

3 August 2015

Our ref Criminal Law Committee - 21

The Research Director
Parliamentary Crime and Corruption Committee
Parliament House
George Street
BRISBANE QLD 4000

By post and email: pccc@parliament.qld.gov.au

Dear Research Director

Parliamentary Crime and Corruption Committee - Review of the Crime and Corruption Commission

We refer to the letter from the former Acting Chair of the Parliamentary Crime and Corruption Committee dated 9 June 2015, inviting the Queensland Law Society to make submissions on the Parliamentary Crime and Corruption Committee's review of the Crime and Corruption Commission (CCC).


Please note that in the time available to the Society and the commitments of our committee members, this submission is not intended to be an exhaustive review. This submission has been compiled by the Criminal Law Committee who have a thorough awareness and understanding of these issues.

The Queensland Law Society makes this submission having regard to the interests of all Queenslanders. It is recognised that Queenslanders have a vested interest in ensuring that corruption and serious and major crime is investigated and prosecuted. However, it is the position of the society that the powers and authority entrusted in the commission be exercised only in appropriate circumstances.

The Society intends to focus its attention on several key terms of reference which are noted below.

Thank you for the opportunity to provide comments on these issues. Please contact our Senior Policy Solicitor, Ms Binny De Saram on (07) 3842 5885 or b.desaram@qls.com.au for further inquiries.

Yours faithfully



Michael Fitzgerald

President



Submission

Review of the Crime and Corruption Commission

Parliamentary Crime and Corruption Committee

A Submission of the Queensland Law Society

3 August 2015

1. The overall performance of the Crime and Corruption Commission (CCC)

In discussing the performance of the CCC there are three specific general areas:-

- crime investigations
- corruption investigations
- research function.

In considering the overall performance of the CCC it is necessary to clearly articulate that the Queensland Law Society (**Society**) is not in a position to make any statements in regards to the operational performance of the CCC. The performance of the organisation is only subject to scrutiny through the publishing of yearly reports. Accountability is maintained through the supervision by the Parliamentary Crime and Corruption Committee. By necessity operational investigations into specific and general crime investigations maintains a requisite degree of confidentiality.

Crime investigations are generally only acknowledged at the closure of the investigation. It is therefore difficult for any entity external to those enshrined with legislative authority to make any recommendations in regards to crime investigations. Quite simply it is difficult to make any statement regarding performance management without having regard and access to sensitive operational information. Additionally it would not fall within the Societies area of responsibility.

The Society does, however, have a strong view as regards the performance of the CCC in relation to its fulfilment of its role in conducting corruption investigations. The Society has clear concerns in relation to the most recent legislative changes and the adverse effect that these changes may have on the detection and deterrence of corruption.

The Society has continually maintained its support for an independent corruption watchdog. The findings of the *Report of a Commission of inquiry pursuant to order in council (The Fitzgerald Report)(Qld) 1989* is still relevant today. The findings of systemic and entrenched corruption had their genesis in the duality of political support and an entrenched lack of accountability.

Additionally it must be acknowledged that the risks and threats posed by corruption are still relevant to contemporary public administration. There are still frequent instances involving fraudulent conduct on behalf of public officials. The role that the Crime and Corruption Commission plays both in the investigation of corruption but also as a means of providing deterrence is integral to the whole system.

Corruption and misconduct in public office and administration has long been an unwanted, but persistent, feature of Queensland's political and public life. We have in Queensland tended to view the issue of corruption and misconduct through the lens of the events surrounding the Fitzgerald Inquiry and its aftermath. A view has developed in the intervening period that those events are somehow sufficiently distant and the landscape in Queensland so changed that crime and corruption on the scale revealed at that time could never happen again. It is precisely to ensure that those corrupt and criminal practices cannot be repeated that

Queensland has a Commission with appropriate powers, adequately resourced and properly funded. More importantly, it is critical that the opportunity presented by the current review is used to ensure a Commission equipped to deal with crime and corruption in the coming decade and beyond.

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

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

Date	Subject	Issue
November 2013	Mr Scott Driscoll Member of Parliament	The CMC is conducting a joint misconduct investigation with the Queensland Police Service. ¹ In November 2013, the Queensland Parliament Ethics Committee found Scott Driscoll guilty of 48 counts of contempt. ²
September 2013	Senior officers from the University of Queensland	The CMC investigation identified ways to manage conflict of interest and misconduct involved senior management officers. ³
December 2011	Mr Hohepa Morehu-Barlow (aka Joel Barlow) Queensland Health finance officer	Mr Barlow was charged with significant fraud charges and other offences against Queensland Health. ⁴

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

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

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

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

Date	Subject	Issue
June 2011	Investigation of police officers- Operation Tesco	Matters arising out of Operation Tesco have been the subject of disciplinary and criminal proceedings against police officers. CMC identified systemic issues to be addressed. ⁵
December 2010	Former Ministerial Adviser	CMC investigation highlighted concerns with the relationship between ministerial advisers and public servants, including undue influence. ⁶

July 2009	Mr Gordon Nuttall Former Queensland Minister	Mr Nuttall found guilty of corruption. As a result of CMC investigation, Mr Nuttall was found guilty on a further five counts of official corruption and five counts of perjury. The Queensland Legislative Assembly also found Gordon Nuttall guilty of 41 instances of contempt in May 2011. ⁷
July 2009	Investigation of police officers- Operation Capri	The investigation resulted in disciplinary and criminal proceedings, as well as recommendations for procedural reform. ⁸
December 2008	Former Director-General of the Department of Employment and Training (DET)	The CMC referred matters to the DPP for possible criminal charges, and suggestions for reform were made on an offence of misconduct in public office and conflicts of interest. ⁹
May 2007	Ms Merri Rose Minister for Tourism and Racing	In May 2007, Ms Rose was sentenced to eighteen months gaol for attempting to blackmail then Premier Beattie.

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

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

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

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

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

May 2006	Various Gold Coast City councillors	CMC investigation highlighted concerns of secrecy, deceit and misinformation which affected the integrity of the Gold Coast City Council electoral process. ¹⁰
November 2003	Member of the Queensland Parliament	Evidence, but no finding of misconduct, of an interest in a prohibited business dealing by a member of parliament with state entities. ¹¹
March 2003	Investigation of police officers- The Volkens case	The investigation raised concerns about police and prosecution processes. ¹²
September 2000	Australian Labour Party Members	The Shepherdson Inquiry An investigation into electoral fraud by members of the Queensland branch Australian Labor Party. ¹³
June 1994	Complaints made against six Aboriginal and Island Councils	A CMC investigation identified conflict of interest concerns and recommended changes to improve financial accountability processes. ¹⁴
May 1987	Former Queensland Ministers Former Police Commissioner	The Fitzgerald Inquiry 4 Ministers goaled and a number of police officers convicted. A former Police Commissioner convicted of corruption and a former Premier charged with perjury. ¹⁵

The Society is also concerned that the recent public criticism of the CCC as no longer being apolitical and considerably less independent has had an impact on the organisation's charter and ability to conduct its core work. The continued political infighting in relation to the appointment of a suitable Chair of the CCC as well as the public controversy in regard to the statements made by the previous acting chair Dr Ken Levy in support of the need for the

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

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

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

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

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

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

Vicious Lawless Association Disestablishment Act (Qld) 2013 has caused some loss of confidence in the independence of the organisation.

We note that the recent appointment of Mr MacSporran SC as chairperson of the CCC has occurred shortly before the submission of this report and it is hoped that this appointment may allow some certainty and stability in the organisation.

The Society also has concerns in regards to restrictions placed on the research components of the CCC. Throughout the life of this organisation it has maintained an independent and professional research component. This research component conducted topical research into broad areas affecting the operation of the Criminal Justice System including areas of law reform, crime prevention and crime trends. Much of this research was directed to areas which would ordinarily not receive academic or government attention.

2. The jurisdiction, responsibilities, functions and powers of the CCC

The CCC has a specific and discrete jurisdiction in regards to crime and corruption investigations conferred upon it by the *Crime and Corruption Act (Qld) 2001*. Crime Investigations must either be specifically referred to the Commission for investigation by the parliamentary committee or alternatively the committee may make a direction that the Commission is to investigate a specific class of offending.

The Society is concerned that amendments as enacted in the *Crime and Misconduct and other Legislation Amendment Bill 2014* has sought to reallocate the principle areas of responsibility from corruption investigations to crime investigations. The amendments seek to refer jurisdiction for corruption investigations back to the respective public sector agencies for investigation. The Society has very real and grave concerns in relation to this legislative amendment.

The conferral of corruption investigations back to the internal investigations section of the respective administrative departments has been shown to be ineffective and significantly conducive to creating an environment which allows corruption to exist.

The amendment effectively makes it more difficult for corruption matters to be investigated because it alters the scope of matters which falls within the ambit of the Commission's jurisdiction. It is no longer sufficient for a matter to fulfil the definition of misconduct or official misconduct as a classification to warrant investigation. These amendments created a category of conduct referred to in the legislation as "corrupt"¹⁶ conduct.¹⁷

In discussing "corrupt conduct" it is legislatively provided that the commission must focus on more serious cases of corrupt conduct and specifically cases of systemic corruption within a unit of public administration.¹⁸ This effectively ensures that the threshold upon which the commission's jurisdiction is enlivened has significantly increased.

¹⁶ Crime and Corruption Act (Qld) 2001, section 14 – definition of "conduct."

¹⁷ Crime and Corruption Act (Qld) 2001, section 15 – definition of "corrupt conduct."

¹⁸ Crime and Corruption Act (Qld) 2001, section 35(3).

The devolution of investigative jurisdiction is specifically enunciated within the legislation and it provides that the investigation of such complaints is best conducted by the relevant effectively ensures that the situation which was so decried during the Fitzgerald Inquiry of "police investigating police" is re-instigated some 26 years after the report was handed down.

The Society maintains that this is inappropriate and that the new definition of "corrupt conduct" transfers responsibility of serious complaints back to the organisations concerned for investigation. The potential for bias and corruption exists. It may be suggested that the lack of suitable accountability gave rise for the potential for the conduct subject to the complaint to allegedly occur in the first place.

All Queenslanders have a right to expect that, where serious allegations of misconduct are identified in regard to public organisations that such complaints are investigated in a fair, impartial and objective manner.

It is also the position of the Society that the need for such vigilant detection and deterrence is best served by maintaining that all corruption investigations are referred directly to the CCC.

3. The application by the CCC of the principles in performance of its corruption functions, including:

- a. The devolution of responsibility for corruption matters to the Queensland Police Service and public sector agencies; and
- b. The CCC's overriding responsibility to promote public confidence in the integrity of units of public administration and, if corruption occurs, in the way in which it is dealt with;

The Society has articulated its position in relation to the devolution of authority for investigation of corruption matters to the Queensland Police Service and other respective public sector agencies in the previous response. The Society holds grave concerns in regards to this alteration of the CCC's previous position.

As previously articulated the Society maintains that a strong, independent, apolitical body is best capable and able to conduct such sensitive and specialised investigations. The Queensland Police Service and other respective public sector agencies should only be involved in the investigation of minor allegations and breaches of duty and professional standards.

The Society's position in regards to this topic is addressed in the next section.

4. The CCC's handling of complaints of corruption in the public sector and the Police Service

After the identification and acknowledgement of systematic and entrenched corruption within the criminal justice system the development of a permanent commission to remain vigilant

against such corruption was viewed as a necessary safeguard. It was identified that the existing system of investigating complaints and allegations of corruption¹⁹ against police officers was found to be woefully ineffective and potentially complicit in such rudimentary corruption.

The Society maintains that there are very real problems which exist in regards to the current methods of reporting corruption to the CCC. Since the enactment of the *Crime and Misconduct and other Legislation Amendment Bill 2014* all persons wishing to make a complaint of corruption cannot do so anonymously. Instead any "informant" must complete an application which identifies them and also sign and swear a statutory declaration attesting to the truth in the allegations.

It is the Society's position that these requirements are overly restrictive and onerous on persons wanting to make a complaint. Much intelligence and evidence has been identified through information received alternatively to that which is currently prescribed.

It must be acknowledged that such means of complaint making could be construed as intimidating potential informants. It also places whistle blowers in a precarious position whereby they are unable to provide information without having to fear recrimination and retribution. Such fears would be founded.

It is also believed that the requirement for informants to make signed statutory declarations attesting to the truth of any complaints being made is also overly intimidating and antagonistic. The CCC has always possessed the right to pursue vexatious and malicious complaints. It appears that the only real effect of such amendments only serves to ensure that only complaints made by person's prepared to provide their names and other identification particulars will be investigated.

The rationale behind such amendments is to be located within the Callinan/Aroney Report which specifically states at page 204:

Also obvious early was the very high number of complaints processed by the CMC. As we suspected, the vast majority of them were trivial, vexatious, or misdirected. The CMC employed, the Chairperson said, a system of triage, which usually resulted, in practice, in devolution. The reception and disposition of so many such complaints are functions that have to be performed by someone. That comes at a considerable public expense. We have concluded that ways should be found to deter baseless complaints, not least so that proper and sufficient attention can be given to the genuine and substantial ones.²⁰

One of the proposed recommendations to address this issue was to introduce the requirement for statutory declarations. The Society's strong view is that mandating the complaint to begin by statutory declaration will be in many cases too onerous, and could affect the giving of

¹⁹ The *Report of a Commission of inquiry pursuant to order in council (The Fitzgerald report)(Qld) 1989* at pages 285 to 298 identified that the then Internal Affairs Section and the Police Complaints Tribunal was not able to adequately investigate such complaints of corruption. The Fitzgerald Report identified that the "system" utilised the rules of evidence, the need to have the complainant compliant with evidentiary provisions and the need to establish the complaint to a requisite standard all worked against being able to circumvent corruption within the organisation. It was acknowledged that in many instances, at that time there was not also a real motivation to pursue such complaints.

²⁰ Callinan/Aroney report, page 204

anonymous "tip offs". The reality of fighting corruption means that in many instances, people will often not be prepared to come forward and swear to the information they wish to provide.

Clearly enough, there is a proportion of such matters where that reluctance might reflect a lack of bona fides in the complaint. Often though, it will be a wish to maintain privacy, or fear of retribution, that will prevent people from publicly declaring their matter of complaint. This amendment, by placing the bar so high as to require every complaint to be sworn, could well mean that the CCC loses an important avenue of information and intelligence. At the very least, anonymous complaints can be important in identifying and recording trends which may indicate a deeper, more systemic problem.

We suggest that a more workable solution is to allow the CCC to make a policy to require statutory declarations to be made in certain cases where it would be appropriate (for example, where coercive hearings may be involved, or where matters may be high profile, or there is a concern a complaint may have been motivated by the desire to gain political advantage) This allows the CCC the flexibility to ensure that all relevant information is still being received and considered, and that a statutory declaration would not be required in every instance.

The recent amendments do not assist the CCC's workload. The CCC's resources would still be taken up in working out whether a person falls into an "exceptional circumstance" category and whether the person is exempt from providing the declaration. Making this a matter for CCC policy will allow for more specific guidance to the public and CCC staff about these issues.

We note that it should be clarified whether the requirement for a statutory declaration is needed when a person makes a complaint to persons other than to the Commission in light of current s36(2). Although, it appears that this section may refer to public administration bodies as opposed to real persons.

The amendments made in the *Crime and Misconduct and other Legislation Amendment Bill 2014* which allows the Commission to dismiss or take no action in relation to complaints has also been widened. The Commission may now dismiss or take no action on a complaint to when the complaint is:

- not made in good faith;
- made for a mischievous purpose;
- made recklessly or maliciously;
- not within the commission's jurisdiction;
- not in the public interest or has been dealt with by another entity.²¹

The Explanatory Notes do not give further detail on what is meant by "not in the public interest". We suggest clarification whether this will be subject to a direction or guide to ensure the public is informed of what this will mean in practice.²²

It is now an offence for the making of a complaint that is made:

- vexatiously;

²¹ Crime and Corruption Act (Qld) 2001, section 46(2)(g).

²² Broad Definition provided in Crime and Corruption Act (Qld) 2001, section 35(c).

- not in good faith;
- primarily for a mischievous purpose; or
- recklessly or maliciously.²³

The legislation defines "make".²⁴

(2) In this section—

make, a complaint to the commission, means—

(a) make a complaint, or give information or matter, to the commission under section 36; or

(b) make a complaint, or give information or matter, to another entity that is under an obligation to refer the complaint, information or matter to the commission; or

(c) cause a complaint, or information or matter, to be referred to the commission.

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

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

*The notice requirement in section 216 (Frivolous complaint) is not included in the new offence provision because the new offence is dealing with complaints that are made vexatiously; not in good faith; primarily for a mischievous purpose; or recklessly or maliciously; as opposed to frivolous complaints.*²⁵

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

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

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

²³ Crime and Corruption Act (Qld) 2001, sections 216, 216A, 217 & 218.

²⁴ Crime and Corruption Act (Qld), section 216A(2).

²⁵ <https://www.legislation.qld.gov.au/Bills/54PDF/2014/CrimeMisconductOLAB14E.pdf>

It is the Society's position that the current means of making complaints in relation to corruption investigations should be amended so as to instead re-institute a system whereby anonymous or semi-anonymous information may be provided and such information is able to be used and actioned by the CCC where appropriate and after suitable safeguards are undertaken.

5. The CCC's role in the investigation of major crime

The Society maintains that it is imperative that adequate safeguards be maintained and incorporated into the operation of the CCC. The significant investigative powers entrusted to the organisation including the ability to conduct coercive hearings should ensure that vigilance is maintained.

The crime reference committee has the ability to refer matters of major crime and/or intelligence operations to the CCC for investigation.²⁶ When making crime investigation referrals the committee may either make specific referrals or alternatively general areas of referral.²⁷

There are specific considerations which are required before a specific referral may be made.²⁸ The compliance with these considerations is evaluated by the Parliamentary Crime and Corruption Committee²⁹ and, in certain instances the Public Interest Monitor.³⁰

However the experience is that too often crime investigations are commenced on behalf of the Queensland Police service after criminal charges have been instigated and defendants have exercised their right to remain silent.

Summonses to attend coercive hearings are then instigated and defendants are forced to take part in such proceedings in instances whereby their privilege against self-incrimination is abrogated.

The issue and use of coercive hearings against accused persons in instances where they have exercised their right to silence has caused the courts in various jurisdictions considerable concern.

The Society is of the view that such coercive powers should only be exercised sparingly in relation to accused persons charged with offences which are the subject to the coercive hearing.

²⁶ Crime and Corruption Act (Qld) 2001, section 8.

²⁷ Crime and Corruption Act (Qld) 2001, section 28.

²⁸ Crime and Corruption Act (Qld) 2001, section 28(1)(a)(b) & (c).

²⁹ Crime and Corruption Act (Qld) 2001, section 9 & 10.

³⁰ Crime and Corruption Act (Qld) 2001, section 11.

6. Any desirable legislative changes affecting the CCC

The Society is of the view that the following changes should occur:

- That the balance between corruption investigations and major crime investigations be redressed to ensure that the Commission's corruption investigation responsibilities are not diminished
- That complaints are able to be made in any manner and that they are acknowledged and investigated
- That consideration be given to having complaints of misconduct other than breaches of discipline or minor indiscretions and investigated by the Commission
- That the Commission's research responsibility be reinstated.

7. The CCC's role in the Criminal Justice System;

The Society adheres to the original role entrusted the corruption watchdog as outlined by the Fitzgerald report. As a result of the systemic and entrenched corruption identified by this commission of inquiry it was envisaged that a permanent body possessing the powers of a standing royal commission be created to ensure that such corruption is not allowed to flourish unchecked again.

In the report it was acknowledged that any such commission must be independent and free of political interference. It must not be accountable directly to the executive branch of government. This was to ensure that the entrenched corruption which was believed to have been supported and nurtured by government was not allowed to occur again.

The report considered a number of structures existing at that time. In the report the preferred organisations body and structure was referred to as an independent commission against corruption (ICAC). Its very name highlighted the significant and paramount role that organisation would play in ensuring that corruption was not allowed to develop again.

At pages 300 to 301 of the Fitzgerald report it is argued that a standing independent commission against corruption (ICAC) be implemented. This body is described as:-

"An ICAC is a permanent structure which endeavours to identify patterns and trends in official misconduct and to expose root causes of crime and the crises and disruptions it causes in public administration. Its main concern is with these larger problems, but in addressing them it amasses evidence concerning individuals which is (sic) passed over to prosecution authorities for action.

It is inquisitorial, that is to say, it conducts hearings, usually closed, with a view to establishing facts and makes inquiries which involve questioning witnesses on oath, exercising powers of search and seizure, conducting covert surveillance and interceptions, compelling the production of documents and the provision of information and, sometimes, detaining people for interrogation and investigation.

It has its own investigators, including police and other specialist investigators, such as accountants, lawyers, bankers, analysts, statisticians, and computer operators. It

is subject to obligations of confidentiality and secrecy. It is obliged to report generally on its activities, but not specifically on particular investigations.

Some ICACs may be directed to investigate particular people or matters. Usually they cannot be directed not to investigate matters within their charter, but may have matters referred to them for investigation by the government.

An ICAC may also carry out community education and public relations exercises. It may conduct an information campaign aimed at public servants, businessmen and professional advisers. Such campaigns may contain information about what constitutes official misconduct in relation to tax evasion, stock exchange fraud and insurance fraud. This is done with a view to raising standards and increasing community awareness of the insidious impact of official corruption."

The existence of an independent anticorruption watchdog has a fundamental and paramount position within the criminal justice system. It ensures that there is community confidence in the operation of the criminal justice system.

To be effective the public must believe that all complaints are investigated impartially and objectively. The public must also believe that all participants in the criminal justice system are beyond reproach and performing their duties in accordance with the law.

There must be confidence that any corrupt behaviour is identified and pursued at any early opportunity. The potential and often existing nexus between organised crime and corruption is identified and the CCC has the authority to conduct operations which transgress such bureaucratic definitions.

The research and education component of the CCC's previous role is also significant. It is one of the few organisations not being a higher education institution conducting significant research in regards to the area of the criminal justice system.

The *Crime and Misconduct and other Legislation Amendment Bill 2014* has made significant changes to the research function of the CCC. The amendments provide that a three year research plan must now be approved by the Minister. More prescriptively, this research plan may only include research to be undertaken by the CCC for the following reasons:

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

The Explanatory Notes to the *Crime and Misconduct and other Legislation Amendment Bill 2014* state that the amendments are made to, "redefine and refocus the commission's role in relation to research".³¹ No further explanation is provided for the reason as to why Ministerial approval is required for research plans or for the restriction of the CCC's research role. While the Society notes that the *Callinan/Aroney* Review was critical of the CCC's research function and recommended changes, the Explanatory Notes fail to articulate the findings of the Implementation Panel.

³¹ Explanatory Notes, page 20.

The Society does not support Ministerial approval of research plans and changes to the research function as recently amended. The Society considers that the CCC should maintain a broad, independent and unrestricted research role, free from Ministerial approval processes. We consider that this is essential to maintain the independence of the CCC's research role. The scope and appropriateness of the research conduct by the CCC is properly a matter for the CCC. The CCC is required to act in a manner that meets the statutory objectives of the Act, and it should be able to direct its own research to that end. In circumstances where that research might sometimes involve a critique of the effectiveness of government policy, for example, it is inappropriate for the research function of the CCC to be subject to the Minister's approval.

The Society considers that the CCC prepares well researched publications on criminal law and law enforcement issues that play an important public education role. In the absence of government structures, such as the Sentencing Advisory Council, the CCC performs this valuable public education role. In this regard, we also note that the Commission for Children and Young People and Child Guardian (**Children's Commission**) role will soon be subsumed into the Public Guardian and the Children's Commission's previous role in publishing public education documents will be dissolved. We also take this opportunity to note that interstate bodies, such as the New South Wales Independent Commission Against Corruption views that part of its role is to "*educate the community about NSW public sector corruption... through... investigation reports and other publications.*"³²

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

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

The Society therefore does not support the amendments made to limit the CCC's ability to conduct independent research and maintains that the CCC should retain independence over its research function.

8. The use and effectiveness of the CCC's investigative powers

The Society maintains the observations identified earlier in regards to the use of coercive hearings as a means of circumventing an individual's right to silence. Such criticisms have often been expressed by criminal defence lawyers and it is acknowledged that it has often caused the courts some real concerns.

The Society also acknowledges that it no longer appears to be the position of the CCC that persons refusing to provide assistance by way of a statement to law enforcement personnel are subject to a subpoena to attend court and the prosecution is provided with a transcript of that witness's attendance at coercive hearings.

³² Independent Commission Against Corruption website.

The Society submits that the nature and scope of the investigations conducted by the CCC warrants the delegation of significant investigatory powers which are not afforded to usual law enforcement bodies. In fact this was the original intention of His Honour Justice Fitzgerald when he discussed the implementation of an independent commission against corruption (ICAC).

However, the delegation of such powers should only be granted where sufficient safeguards exist to ensure that the public interest is maintained and such intrusions into privacy and human rights are not unduly and unnecessarily infringed.

As previously mentioned the society has had concerns in regards to coercive hearings which were conducted after an accused person has been charged and prior to the evidence being tested in any court.

Such coercive powers are particularly concerning having regard to the contempt provisions and penalties which may now be imposed for non-compliance.

In summary the Society is concerned to ensure that safeguards and accountability are maintained in regard to these extensive and evasive investigatory powers.

9. The CCC's telecommunication interception powers

There is limited empirical evidence available to be able to sensibly make a submission in regards to these powers. As these investigative powers are now able to be utilised by the Queensland Police Service in pursuing their investigative functions the significance of the role of these powers may have diminished somewhat.

However, the society is clearly of the view that such invasive investigatory powers must be treated with the utmost discretion. Much of the material obtained by the CCC through these investigative powers may be sensitive, potentially both personally and commercially and all such reasonable steps should be undertaken to ensure that only material which relate to criminal or corruption investigations is utilised and disclosed.

10. The CCC's role in overseeing the Police Service including the management of Police Discipline and misconduct matters

The Society is of the view that the CCC should have responsibility to oversee and manage the administration of police discipline. However, as has been highlighted previously in this submission it is the view of the society that the Police Service should only be performing an investigatory function in regards to minor breaches of discipline and minor matters.

It is the Society's view that the majority of corruption allegations should be conducted by the CCC.

11. Corporate Governance

In 2014 the Society provided an in-depth submission in response to the *Crime and Misconduct and Other Legislation Amendment Bill (Qld) 2014* in regards to the corporate governance of the CCC. In this submission the Society articulated its support for initiatives to introduce a governance structure to the CCC, including through introducing the office of Chief Executive Officer to manage the operational aspects of the CCC.

The Society noted, however, that the Bill missed an opportunity to implement a best practice model of corporate governance best suited to oversight the operations of the CCC.

The model that was implemented concentrates the powers in the person of the Chair of the CCC, rather than in the CCC itself.

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

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

The Society has serious concerns about a number of aspects of the recent amendments. Fundamentally, the Society considers it critically important to ensure that the CCC remains an independent, apolitical corruption watchdog.

The principal concerns of the Society are:

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

- Ensuring that the role of parliamentary commissioner is truly independent and affords procedural fairness in its investigations and actions.

12. The accountability of the CCC, including the role of the office of the Parliamentary Crime and Corruption Commissioner

Significant regard must be had to the allegations of lack of independence previously displayed by the Government, the Parliamentary Crime and Corruption Committee and the Chair.

It must also be noted that the recent appointment of a chair is long overdue and will assist in ensuring that accountability is maintained.

The recent amendments decree that the activities of the CCC are to be reviewed by 30 June 2016 and then at the end of each five year period. The Society submits that as there have been substantial changes to the Act, a three year review period will be more appropriate in analysing the changes.

We therefore recommend the five year period be revised to a three year period.

The previous government made amendments that establish that there is no longer a requirement for the Minister to consult with the Leader of the Opposition prior to nominating a person to the reference committee.

Previously, in response to a call for submissions the Society has submitted that we consider, to ensure the independence and objectivity of the reference committee that an independent panel be tasked with membership, comprising of:

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

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

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

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

We trust that this submission receives favourable consideration. If there is anything further that we can do to assist please do not hesitate to contact the society at your convenience.

20 October 2015

Parliamentary Crime and Corruption Committee
Parliament House
George Street
BRISBANE QLD 4000

By post and by email: pccc@parliament.qld.gov.au

OUR REF: AML/CTF

To the members of the Committee

Anti-Money Laundering / Counter-Terrorism Financing and the Legal Profession

Queensland Law Society (**the Society**), has had regard to the Queensland Crime and Corruption Commission (**the QCCC**)'s Annual Report 2014-15 (**the Report**) and in particular the statement at page 14 that:

'Professional facilitators such as lawyers and accountants help criminal networks to operate undetected across both legitimate and illicit markets. Their expertise may assist in laundering the proceeds of crime, avoiding tax and disguising criminal activity.'

As a result, I have asked the Society's Anti-Money Laundering and Counter-Terrorism Financing Working Group (**Working Group**) to review that, and as a result of that review, the Society would wish to raise the comments made in the Report with the Committee, and in particular, to ascertain the evidential basis for those comments.

Background

The Society raises these issues with a view to achieving two primary outcomes; to:

1. Draw the Committee's attention to the serious and concerning statements made in relation to the legal profession in connection with money laundering (**ML**); and
2. Establish a continuing, cooperative relationship with the QCCC in order to address existing and future concerns in this area.

The Report

Against the backdrop of there being no substantive evidence that the Society or the Law Council of Australia (**the LCA**) is aware has been brought forward of prosecutions (be it at the Federal or State level), the Society is concerned that a statement to this effect potentially damages the reputation of the legal profession, and undermines the trust that the community needs to repose in the profession, and more broadly, the administration of justice.

The 'structuring' offence alleged in the Report is, as the Society understands it, an as yet undetermined matter, confined to a single law firm, before the courts. This is in contradistinction to the statement at the Report's page 14, which carries the import and creates the impression of a systemic problem within the legal profession – one which is not reflected in the available evidence, or about Queensland more generally as conveyed by the Financial Advisory Task Force (FATF)'s Mutual Evaluation Report April 2015 (**the FATF Report**) on Australian regulation.

These aspects, coupled with the FATF Report which sets out that neither the Australian Federal Police, nor the QCCC, directs its focus towards money laundering activities, suggest to the Society that the regulatory scheme under which this conduct is prosecuted requires further and closer assessment (and accordingly, any suggestion that the regulatory regime be extended to other professions is premature).

The absence of concluded prosecutions or investigations of lawyers alleged to have been involved in ML is further underscored by the purported evidence to which the Australian Transaction Reports and Analysis Centre (AUSTRAC)'s Strategic Analysis Brief entitled *Money Laundering Through Legal Practitioners*¹ refers, none of which contains reference to primary source case material.

To that end, it has been brought to the Society's attention that the QCCC currently seeks to curtail the process by which it seeks and obtains the Attorney-General's approval before investigating money laundering activities in Queensland. The Society would be grateful for further information concerning, firstly, the current framework under which the QCCC seeks the Attorney-General's approval before conducting investigations; and secondly, the background to the Commission's seeking to improve this approval process. Further, should there be any other substantive evidence germane to these matters, the Society and no doubt the LCA would look forward to being appraised of that material as soon as practicable.

Regulation of lawyers

The Society impresses upon the Committee its strong disapproval of financial criminality and express commitment, as a professional association, to assist in promoting the profession's awareness of, and response to, the risks that law practices face. This is facilitated by the current regulatory framework to which the profession is subject, and to which the absence of prosecutions of lawyers for any manner of involvement in ML is attributable, including:

- High level of regulatory oversight under legal profession legislation and rigorous accounting and trust account funds regulations;
- The profession's heavy emphasis on its ethical framework;
- The work of the office of the independent legal services commissioner;
- Development of dedicated guidance materials to assist practitioners in fortifying law practices against unwitting involvement in ML.

We annex a copy of the draft guidance materials, and the Society and the LCA would be happy to receive the QCCC's input and feedback, ideally before 6 November 2015.

Above and beyond laws and regulations specifically directed at the legal profession, lawyers are of course subject to the full force and scope of state and federal criminal laws.

¹ Australian Transaction Reports and Analysis Centre, Strategic Analysis Brief; Money Laundering Through Legal Practitioners July 2015 available at <http://www3.austrac.gov.au/sites/default/files/sa-brief-legal-practitioners.pdf>

Next steps

The Society again impresses upon the Committee its concerns in relation to the statements made in relation to the legal profession, and the apparent dearth of evidence before it to substantiate any indication that a systemic (or even lesser-scale) problem exists, or is unable to be raised and prevented by, the existing laws and regulations to which the profession is already exigently subject.

The Society also welcomes the QCCC to bring any corrective evidence to bear if it considers the Society's position to require redress.

The Society is committed to ongoing regulation of the legal profession; it opposes financial criminality, and wishes to foster an ongoing, cooperative role with the Commission to address concerns that might exist.

The Society would request that this letter be considered supplemental to our earlier submission dated 3 August 2015.

The Society requests further discussions with the Commission in relation to this. Please contact Julia Connelly, Policy Solicitor, on

Yours faithfully



Michael Fitzgerald
President