining 3 part time members would be able to hold the chairman and CEO to account, even if those functions were any part of the commission's role. From what we can see the three part-time commissioners will dance to the tune played by the government's hand-picked choir (the new chairman and CEO). Indeed they may be happy to dance as all five will be the government's choices.

We have not attempted to identify all the issues associated with the new governance arrangements in the Bill. In the submission by the Bar Association for example, the opinion is expressed that the new CEO should not be a voting member of the commission. While we do not disagree with the idea of separating out the governance aspects of the chairperson's responsibilities and placing them with a "CEO", the government should have no role in the employment or supervision of the "CEO" as those are responsibilities which logically rest with the commission.

Our objection to the new governance arrangements proposed in the Bill is twofold. Firstly, the arrangements do not meet accepted standards of governance for either corporate or public bodies. The task of effectively supervising and monitoring the performance of management is a core function of any board[16], and the failure to provide for any mechanism for those functions sets in place a totally ineffective system of governance.

Secondly, the report of the PCMC on an *Inquiry into the CMC's release and destruction of Fitzgerald Inquiry documents* recommended (Recommendation 19) that the CM Act be amended "to cause structural separation of the role of Chairperson and CEO" adding that the new CEO should report directly to the commission ("the board"). The rationale for the proposed creation of a CEO is the insight that appointees as chairperson, while otherwise distinguished, may be unlikely to possess a

[16] Uhrig, 2003, *Review of the corporate governance of statutory authorities and office holders*, Australian Government, Canberra; Australian Stock Exchange Corporate Governance Council 2003, *Principles of good corporate governance*, ASX, Canberra; and Australian Stock Exchange Corporate Governance Council, 2006, *Review of the principles of good corporate governance*, ASX, Canberra.

background in corporate management and may possess little experience in managing a complex organisation like the CMC. An additional rationale is that if the commission is to discharge the core governance function of holding management accountable for its performance it is logical to attempt to separate, as far as possible, management from its oversight committee (that is, the commission). In fact, by what amounts to little more than a slight of hand the intent of Recommendation 19 of the Parliamentary Committee (PCMC) is entirely subverted by the governance scheme in the Bill.

As we have pointed out the implementation panel had no mandate from either the Callinan-Aroney recommendations or the report of the Parliamentary Committee (PCMC) on an *Inquiry into the CMC's release and destruction of Fitzgerald Inquiry documents* to introduce the changes in the governance of the CMC. And no coherent explanation has been given for the decisions to remove the requirement for bipartisan agreement for appointments to the commission (including the chairman) and to disable the commission from carrying out a full range of governance functions.

6. Issue #3: Downgrading the CMC's remit to pursue corruption

The CMC is the combination of an anti-corruption agency and a crime commission with the twin mandate of combatting public sector misconduct and major crime[17]. The Bill relegates the anti-corruption functions to secondary importance. Clause 6 of the Bill amends the CM Act by inserting as the purposes of the Act "*The primary purpose of this Act is to combat and reduce the incidence of major crime"* and "*The secondary purpose of this Act is to reduce the incidence of corruption in the public sector".*

The decision to downgrade the identification and investigation of public corruption as a priority for the CMC is a political decision that at least provides a rationale for a series of other changes that otherwise appear to make no sense[18] .

The underlying drive to curtail the capacity of the CMC to identify and investigate public sector corruption ignores Queensland own past corruption[19] and the levels of public sector corruption in Australia[20]. We are apprehensive the government has placed a view of its own self-interest above the public interest.

7. Conclusions

In the time allowed for response we have concentrated on the governance arrangements in the Bill. While we agree with criticisms of other aspects of the Bill (for example, we, in common with other respondents, do not agree the Attorney-General should control the CMC research program), we have not attempted to discuss other aspects of the Bill.

Executive government in Queensland, through its control of Parliament, exercises great power. Power however should be exercised wisely. We do not believe it would be a wise exercise of legislative power to bring the independence of the CMC to an end, and to create, by legislative change, the opportunity for executive government to place its own people at the head of the CMC.

[17] Section 4 CM Act

[18] For example, the requirement of a statutory declaration as a necessary part of a complaint, and the power given to the new CEO to issue directions to investigators about the corruption function (the new 35A).

[19] To quote from Math

[20] Witnessed by the continuing ICAC corruption hearings in NSW.

The changed governance arrangements are not consistent with accepted standards of governance in either the corporate or private sectors, and appear to be more calculated to entrench the position of the hand-picked government officials in charge of the CMC than to provide good governance.

In downgrading the CMC's mandate to identify and investigate public sector corruption our fear is that the government has placed its own self-interest in avoiding scrutiny above the public interest.
