Griffith UNIVERSITY

Centre for Governance and Public Policy
Griffith University
Nathan Queensland 4111
Australia
Telephone +61 (0)414 782 331

www.griffith.edu.au
Email *A.J.Brown@griffith.edu.au*

14 April 2014

Crime & Misconduct & OLAB 2014
Submission 034

The Secretary
Legal Affairs and Community Safety Committee
Legislative Assembly of Queensland
Parliament House
BRISBANE QLD 4000

Dear Secretary

Inquiry into Crime and Misconduct and Other Legislation Amendment Bill 2014

Thankyou for the opportunity to make a submission to your inquiry into the above legislation.

Summary

There is scope for reform of the Crime & Misconduct Commission (CMC) and its enabling legislation to support a stronger and more efficient Queensland public integrity system.

However, the Bill as proposed contains several defects and retrograde steps that – if passed as a whole – will not achieve that objective. Instead, the Bill as proposed would take Queensland a considerable distance in reverse of the Premier's stated objective of setting the highest standards of integrity, accountability and transparency within the Queensland public sector.

As a result, the Legislative Assembly should not pass the Bill in its current form.

The defects in the Bill appear to have resulted, at least in part, from a **flawed policy development process**, in which the main report on which the amendments are based (the report of the Implementation Panel) is not even publicly available. This underscores the lack of confidence that the people of Queensland can have in the Bill as proposed.

Recommendations regarding the clauses of the Bill that should not be proceeded with, or only proceeded with an altered form, are provided below, dealing with:

1. Inappropriate and unnecessary downgrading of **the anti-corruption purpose** of the Crime & Corruption Commission (as proposed) (clause 6 / s 4)

2. Unnecessarily restrictive narrowing of the **definition of 'corrupt conduct'** to which the Act would apply (clauses 9 & 14 / ss 15 & 35)

3. Proposed unworkable requirement for some/all (?) information regarding corrupt conduct to be accompanied by **a statutory declaration** (clause 16 / s 36)

4. Insertion of unworkable and inappropriate **disincentives to reporting** of suspected corrupt conduct, which will undermine and render otiose important sections of the State's public interest whistleblowing regime under the *Public Interest Disclosure Act 2010 (Qld)* (clauses 19 & 29 / ss 46 and 216A)

5. Unnecessary over-reaction in the extent to which the Commission is restrained from engaging in **corruption prevention** (clauses 10 & 11 / ss 23 & 24)
6. Unnecessary, inappropriate and unworkable fettering of the Commission's discretion to direct its **research efforts** consistently with its functions (clause 21 / s 52)
7. Unnecessary removal of measures promoting **bipartisan support** and appropriate **qualifications** for the appointment of Commissioners (clauses 36 & 38 / ss 225, 228, 230).

It is vital to public confidence in public integrity institutions that they be seen, as much as possible, as being **above short-term party politics and partisan political interests**. While this should not and need not insulate such institutions from reform, it means that significant reform should only occur based on an effective policy process, supported by broad community understanding and acceptance, and maximum bipartisan or multi-party political support.

This was the history of the original reforms emanating from the Fitzgerald Inquiry (1987-1989).

It will be a retrograde step, doing lasting damage to the political fabric and reputation of Queensland, if the Legislative Assembly proceeds to pass the Bill in its present form without these requirements being satisfied. Members of the Legislative Assembly should be mindful of the consequences if this Bill is driven through the Parliament without reasonable bipartisan support, given that it is likely to result in the quality of the CMC/CCC's enabling legislation becoming a partisan-political football at successive elections for many years to come.

In particular, such a course will be likely to result in the current Government:

- giving itself a lasting reputation as being 'anti-accountability' – irrespective of reality; and
- giving the current Opposition an undesirable licence to claim itself to be a party of superior commitment to public accountability – again irrespective of reality

all in a manner which will be counterproductive to the healthy governance of Queensland.

It is suggested that all members of the Committee, the Government and the Parliament should bear these likelihoods in mind as they consider the serious degree of improvement needed to this Bill before passage should be considered.

In conclusion, some of my relevant qualifications and experience are also provided.

I trust these submissions will assist the Committee.

Yours sincerely

A J Brown
Professor of Public Policy and Law
Program leader, Public integrity and anti-corruption
Centre for Governance & Public Policy

ATT.

Inquiry into Crime and Misconduct and Other Legislation Amendment Bill 2014
Submissions – Professor A J Brown

A. Flawed policy development process

In my submission, the people of Queensland cannot have confidence in the Bill as proposed, not only because of the defects detailed below, but because these defects appear to have resulted, at least in part, from a flawed policy development process. In particular, the main report on which the amendments are based (the report of the **Implementation Panel**) is not publicly available. This is significant because:

- The Explanatory Notes to the Bill claim that the amendments represent 'implementation of the accepted recommendations' of the **Review Panel** (Mr Callinan and Professor Aroney) as well as the relevant Parliamentary Crime & Misconduct Committee (PCMC) report – but on key issues (see especially 1 and 2 below) this is simply not the case, as the proposed amendments either depart from or go significantly beyond the recommendations of the Review Panel (or the PCMC report);
- Neither the Explanatory Notes nor any known statements of the Government to the Parliament, to date, explain the purpose of these particular amendments;
- The apparent basis of these amendments lies in the report(s) of the **Implementation Panel** – consisting of the Director-General, Department of Justice and Attorney-General (Chair); Director-General, Department of the Premier and Cabinet; Commission Chief Executive, Public Service Commission; and Acting Chairperson, CMC – which according to the Explanatory Notes 'has met on a regular basis and provided reports to the Premier and the Attorney-General and Minister for Justice', including advice on these amendments.

In response to a request for the relevant report(s) that may explain these amendments, the Department of Premier & Cabinet has advised (11 April 2014) that 'the work undertaken by the CMC Implementation Panel was for the purpose of advising Cabinet, and documents resulting from this process have the usual Cabinet confidentiality requirements attached to them'.

The unavailability of the Implementation Panel report(s) makes it difficult to comment in a fully informed way on the Bill, because some of its true purposes remain unknown or unclear. This is not only because some amendments go beyond the Review Panel's report, but because the nature of the process followed by the Government makes it difficult for the people of Queensland to understand the relationship between these amendments and the Government's stated policy purposes with respect to the Crime & Misconduct Commission:

- While the Review Panel was ostensibly appointed to review the *Crime and Misconduct Act 2001,* its report (somewhat inconsistently with its terms of reference) suggests that the Government's true purpose and expectation of the Panel was not a review of whether the legislation was serving its intended purposes, but a wholescale review of the role, powers and operations of the Crime & Misconduct Commission;
- This was confirmed when the Panel reported, as many of the opinions reached and recommendations made bore **little direct relationship with the terms of reference**, and included a wide range of policy and operational issues that the public could not have anticipated would be dealt with by the Review, from the original terms of reference;
- In apparent recognition of this, the Review Panel recommended (Recommendation 17) that a further implementation panel be appointed, including relevant **independent** experts with broader non-public service expertise, to address these policy and operational issues – but the Government rejected this recommendation, and instead appointed the above panel

comprised entirely of Government appointees, chaired by the Director-General of the Department of Justice and Attorney-General;

- While the Government did seek formal advice from one independent expert (**Mr Mick Keelty**, 19 November 2013), this advice did not touch further on the policy issues reflected in, nor provide a basis for, the key amendments referred to below;
- Contrary to the Government's statements that it is implementing the recommendations of the Review Panel, the Government Response to the Panel (4 July 2013) in fact only clearly accepted 9 of the Panel's 22 recommendations (recommendations 1, 2, 3A, 3C, 3E, 4, 11, 12 and 16) – and some of these 9 recommendations, as detailed below, are **not implemented** by these amendments, but rather are inconsistent with them.

  (While only one recommendation (13) was explicitly not agreed to, six further recommendations (5, 6, 7, 9, 10, 14) were only noted or classed as relating to other processes, and six recommendations which were notionally accepted (3B, 3D, 3F, 8, 15 and 17) were accepted with major qualifications suggesting that the Government disagreed with one or more fundamental precepts of the recommendation, and intended to seek a different solution independently of the Review Panel's opinion.)

The consequence is that on several key issues, these amendments have **no clear relationship** with either the original terms of reference of the Review Panel, nor its subsequent report (nor that of the PCMC).

This is further emphasised by the fact that the most prominent issue which gave rise to the establishment of the Review Panel – the adequacy of provisions governing **when and how the making of a complaint to the CMC should be publicly revealed or confirmed** – does not appear to be even dealt with **at all** by these amendments:

- This issue was triggered by publicity surrounding complaints regarding the now Premier, in the context of the last State election campaign, which were not then substantiated;
- It was dealt with in detail by the Review Panel (pp.82-113, 216-217, recommendation 8), not only in respect of that example but wider considerations; but
- Contrary to its supposed acceptance by the Government Response (p.29), this recommendation does not now appear to have **any reflection** anywhere in the proposed amendments, without any indication from the Explanatory Notes or other known statements of the Government as to why not.

In my submission, neither the Review Panel's recommendation 8 nor the Government Response proposed an adequate solution to this issue – which means that if or when the Parliament does propose to deal with it, further consultation on any amendment should still be undertaken.

More broadly, the degree of policy 'drift' between the original purposes of the review, its report, the Government's ambiguous responses, and these amendments, makes it difficult to be confident that the true purposes of all major amendments have been disclosed to the public or the Parliament – especially in the absence of the Implementation Panel's report. Having worked within the Queensland Government for 13 months during the first Beattie administration, as well as other levels of government over the last 21 years, I have seen policy development and law reform processes of varying degrees of competence at close range. In my experience, any side of politics is capable of departing from good standards of policy development and law reform, but this particular process is one of the most confused and disturbing I have ever observed.

Nevertheless, it is hoped that the Committee may now be able to restore some clarity and confidence to this process. The following submissions are made in the hope they may assist.

B. Submissions and recommendations

1. Inappropriate and unnecessary downgrading of the *anti-corruption purpose* of the Crime & Corruption Commission (as proposed) (clause 6 / section 4)

Clause 6 of the Bill proposes to make it the 'primary purpose' of the Act to combat and reduce the incidence of major crime, with the anti-corruption purpose ('to reduce the incidence of corruption in the public sector') explicitly reduced to a '**secondary purpose**', behind the anti-crime purpose. This amendment would in effect make the Commission a crime commission, tasked also with a secondary purpose of anti-corruption functions. This represents a major policy departure which is unique in Australia, carrying significant dangers, the reasons and implications of which have not been publicly debated.

The Review Panel noted the competing considerations governing whether these functions should even be retained in the same body. Prominent among these is the inherent difficulty of an anti-corruption body being able to independently oversight the exercise of its own increasingly powerful anti-crime functions, in circumstances where these become a prime target for corruption. Such high level corruption has been proven to occur, not only in theory but practice, in the NSW Crime Commission. It should be remembered that the Borbidge National-Liberal Government separated these functions into two Commissions, for these among other reasons. No other Australian jurisdiction has combined these functions (Western Australia's Corruption and Crime Commission ostensibly does so, having been the only jurisdiction to follow Queensland's 2001 re-merger, but as noted by the Review Panel (p.69) its crime function is 'supervisory not executive'.)

While the Review Panel did not resolve this question, it suggested that the operational and administrative review of the CMC should look first and foremost towards '**the possible division of its functions between two bodies if that is administratively justifiable, likely to save expense and can be done without in any way compromising the important core functions which the CMC now has**' (Recommendation 1). In no way did it support a model in which the State's primary anti-corruption institution has its functions reassigned to, or subsumed within, what will fundamentally become a Crime Commission.

The Review Panel's recommendations for ensuring a rebalancing of the CMC's priorities for maximum public benefit were instead concerned with ensuring that it focused its resources on more serious official misconduct and corruption matters and risks, rather than having these consumed by an allegedly inefficient complaint-handling bureaucracy. This objective is more than satisfied by other amendments below, as well as the other administrative reforms already being pursued by the Commission.

Recommendation 1a. **That clause 6 not be proceeded with; or alternatively, reversed to make clear what the people of Queensland logically expect, which is that the specific anti-corruption purpose of the Act is its primary purpose – not its anti-crime purpose.**

Recommendation 1b. **That if the anti-crime purpose is retained, the title of the Act and the Commission be reversed to create the 'Corruption & Crime Commission'.**

Recommendation 1c. **That the Committee recommend that before any amendments are presented which would reprioritise functions in the manner of clause 6, a full public review be completed, by appropriately qualified including independent persons, regarding the risks and merits of retaining major crime investigation functions within the Corruption & Crime Commission or transferring these either to the Queensland Police Service (as in Victoria and elsewhere) or a small independent Crime Commission (as in NSW and elsewhere).**

2. Unnecessarily restrictive narrowing of the *definition of 'corrupt conduct'* to which the Act would apply (clauses 9 & 14 / sections 15 & 35)

The Review Panel recommended a rationalisation of the definition of '**official misconduct**' to raise its threshold, in order to help reduce the number of less serious misconduct matters attracting disproportionate attention and resources under the present Act.

The amendments go beyond this in restricting the coverage of the Act to '**corrupt conduct**'.

The replacement term 'corrupt conduct' does not, of itself, necessarily represent a narrowing of the scope of conduct, because the existing definition of 'official misconduct' already corresponds with a reasonable administrative definition of 'corrupt conduct' (for example, it already matches and is slightly more restrictive than the definition of 'corrupt conduct' under ss.8 and 9, *Independent Commission Against Corruption Act 1998* (NSW). To the extent that it helps communicate that less serious official misconduct matters should and will be managed as such within a more streamlined integrity system, the change of term does have potential to contribute to the objective identified by the Review Panel.

Apart from simplification of drafting and the addition of examples of corrupt conduct (also in the manner of the NSW definition), clauses 9 and 14 nevertheless propose three substantive changes which narrow the definition and its application:

1) Proposed paragraph 15 (d) narrows the definition to apply to conduct that '**would, if proved**' constitute a criminal offence or terminable disciplinary offence, rather than the present '**could, if proved**'.

   (It should be noted that the Explanatory Notes to the Bill currently incorrectly state this proposed amendment **in reverse** of its actual effect (see p.4). Such a basic error further undermines confidence that the purposes of the amendments are being adequately understood and explained, even within the Government.)

   The amendment is in fact unnecessary, as the term 'could' remains the one already used in the other equivalent definitions (e.g. in NSW and Western Australia), and the existing definition is already narrower (e.g. in NSW, the defined conduct may amount to *any* disciplinary offence, not only conduct amounting to a disciplinary offence which justifies *termination*). Nevertheless, if the Parliament considers it important to make some substantive change to the definition in order to achieve the symbolic objective noted above, then this change is at least supported by the report of the Review Panel.

2) Proposed paragraph 15 (c) inserts an **entirely new restriction** into the definition, requiring that to amount to corrupt conduct, the conduct must be:

   > **'engaged in for the purpose of providing a benefit to the person** [who commits it] **or another person or causing a detriment to another person'**

   This new element was **not** canvassed or recommended by the Review Panel. Nor are the reasons for its inclusion discussed in the Explanatory Notes. Nor does it have direct precedent in the equivalent definitions in NSW or WA. In the absence of the Implementation Panel's report(s), its purpose can only be guessed at.

   Whatever the intent, this additional element goes beyond the recommendations of the Review Panel, and in practice, is likely to raise a range of difficult legal questions which not only further narrow the range of conduct that can be captured, but are likely to provoke difficult and costly litigation over the jurisdiction of those conducting investigations under the Act. This is because it incorporates a criminal-style

requirement for particular types and levels of "intent", without making clear the particular type or level of intent required (since the language used is 'for the purpose').

The inclusion of this additional restriction should therefore be of great concern to the Parliament. This change increases the investigative and evidentiary burden on the CMC/CCC and others administering the Act, in a substantive way that goes beyond the Review Panel's objective of refocussing administrative and investigative resources away from less serious complaints. In the absence of justification, the people of Queensland might reasonably suspect that the Government is intending that a range of persons whose conduct would otherwise be captured by definitions of official misconduct or corrupt conduct, should be able to escape investigation under the Act, if the State is unable to show either at point of complaint, or at conclusion of investigation, that the conduct was engaged in for those purposes even when it is deliberate and has the other corrupting effects identified by section 15.

3) Proposed sub-section 35(3) (clause 14(5) of the Bill) narrows the application of the Act by requiring:

   (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.

   This amendment is consistent with the recommendations of the Review Panel, but gives effect to them in a way that similarly – but unnecessarily – raises difficult legal questions by further narrowing the range of conduct and potentially provoking costly litigation over the jurisdiction of those conducting investigations under the Act. For example, the amendment is likely to provide grounds for persons to seek to escape investigation or action under the Act by asserting that their 'case' does not amount to a 'more serious' case, nor a 'systemic' case, relative perhaps to other cases, sufficient to attract the 'focus' of the Commission; and thus that the Commission lacked jurisdiction to conduct particular investigations or make particular findings.

Recommendation 2a. **That paragraph 15(c) as proposed in clause 9 not be proceeded with; or alternatively, that it be reworded to include additional words which avoid implications of additional evidentiary burdens, for example:**

> **'is engaged in for the purpose, *or could reasonably be seen as having or as likely to have the effect*, of providing a benefit to the person or another person; or *of* causing a detriment to another person *or to public confidence in one or more units of public administration*'.**

Recommendation 2b. **That sub-section 35(3) as proposed in clause 14 only be proceeded with subject to altered wording that appropriately gives effect to its purpose, and not other unintended or unstated purposes, for example:**

> **(3) Without limiting the matters with which the commission may deal, in performing its corruption function the commission must assess the seriousness of any complaint about, or information or matter involving, corrupt conduct, including by having regard to whether it discloses possible systemic corrupt conduct in one or more units of public administration; and must give priority to those complaints, information or matters that it deems most serious.**

3. Proposed absurd and unworkable requirement for some/all (?) information regarding corrupt conduct to be accompanied by *a statutory declaration* (clause 16 / section 36)

If amended as proposed, section 36 of the Act will read (new words italicised):

(1) A person may complain about, or give information or matter involving, ***corruption*** to the commission.

(2) Subsection (1) does not limit to whom a person can complain about **misconduct**.

Examples—

1 A person may complain directly to the commissioner of police about misconduct.

2 A person may complain directly to the chief executive of a government department about misconduct happening within the department.

*(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*

*(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).*

This amendment threatens to make much of the Act unworkable, and should not be proceeded with. It should also be noted that there is **no disadvantage** to the Government's stated objectives in not proceeding, because its other amendments and administrative reforms are already more than sufficient to support the goal of simplifying and redistributing the misconduct complaint loads generated under the Act.

The statutory declaration proposed above is qualitatively different to the one recommended by the Review Panel (recommendation 3B). That recommendation was for a declaration as a deterrent to 'baseless' complaints, and as a vehicle for extracting undertakings of confidentiality, with the expected collateral effect of reducing the number of complaints (hopefully, the frivolous and vexatious, as opposed to legitimate complaints). The Government Response, despite indicating 'acceptance' of this recommendation, also indicated a lack of confidence that the recommendation would have its desired effect; and foreshadowed an 'alternative' change to simply expand the CMC's 'discretion to decide when it may take no action, discontinue action or dismiss a complaint'.

However, rather than entailing any such alternative change, the declaration proposed by sub-section 36(3) represents an even more unworkable requirement than that recommended, and one likely to jeopardise the effective operation of the Act – for at least six reasons:

- The required content, consequences or purpose of the declaration is **entirely undefined**, leaving it unclear as to what would represent a sufficient or satisfactory declaration under the sub-section;

- Proposed sub-section 36(4) has the effect of **negating** any clear value in the proposed change, since it means that a statutory declaration is only required in respect of a '**complaint**' about corruption, but does not otherwise apply to a person '**giving information or matter'** involving corruption to the Commission;

- Any distinctions between 'complaints', 'information' or other 'matter' are otherwise left undefined by the Act, making it further unclear when the requirement for a statutory declaration **would or would not be triggered**, and carrying a clear risk – if not likelihood – of inconsistency or capriciousness in the differential ways in which this requirement could be applied from case to case;

- This lack of clarity is compounded by the confusion entailed in the fact that **at least 8 other relevant sections** of the Act are worded so as to indicate that in most areas of the Act's operationalization, all three of these terms ('complaint', 'information' and 'matter') are to be interpreted as subsumed within the generic term '**complaint**' (ss. 38(3); 42(1); 44(2); 46(1); 47(4); 48(4); 48A(4); 216A).

  These many instances in which 'complaint' is defined to **include** 'information or matter' confuse, if not negate, the value of any distinction between these things within section 36, because as a question of statutory interpretation it is arguable, if not likely, that key obligations under the Act will still only be triggered if a statutory declaration is made even in respect of mere 'information'. Without substantial clarifying amendments throughout the Act, it is likely to be impossible to administer or sensibly interpret on this issue. With such clarifying amendments, however, the Act would also only be likely to become even more convoluted and bureaucratic to administer than at present, defeating many of the objectives of the Review;

- The proviso that the Commission may waive the requirement for a statutory declaration in 'exceptional circumstances' does nothing to increase the workability of the provision. Rather, it further **complicates the task** of Commission officers who receive and assess information regarding suspected corrupt conduct, since it is unclear whether or when this discretion itself would be triggered (for example, whether it would be triggered in respect of information that appears to represent a 'complaint', which is not already made by way of statutory declaration; or whether it is triggered by any information or approach which *could* constitute a complaint, which is then unlikely to be formally made unless the requirement is waived);

- The first example of proposed 'exceptional circumstances' in which the declaration requirement may be waived, that of a person who '**fears retaliation for making the complaint**', does nothing to assist with the resolution of these issues, especially because it is not clear why a person's fear of retaliation is relevant to whatever purposes are intended to be served by the declaration in the first place.

  All existing research and policy knowledge regarding the making of complaints, especially by internal sources (i.e. whistleblowers), indicates that a procedural requirement such as a statutory declaration *itself* acts as a deterrent to the provision of valid information and the making of valid complaints, by:

  - Directly raising the fear in the mind of the source that they will be subject to prosecution for having sworn a false or misleading statement, or other formal retaliatory action, in the event that *any* aspect of the information they provide proves to be incorrect or is not able to be substantiated;
  - Requiring the source to identify themselves in a very formal way (indeed, by their own signature) which, in the mind of the average person, runs counter to any undertakings of confidentiality or discretion that are typically central to the confidence of high quality complainants to reveal information; as well as running counter to other statutory settings, such as the provision in sub-s.17(1) of the *Public Interest Disclosure Act 2010* (Qld) that a person may make a disclosure to a proper authority 'in any way, including anonymously'.

> As a result, the example proposed by the amendment tends to confirm – without making clear – that the intention of the declaration is to **enable** such prosecutions or other formal retaliatory action to be taken, since this is the apprehended risk which appears to be removed by the waiver. In other words, the example serves to defeat its own purpose, by undermining confidence that public officials or others can provide information safely **as a matter of course**, rather than in exceptional circumstances.

If there was need for such additional disincentives to the reporting of suspected corrupt conduct, beyond the tightening of the thresholds noted earlier and the other administrative and operational reforms being implemented by the Government and Commission, then I would propose an alternative solution. However, there is not. The requirement as proposed is not only absurdly unworkable, but simply unnecessary to achieve any known, legitimate policy purpose, including any identified by the Review Panel.

Recommendation 3a. **That sub-clause 16(2) of the Bill, i.e. the insertion of proposed sub-sections 36(3) and 36(4), not be proceeded with.**

The amendments are also inappropriate for the further reason that although the term 'misconduct' is updated to 'corruption' in sub-section 36(1), this does not occur in sub-section (2), where the term 'misconduct' remains. Unless this is an oversight, the effect of the amendments is to suggest that corrupt conduct may only be disclosed directly to the Commission, and may not – unlike other forms of misconduct – be disclosed to other persons such as internally within a unit of public administration.

The failure to similarly update sub-section 2 is not explained in the Explanatory Notes. If deliberate, then this failure also represents an inappropriate, unworkable and retrograde constraint on the disclosure of suspected corrupt conduct, since all research into whistleblowing confirms that for a range of reasons, most public officials will only report concerns of this kind within their own agency to managers that they know, and will not go outside, even to the CMC/CCC – even when their concerns are valid and serious.

Recommendation 3b. **That sub-section 36(2) of the Act be amended similarly to sub-section 1, to replace the term 'misconduct' with 'corruption'.**

4. Insertion of unworkable and inappropriate *disincentives to reporting* of suspected corrupt conduct, which will undermine and render otiose important sections of the State's whistleblowing regime under the *Public Interest Disclosure Act 2010* (Qld) (clauses 19 & 29 / sections 46 and 216A)

The Government has stated publicly that its reforms to the Crime and Misconduct Commission are intended to set the highest standards of integrity, accountability and transparency within the Queensland public sector – including by maintaining the ability of honest Queensland public officials to reveal any reasonable concerns about possible corrupt conduct, and receive the responses and protections guaranteed under the *Public Interest Disclosure Act 2010* (Qld) (formerly the *Whistleblower Protection Act 1994* (Qld).

The Liberal National Party also has a proud track record of helping ensure that Queensland's whistleblowing regime is as strong as it is, having proposed important expansions of the regime since as early as 2006, leading directly to its reform under the *Public Interest Disclosure Act 2010* – which the then Opposition wholeheartedly supported. Consequently only minimal, mechanical amendments are **directly** proposed to the *Public Interest Disclosure Act 2010* (Qld). Members of the Review Panel have also stated publicly that

their recommendations were not intended to adversely restricted or affected the State's whistleblower protection regime.

Unfortunately, the legal effect of the proposed amendments is to **severely, and adversely, affect the operation of the State's whistleblowing regime** by changing the basis of the circumstances in which information about corrupt conduct can receive effective protection under the *Public Interest Disclosure Act 2010.* The amendments appear to have been drafted without detailed appreciation of these consequences. They impact adversely on the whistleblowing scheme in three major ways:

i) Altered thresholds for protection

Sub-section 13(3) of the *Public Interest Disclosure Act 2010*, and other equivalent sections, means that a public officer who has and discloses information about corrupt conduct will be protected (including from criminal and other liability, other than in respect of their own wrongdoing) if:

(a) the officer 'honestly believes on reasonable grounds that the information tends to show' corrupt conduct; or

(b) 'the information tends to show' corrupt conduct, regardless of whether the person honestly believes the information tends to show the conduct.

However, under the present Bill (clause 29 inserting s. 216A, 'Other improper complaints'), a public officer will become liable for criminal prosecution under a range of highly subjective circumstances which are inconsistent with the above threshold, including where the complaint is:

i. 'not made in good faith'; or
ii. 'made primarily for a mischievous purpose'; or
iii. 'made recklessly or maliciously'.

These are inappropriate and unworkable grounds for imposing criminal liability. They have been debated over many years and consistently discarded as workable tests for whistleblower protection – in preference to the basic standard above, which is now that adopted in most relevant State and federal legislation, supported by basic rules against the provision of false or misleading information or the pursuit of vexatious complaints.

The proposed grounds for criminal prosecution are especially unworkable because it is routine for honest and reasonable concerns about corrupt conduct to be disclosed in circumstances where powerful persons affected by an investigation are well placed to assert that a complaint is 'primarily mischievous', has been made 'recklessly' or contains some element of 'malice'. In some cases, any of these things may in fact be true, to some degree – for example, corrupt conduct is often revealed only after personal or management conflicts arise which can easily see a complainant identified as motivated in part by 'malice' (i.e. an intent to harm the interests of the person validly suspected of corrupt conduct).

It is also notoriously common, and easy, for these claims to be raised against honest and reasonable disclosures, irrespective of the reality. As a result, the creation of offences containing such unnecessarily emotive and subjective grounds is itself sufficient to persuade many officials that it is never worth the risk to make such a disclosure – given the apparent likelihood that they will not only remain unprotected, but may well be prosecuted on the grounds that they are, in effect, no more than a troublemaker.

For similar reasons, a 'good faith' test has been routinely rejected, and is in the process of being removed from most legislation intended to ensure the disclosure of such wrongdoing. The most recent step in this direction was taken in 2013 by the United Kingdom's Cameron

(Conservative) Government, which removed the 'good faith' requirement for the making of protected disclosures under the *Public Interest Disclosure Act 1998* (UK) in favour of a clearer public interest test, and instead reducing the issue of good faith to one factor bearing on the quantum of damages in the event that a whistleblower demonstrates reprisal (see ss. 49(6A) and 123(6A), *Employment Relations Act 1996* (UK)).

The present amendment has its origin in the Review Panel's recommendation for measures to 'enable and ensure' the prosecution of those who make 'baseless complaints', including complaints that are 'malicious, vexatious, reckless or exclusively vindictive' (Recommendation 3D). The objective was to help reduce the number of less serious misconduct matters attracting disproportionate attention and resources under the present Act, help protect against misuse of the Act, and address some of the political circumstances that gave rise to the Review.

However, the Government Response to this recommendation was highly qualified, indicating it was indeed unworkable in those imprecise terms. Indeed, the Government indicated that an 'alternative' solution was to reduce the impact of unworthy complaints by strengthening the discretions of the Commission to not take action in response (see ***ii*** below).

As well as now pursuing both courses, the amendments proposed do not even match the underlying message of the recommendation, which is that complaints should be actively discouraged which are 'exclusively vindictive'. If *exclusively* vindictive, with no other purpose or substantive merit, then such a complaint in fact meets the legal definition of 'vexatious' – which is then enough of a basis for dealing with such a complaint, without the need for the additional grounds for prosecution above.

As the Review Panel and the Government Response also make clear, the real issue is not whether existing legal provisions are enough to arm the Commission to reduce the incidence of vexatious complaints, but whether it is taking the correct administrative approach to how it assesses and screens matters, how it explains its decisions to informants, and whether it is prepared to take action in the event of genuinely vexatious complaints. Given that this is the real issue, which is already being dealt with by administrative changes and supported by other amendments, the creation of these additional grounds for prosecution are simply unnecessary, and as such, represent counter-productive overkill.

ii) Altered, inappropriate and unnecessary discretions for when investigation not required

Sub-section 30(1) of the *Public Interest Disclosure Act 2010* provides basic principles for when a public sector entity may decide not to investigate or deal with a public interest disclosure, including disclosures relating to corrupt conduct. While these do not override more specific investigative obligations in legislation such as the *Crime and Misconduct Act*, they provide the baseline approach for ensuring that matters are appropriately dealt with, and are not seen as likely to be ignored or swept under the carpet, where inconvenient.

These principles are important because all research indicates that the conviction of public officials that action will be taken, if they disclose their honest and reasonable concerns, is the single most important factor determining whether they will be prepared to do so.

However, under the present Bill (sub-clause 19(3) amending par. 46(2)(g)(i) 'Dealing with complaints'), the Commission will be empowered to take no action or discontinue action where satisfied of the same matters identified above, i.e. that a complaint is:

i. 'not made in good faith'; or
ii. 'made primarily for a mischievous purpose'; or
iii. 'made recklessly or maliciously'.

It should be noted that under the same section, the Commission is **already** empowered to take no action or discontinue action, whenever satisfied that a complaint is 'frivolous or vexatious', or 'lacks substance or credibility'. Sub-clause 19(4) of the Bill **also** proposes to significantly strengthen the Commission's discretions not to investigate, by amending paragraphs 46(2)(g)(ii) and (iii) of the Act so that action need not be taken or may be discontinued where (insertions italicised):

(ii) dealing with the complaint—

(A) *would not be in the public interest*; or

(B) would be an unjustifiable use of resources; or

(iii) the subject matter of the complaint—

(A) is not within the commission's functions; or

(B) has been dealt with by another entity; ....

In my submission, the existing provisions combined with the significant strengthening provided by sub-clause 19(4) are more than enough to empower the Commission to manage and repel unworthy matters, in a manner consistent with the *Public Interest Disclosure Act 2010.* For the same reasons spelt out above, anything else, especially the highly subjective and unworkable discretions proposed to be inserted in par. 46(2)(g)(i) by sub-clause 19(3), again simply represent counter-productive overkill, undermining the operation of the State's existing whistleblowing regime.

iii) Reduced scope of conduct guaranteed protection

Finally, it should be noted that any narrowing of the definition of corrupt conduct under the Act, discussed previously, impacts on the range of conduct which public officials may report and receive protection in relation to, under s.13(1) of the *Public Interest Disclosure Act.*

This is because a range of matters may be captured under the present definition of 'official misconduct', which it is in the public interest to encourage officials to report, but which would no longer be covered by the definition of corrupt conduct contained in par. 13(1)(a)(i) of the *Public Interest Disclosure Act* (as proposed to be amended). Such matters may still amount to future reportable misconduct under the *Public Service Act 2008,* but unless s.13 of the *Public Interest Disclosure Act* is extended to include some or all types of Public Service Act misconduct, then the protections under the PID Act will not apply.

It is important to ensure that all types of wrongdoing whose disclosure should be covered by the *Public Interest Disclosure Act*, are indeed still covered. As is presently the case, however, not all types of misconduct under the *Public Service Act* should necessarily attract the requirements and protections of the PID Act. The question of which matters should attract these requirements and protections now requires further consideration, and it is important that the Committee recommend accordingly.

Recommendation 4a. **That clause 29 of the Bill (s216A) not be proceeded with.**

Recommendation 4b. **That sub-clause 19(3) of the Bill (amending par. 46(2)(g)(i)) not be proceeded with.**

Recommendation 4c. **That further consideration be given to amendment of s.13 of the *Public Interest Disclosure Act 2010* to ensure that any matters which are currently appropriately disclosable as official misconduct, but which may no longer be disclosable as corrupt conduct, continue to trigger the requirements and protections available under the *Public Interest Disclosure Act*.**

5. Unnecessary over-reaction in the extent to which the Commission is restrained from engaging in *corruption prevention* (clauses 10 & 11 / sections 23 & 24)

The Review Panel recommended, and the Government has accepted (Recommendation 4), that the Commission's corruption prevention functions should cease and be transferred to the Public Service Commission. However, the amendments represent an unnecessary over-reaction to the issues seen as relevant by the Review Panel because they conflate three separate elements of present prevention functions:

(i) The Commission's current 'lead agency' role in anti-misconduct education and capacity building.

Clauses 7 and 13 of the Bill remove this.

(ii) Skills and expertise in corruption detection and investigation which the Commission imparts to agencies with which it deals, as a means of prevention.

Clause 14 of the Bill **strengthens** this, by amending sub-section 35(1) of the Act to give the Commission clearer roles in: '(i) assessing the appropriateness of systems and procedures adopted by a unit of public administration for dealing with complaints about corruption'; and '(j) providing advice and recommendations to a unit of public administration about dealing with complaints about corruption in an appropriate way'.

(iii) Intelligence functions which should enable the Commission to more pro-actively identify areas of corruption risk within the Queensland public sector, and so more efficiently investigate and deal with minor corruption as a means of preventing its development into major or systemic corruption

This is an important area which like (ii) above, needs to be supported and not undermined by the amendments, if the Government's objectives are to be achieved.

Despite the continuing importance of the latter two functions, clauses 10 and 11 of the Bill propose to limit the Commission's functions by removing all reference to *any* prevention functions from sections 23 and 24 of the Act.

The effect of these amendments is to leave the Commission with crime prevention functions, but to remove any functions related to corruption prevention – even those identified above, including functions which are being strengthened. These amendments thus undermine confidence that the Commission is intended to continue to have power to undertake its responsibilities effectively, and send a worrying message that corruption prevention is not only less important than crime prevention in Queensland, but totally unimportant.

Recommendation 5. **That clauses 10 and 11 of the Bill removing any reference to misconduct or corruption prevention not be proceeded with, and replaced with clauses which redefine 'misconduct prevention' as 'corruption prevention'.**

6. Unnecessary, inappropriate and unworkable fettering of the Commission's discretion to direct its own *research efforts*, consistent with its functions (clause 21 / section 52)

The new section 52, proposed by clause 21, proposes to limit the independence of the Commission in its research function, in ways that are inconsistent with its continued independence in all other matters of corruption prevention and investigation.

Even if the Review Panel's concerns regarding the quality and relevance of Commission-led research were correct, this would not provide an argument for reducing the Commission's independence. This is especially the case when the research function, exercised properly,

may inform the Commission's intelligence functions and play a significant role in the identification of areas of corruption risk, which may or not be conducive to the short-term political interests of the Government of the day, or specific agencies of Executive government who might find it more convenient to escape the scrutiny of the Commission.

Further, the solution proposed by the amendments – a three-year research plan which must be reviewed and approved by the Attorney-General every year – appears to be unworkable, since there is no guarantee that approval will remain in place even for research requiring three years, in the event that the Attorney-General changes, or determines that a previously approved research priority is no longer convenient to the interests of the Government.

Mr Keelty's advice regarding the CMC also noted the potential value of the research function, but made suggestions more consistent with the importance of the Commission engaging in collaborative research with other institutions, than making it subject to direction by the Government of the day.

Recommendation 6. **That clause 21 of the Bill not be proceeded with; and instead replaced with a new section 52 which simply requires the Commission to develop a research plan in support of its functions, and to consult with the Minister, universities, and other relevant agencies in the development of the plan; and to give priority in the development of the plan to a specific range of considerations conducive with ensuring more focused and higher value research, including opportunities for collaboration with other research institutions, rather than relying on Ministerial approval.**

7. Unnecessary removal of measures promoting *bipartisan support* and appropriate *qualifications* for the appointment of Commissioners (clauses 36 & 38 / sections 225, 228, 230).

These amendments do not reflect any recommendations of the Review Panel, nor any of the other reviews or expert opinions received by the Government. Other structural reforms to the Commission, particularly the separation of the roles of chairman and chief executive through the creation of the latter role, are dealt by other amendments. Despite its otherwise exhaustive criticism of the Commission, the Review Panel does not appear to have identified particular problems with current appointment processes and qualifications in respect of the chairman or commissioners.

These processes, especially in respect of the requirement for bipartisan support for the appointment of the chairman under s.228 of the Act, have been central to the independence and reputation of the Commission, and promise to continue to be so. While innovative at the time, such requirements continue to point the way forward as provisions from which other institutions and jurisdictions can learn.

By contrast, removing them – especially in the absence of any published policy rationale for doing so – simply suggests that the Government of the day is taking a short-term view of how it might most easily assert greater control over an integrity institution that, in fact, the general public relies on to function with independence from the Executive that it is principally tasked to help oversight. It is thus appropriate that it continue to be headed by a person known to have the confidence of the Parliament, representing all sides of politics, rather than simply the Government. In this respect, clause 38 of the Bill represents a retrograde step for which no clear justification exists, and which only stands to undermine the reputation of both this Government, and the State of Queensland, with regard to their commitment to integrity and accountability.

Clauses 36 and 38 of the Bill propose to remove current criteria for ensuring that part-time commissioners can assist the Commission, represent the views of the community, and oversight the Commission's strong powers by providing a breadth of qualifications and experience including with reference to gender, and experience in civil liberties.

Even if the Parliament considers there is benefit in revisiting, refining or streamlining these criteria, the proposed amendments effectively propose no replacement criteria, but rather simply circular statements that 'a person is qualified for appointment' if they have the 'qualifications, experience or standing appropriate' for appointment (proposed s. 225). In light of the other amendments proposed, the failure to propose alternative criteria, without clear justification for the amendment, simply leaves the Government open to further criticism that it is motivated primarily to make appointments which will suit its own short-term political interests, rather than the long-term interests of the Parliament, Commission and community. Again, this presently only stands to undermine the reputation of both this Government and the State of Queensland.

Recommendation 7. **That clauses 36 and 38 of the Bill not be proceeded with; or alternatively, replaced with amendments which update the appointment processes for commissioners, developed through full public debate and with clear policy justification, without jeopardising the advantages of bipartisan support for the chairmanship and a breadth of specific relevant experience for other commissioners.**

C. Relevant qualifications and experience

A J Brown is Professor of Public Policy and Law, and program leader, public integrity and anti-corruption in the Centre for Governance & Public Policy at Griffith University. He is also a board-member of Transparency International Australia, Fellow of the Australian Academy of Law, and Fellow of the Regional Australia Institute.

Formerly he has been a State ministerial policy advisor in Queensland (1998-1999), Associate to Justice G E 'Tony' Fitzgerald AC, President of the Queensland Court of Appeal (1998), and a Senior Investigation Officer with the Commonwealth Ombudsman, Canberra (1993-1997).

Professor Brown has researched, consulted and taught widely in public policy, public sector management, public accountability and public law. He is an internationally regarded expert on national integrity systems and the management of public interest whistleblowing. He has been project leader on four Australian Research Council National Competitive Grants, including the ARC Linkage Project *Whistling While They Work* (2005-2011), funded by the ARC and 14 public integrity and public sector management agencies nationally, including the Queensland Ombudsman, Public Service Commission, and Crime & Misconduct Commission.

This project was one of the largest and most successful projects on public interest whistleblowing, ever undertaken worldwide, collecting data from over 8,000 managers and employees from 118 organisations, and leading directly to the present *Public Interest Disclosure Act 2010* (Qld) as well as reform of similar legislation throughout Australia, including the *Public Interest Disclosure Act 2013* (Cth). Key results and recommendations from this research are available in:

- Brown, A. J. (ed) (2008), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* Australia & New Zealand School of Government / ANU E-Press, Canberra.

- Roberts, P., Brown A. J. & Olsen J. (2011), *Whistling While They Work: A good practice guide for managing internal reporting of wrongdoing in public sector organisations*, Australia & New Zealand School of Government / ANU E-Press.

Professor Brown is also currently lead editor of the *International Whistleblowing Research Handbook* (Edward Elgar, forthcoming 2014). He is also one of Australia's leading scholars and commentators on Australian federalism and intergovernmental relations. He is the foundation lead researcher on the Australian Constitutional Values Survey; in 2008, was a delegate to the Australia 2020 Summit; and in 2011, was a member of the Commonwealth Government's Expert Panel on Constitutional Recognition of Local Government.