

CRIME AND MISCONDUCT COMMISSION

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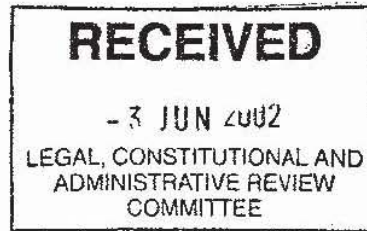
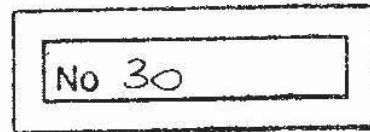
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30 May 2002

Ms Karen Struthers MP
Chair
Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms Struthers

RE: ISSUES OF CONSTITUTIONAL REFORM

Thank you for your letter of 18 April 2002 which invited submissions from the Commission in relation to an Issues Paper concerning substantive issues of constitutional reform.

The Commission wishes to comment only on areas in the Issues Paper which relate directly or indirectly to its functions.

The Governor's Role

The Issues Paper notes that the Queensland Constitutional Review Committee ["QCRC"] considered what should happen if a Governor believed or suspected that a Premier was engaged in "illegal" conduct. The QCRC raised the issue that, in cases where the lawfulness of such actions was not determined by court action or there was no timely resolution of any such court action, the Governor might have difficulty in deciding whether there was illegality warranting the exercise of his or her power to dismiss the Premier.

The QCRC dealt with this perceived difficulty by recommending that there should be legislative recognition of the Governor's right:

- to be kept informed and to request information about matters relevant to the performance of the functions of the office of Premier;
- to apply to the Supreme Court for a declaration concerning possible illegal or corrupt activities by a member of the ministry so that the Governor has a mechanism by which to establish publicly and with certainty whether a breach of law has occurred.

The Commission notes the practical difficulties identified by the Issues Paper in respect of the second proposal. Further, it submits that a court could make a declaration about any alleged illegality only if the factual circumstances involved had been fully investigated, as the courts have no investigative capability as such.

The CMC already has jurisdiction to investigate alleged illegal conduct by the Premier, or other Ministers, in an official capacity. Any alleged illegal conduct in a private capacity would be investigated by the QPS. In the Commission's view, the appropriate course for a Governor who suspected or believed that a Premier was involved in illegal conduct would be to refer the matter to the CMC or to the QPS for investigation. That way the matter could be fully investigated.

It is clear that in proposing that a declaration should be made by a court concerning alleged "illegal conduct" the QCRC was concerned with criminal or corrupt conduct. At page 53 of its report¹, the following comment appears:

It might be added that it would be a question of the criminal law, or analogous statutory law relating to corrupt conduct by a public officer, that would be before the Supreme Court. It would not be an interpretation of prerogative or reserve powers, of constitutional conventions or political precedents, which the Commission agrees are better kept out of the courts for the reasons stated above.

In the Commission's respectful submission, it would not be appropriate to ask the Supreme Court or the Court of Appeal to make a "declaration" as to the legality of alleged criminal or corrupt conduct, rather than allowing such matters to be investigated and to proceed to trial in the normal manner. If an investigation of such allegations by the CMC disclosed sufficient evidence to justify charges, a report would normally be made to the Director of Public Prosecutions under section 49 of the *Crime and Misconduct Act 2001*. If the DPP considered that charges were warranted, the matter would proceed through the normal criminal trial process. If an investigation disclosed that the allegations were not substantiated, the CMC would normally report to the Governor, if he or she were the complainant, on the results of such investigation. The CMC could also publish a report (if the allegations were not substantiated) which would clarify the issue on the public record.

In cases where a matter was referred for prosecution, and there was likely to be no timely resolution, the Commission could provide information about the matter to the Governor under section 60(1) of the *Crime and Misconduct Act 2001*, which would allow an exercise of his or her discretion on the basis of the information contained in the report.

In the circumstances, it is the Commission's submission that there is presently an appropriate legislative framework to deal with the sorts of problems raised in the QCRC report. However, if it is considered that the situation needs to be clarified, it could be done by legislation which specified that the Governor may refer his or her suspicion or belief about alleged illegal conduct by the Premier or other Ministers to the CMC and that the CMC may report on the results of its investigation of such conduct to the Governor (in addition to other appropriate authorities such as the DPP).

Statutory Office Holders

The QCRC made a number of recommendations in relation to statutory office holders who hold positions which are considered sensitive because they deal with issues which could affect the political careers of members of the legislative assembly and Cabinet (including through investigating and reporting adversely on the activities of government departments and agencies).

The questions now raised in the Issues Paper are whether there should be special recognition of such statutory office holders in the Constitution, whether the list of officer holders proposed by the QCRC is appropriate and whether clause 58 of the QCRC's Constitution contains an appropriate form for any such special recognition.

¹ Queensland Constitutional Review Committee (QCRC), *Report on the possible reform of and changes to the Acts and laws that relates to the Queensland Constitution*, Brisbane, Goprint, February 2000.

The Commission agrees in general terms with the proposition that certain statutory positions within Queensland are sensitive and need special provisions about appointment and removal of officer holders, because of the potential for political interference in such processes.

The question remains whether such recognition needs to be made uniform and included in the Constitution, or dealt with on a case by case basis through existing legislation.

Obviously, one way to avoid any suggestion of political interference in the appointment process is a system which requires bi-partisan support for such appointments, as presently occurs with the positions of Chairperson of the CMC and Parliamentary Crime and Misconduct Commissioner. These appear to be the only positions in the list of statutory officer holders in Schedule B to the Issues Paper which presently require bi-partisan support.

Part of the rationale advanced by the QCRC for the protection of certain sensitive positions was that the holders of those positions may be subject to executive interference because *"they investigate, and may report adversely on, the activities of government departments and agencies with possible consequences for political reputations and careers of cabinet Ministers and, more rarely, other members of Parliament, or in the case of the Director of Public Prosecutions, decide whether Ministers and Members should be prosecuted for breaches of criminal law"*.

While the extent and form of any protection provided to statutory office holders is a matter for government, the Commission supports the suggestion that the independence of the holders of sensitive statutory offices in this State should be protected, and that the appointment process for such offices should be insulated from partisan political interference as far as possible.

In respect of the removal of statutory office holders, there is also presently no uniform legislative scheme. However, as the Issues Paper notes, there are certain broad themes which are repeated in most of the provisions, relating mainly to a right to remove an office holder for misconduct or incapacity.

The scheme proposed by the QCRC provides for the removal of certain office holders only by the Governor on the address of the Legislative Assembly for proved misbehaviour or proved incapacity. It also provides that such an address should be made only after a tribunal had found, on the balance of probabilities, that the person had misbehaved or was incapable of performing the duties of the office, and that the person's removal was justified. The tribunal proposed by the QCRC would consist of three persons, namely, a former judge and two barristers of five years' standing. The tribunal members were to be appointed by "resolution of the Legislative Assembly".

In terms of the stated purpose of insulating sensitive positions from political interference, a requirement that the members for the proposed tribunal would be appointed by resolution of a simple majority of the Legislative Assembly would not seem to provide such protection.

Further, the system proposed would be, as the Issues Paper points out, costly and likely to involve substantial delay.

In the Commission's submission, it would also involve an unnecessary duplication of existing mechanisms available to carry out such functions. It is not clear how the proposed tribunal would operate, but it does not appear that it would have any investigative capacity as such. All of the statutory offices involved are within the investigative jurisdiction of the CMC, with the exception of the Chairperson of the CMC and the Parliamentary Crime and Misconduct Commissioner.

In respect of the Chairperson of the CMC, he or she is already subject to the investigative jurisdiction of the Parliamentary Crime and Misconduct Commissioner who can, through the PCMC, provide any report which might be necessary for the Legislative Assembly to act in respect of alleged misbehaviour. The Parliamentary Crime and Misconduct Commissioner is in turn subject to the direction and control of the all-party Parliamentary Crime and Misconduct Committee.

The Commission therefore considers that there are existing mechanisms which could be used to ensure that any investigation which is intended to form the basis of the removal of a statutory officer holder is carried out in an independent and apolitical manner.

I thank you for providing the Commission with an opportunity to comment on these interesting proposals, and would be happy to provide any further information which your Committee might request.

Yours faithfully

A handwritten signature in black ink, appearing to read 'B. Butler', with a stylized flourish at the end.

BRENDAN BUTLER SC
Chairperson