BAR ASSOCIATION OF QUEENSLAND

27 October 2017

Committee Secretary
Parliamentary Crime and Corruption Committee
Parliament House
George Street
Brisbane Qld 4000

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

Dear Committee Secretary

Re: Review of the operation of section 329 of the Crime and Corruption Act 2001 (Qld)

Thank you, on behalf of the Bar Association of Queensland ('the **Association**'), for the invitation to make a submission to the Parliamentary Crime and Corruption Committee's ('the **PCC Committee**') review of the operation of section 329 of the *Crime and Corruption Act 2001* (Qld) ('the **Act**').

The Association welcomes the PCC Committee's review of the operation of section 329 of the Act.

The Act has been amended on numerous occasions; most substantively by the *Crime and Misconduct and Other Legislation Amendment Act 2014* (Qld) ('the **2014 amending Act**'), and the *Crime and Corruption Amendment Act 2016* (Qld) ('the **2016 amending Act**').

The Association has previously provided feedback in relation to the aforementioned amending Acts in the following submissions, copies of which are **enclosed** for your reference:

1. submission to the Legal Affairs and Community Safety Committee ('the **LACSS Committee**'), regarding the *Crime and Misconduct and Other Legislation Amendment Bill 2014* (Qld) ('the **2014 amendment Bill**') dated 2 April 2014;

2. submission to the PCC Committee regarding the review of the Crime and Corruption Commission dated 13 August 2015;

3. further submission to the PCC Committee regarding the review of the Crime and Corruption Commission dated 11 November 2015; and

4. submission to the LACSS Committee regarding the *Crime and Corruption Amendment Bill 2015* (Qld) ('the **2015 amendment Bill**').[1] The Association notes this submission was not published on the LACSS Committee's parliamentary website.

[1] The 2015 amendment Bill was passed as the *Crime and Corruption Amendment Act 2016* (Qld).

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The Act is also proposed to be amended by the *Crime and Corruption and Other Legislation Amendment Bill 2017* (Qld) ('the **2017 Bill**'), which has been listed for second reading in the Legislative Assembly on 24 October 2017.[2]

The Association will address its concerns with the operation of section 329 for the benefit of the PCC Committee, and then further concerns associated with the overall operation of the Act.

At the outset, the Association's primary concerns with the operation of section 329 relate to the definition of 'corrupt conduct' (both as it is currently, and as it is proposed to be amended by the 2017 Bill), and the definition of 'improper conduct' (as it is currently).

Section 329 of the Act

Section 329 is an important provision of the Act which allows Parliament, through the PCC Committee, oversight of the Crime and Corruption Commission ('the **Commission**').

Legislative history

Section 329 of the *Crime and Misconduct Act 2001* (Qld) ('the **pre-2014 Act**') provided (emphasis added):

> *(1) The chairperson must notify the parliamentary committee, in the way, and within the time, required by the committee, of all conduct of a commission officer that the chairperson suspects involves, or may involve, improper conduct.*
>
> *(2) In this section—*
>
> *improper conduct, of a commission officer, means—*
>
> *(a) disgraceful or improper conduct in an official capacity; or*
>
> *(b) disgraceful or improper conduct in a private capacity that reflects seriously and adversely on the commission; or*
>
> *(c) conduct that would, if the officer were an officer in a unit of public administration, be **official misconduct.***

Section 15 of the pre-2014 Act defined 'official misconduct' as (emphasis added):

> *... conduct that could, if proved, be—*
>
> *(a) a criminal offence; or*
>
> *(b) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment.*

Following amendments, section 329 of the Act currently provides (emphasis added):

> *(1) The person mentioned in column 1 of the following table (the notifier) must notify the parliamentary committee and the parliamentary commissioner of all*

[2] Legislative Assembly of Queensland, *Notice Paper for Tuesday, 24 October 2017* (12 October 2017) Queensland Parliament <http://www.parliament.qld.gov.au/documents/tableoffice/notice_paper/2017/171024_NP.pdf>.

conduct of a person mentioned opposite the notifier in column 2 of the table that the notifier suspects involves, or may involve, improper conduct.

Column 1	***Column 2***
chairperson	*commissioner other than the chairperson* *chief executive officer*
deputy chairperson	*chairperson*
chief executive officer	*commission officer other than a commissioner or the chief executive*

...

(4) In this section—

improper conduct, of a person, means—

(a) disgraceful or improper conduct in an official capacity; or

(b) disgraceful or improper conduct in a private capacity that reflects seriously and adversely on the commission; or

*(c) conduct that would, if the person were an officer in a unit of public administration, be **corrupt conduct**; or*

(d) disclosure of confidential information without the required authorisation, whether or not the disclosure contravenes an Act; or

(e) failure to ensure—

(i) a register kept by the commission under an Act is up to date and complete; or

(ii) all required documentation is on a file kept by the commission and correctly noted on a register kept by the commission under the Act; or

(e) exercise of a power without obtaining the required authorisation, whether inadvertently or deliberately; or

(f) noncompliance with a policy or procedural guideline set by the commission, whether inadvertently or deliberately, that is not of a minor or trivial nature; or

(g) exercise of a power conferred on the person under this or another Act in a way that is an abuse of the power.

Effects of the 2014 amending Act

The 2014 amending Act was introduced in response to[3] the PCC Committee's *'Report No. 90: Inquiry into the Crime and Misconduct Commission's release and destruction of*

[3] Explanatory Memorandum, *Crime and Misconduct and Other Legislation Amendment Bill 2014* (Qld) 1.

Fitzgerald Inquiry documents' ('the **Report No. 90**') dated July 2013, and The Honourable Ian Callinan AC and Professor Nicholas Aroney's '*Review of the Crime and Misconduct Act 2001 and related matters*' ('the **Callinan/Aroney review**') dated 28 March 2013.

The 2014 amending Act had significant effects on the operation of section 329 of the Act, including:

1. replacing 'official misconduct' (forming part of the definition of 'improper conduct' in the pre-2014 Act's section 329(2)(c)) with 'corrupt conduct' (forming part of the definition of 'improper conduct' in the present Act's section 329(4)(c)); and

2. broadening the definition of 'improper conduct' in section 329(2).

The Association will examine each of these effects separately. The Association encourages the PCC Committee to consider the adverse impact of the 2014 amending Act in its review of the operation of section 329 of the Act.

1. ***Replacing 'official misconduct' with 'corrupt conduct'***

   The Act, previously

   Section 15 of the pre-2014 Act defined 'official misconduct' as (emphasis added):

   ... conduct that could, if proved, be—

   (a) a criminal offence; or

   (b) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment.

   'Conduct' was defined in section 14 of the pre-2014 Act as follows (emphasis added):

   (a) for a person, regardless of whether the person holds an appointment—conduct, or a conspiracy or attempt to engage in conduct, of or by the person that adversely affects, or could adversely affect, directly or indirectly, the honest and impartial performance of functions or exercise of powers of—

      (i) a unit of public administration; or

      (ii) any person holding an appointment; or

   (b) for a person who holds or held an appointment—conduct, or a conspiracy or attempt to engage in conduct, of or by the person that is or involves—

      (i) the performance of the person's functions or the exercise of the person's powers, as the holder of the appointment, in a way that is not honest or is not impartial; or

      (ii) a breach of the trust placed in the person as the holder of the appointment; or

      (iii) a misuse of information or material acquired in or in connection with the performance of the person's functions as the holder of the appointment,

whether the misuse is for the person's benefit or the benefit of someone else.

The Callinan/Aroney review noted that *'the definition of official misconduct in Queensland is very wide'*,[4] and recommended the definition be amended *'along the lines of the Victorian provision, so that is extends only to conduct which "would, if proved" constitute a relevant offence or disciplinary breach'*.[5]

The Act, currently

The 2014 amending Act subsequently replaced 'official misconduct' with 'corrupt conduct', currently defined in section 15 of the Act as (emphasis added):

(1) ... conduct of a person, regardless of whether the person holds or held an appointment, that—

(a) adversely affects, or could adversely affect, directly or indirectly, the performance of functions or the exercise of powers of—

(i) a unit of public administration; or

(ii) a person holding an appointment; and

(b) results, or could result, directly or indirectly, in the performance of functions or the exercise of powers mentioned in paragraph (a) in a way that—

(i) is not honest or is not impartial; or

(ii) involves a breach of the trust placed in a person holding an appointment, either knowingly or recklessly; or

(iii) involves a misuse of information or material acquired in or in connection with the performance of functions or the exercise of powers of a person holding an appointment; and

(c) is engaged in for the purpose of providing a benefit to the person or another person or causing a detriment to another person; and

(d) would, if proved, be—

(i) a criminal offence; or

(ii) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or were the holder of an appointment.

(2) Without limiting subsection (1), conduct that involves any of the following could be corrupt conduct under subsection (1)—

(a) abuse of public office;
(b) bribery, including bribery relating to an election;
(c) extortion;

[4] The Hon Ian Callinan AC and Professor Nicholas Aroney, *Review of the Crime and Misconduct Act and Related Matters* (2013) 117. The report can be accessed at https://www.cabinet.qld.gov.au/documents/2013/Jul/Response%20CMC%20reports/Attachments/Independent%20Panel%20Report.pdf.
[5] Ibid 119.

(d) obtaining or offering a secret commission;
(e) fraud;
(f) stealing;
(g) forgery;
(h) perverting the course of justice;
(i) an offence relating to an electoral donation;
(j) loss of revenue of the State;
(k) sedition;
(l) homicide, serious assault or assault occasioning bodily harm or grievous bodily harm;
(m) obtaining a financial benefit from procuring prostitution or from unlawful prostitution engaged in by another person;
(n) illegal drug trafficking;
(o) illegal gambling

'Conduct' is defined in section 14 of the Act as (emphasis added):

(a) neglect, failure and inaction; and

(b) conspiracy to engage in conduct; and

(c) attempt to engage in conduct.

The significant changes to the definition of the relevant standard of misconduct in sections 14 and 15 may be summarised as follows:

a) the addition of section 15(1)(c), which requires the conduct to *'have been engaged in for the purpose of providing a benefit to the person or causing a detriment to another person'*;[6]

b) in relation to section 15(1)(d), the conduct is subject to the higher standard of 'would', rather than the pre-2014 Act standard 'could';[7]

c) each sub-section of section 15(1) must be satisfied cumulatively, rather than in the alternative as in the pre-2014 Act;[8] and

d) the addition of sub-section (2), which provides a non-exhaustive list of conduct which could amount to 'corrupt conduct'.

The Association takes the opportunity to repeat its previous feedback in relation to the changes to the definition of the relevant standard of misconduct made by the 2014 amending Act (emphasis added):

12. The Association notes the evidence to the Committee of the Honourable Philip Nase, who has extensive experience as a prosecutor and judge as well as his immediate and more recent involvement with the Commission.

13. Mr Nase pointed out that the "tightening" of the definition was based on a misapprehension by the Callinan/ Aroney Inquiry that the Commission received an unusually high level of complaints of official misconduct.

[6] Parliamentary Crime and Corruption Committee, Queensland Parliament, *Report No. 97: Review of the Crime and Corruption Commission* (2016) 45.
[7] Ibid.
[8] Ibid.

14. Mr Nase also pointed out that since Callinan/Aroney reported, the Victorian approach from which they drew, and from which the amendments to s. 15 were drawn, has been criticised broadly as limiting the analogous Commission, in that State, from investigating corruption, effectively.

15. It would appear that the question which was put to the Association, namely, where does one draw the line, may be answered by concluding that the line has been drawn too far in favour of restricting investigation of corruption rather than drawn appropriately to avoid unnecessary or uncalled for investigations.

16. The Association is reinforced in this view by the evidence of Mr Alan MacSporran QC.

17. Mr MacSporran identified in evidence to the Committee that the element in the s. 15 definition requiring evidence of intention to obtain a benefit (to oneself or another) or intention to cause a detriment to another was unnecessarily restrictive of the Commission's ability to investigate suspected corruption. The Association adopts Mr MacSporran's opinion in this regard.

18. The evidence of Mr MacSporran and Mr Nase provides some explanation for the difficulty experienced by the Commission in investigating corruption as observed in the discussion at paragraphs 41 to 45 of the Association's 2015 submission.

19. The Association urges the Committee to seek a workable definition of corruption (or official misconduct) which will allow the Commission to carry out its investigative work in that field in an effective manner.[9]

The Association maintains this position and hopes this will be considered by the PCC Committee in its review of the operation of section 329 of the Act.

The Act, as proposed to be amended by the 2017 Bill

The Government made an election commitment to widen the definition of 'corrupt conduct',[10] and subsequently released an issues paper titled *''Corrupt conduct' under the CC Act'*.

In Report No. 97 (published in June 2016), the PCC Committee found that *'the threshold at which the Commission's jurisdiction is enlivened is now substantially higher than it was previously, as well as relative to other jurisdictions...deleting section 15(1)(c) will not compromise the intention of the Act'*,[11] however that it was *'premature to make any definitive recommendation for the reform of section 15'*.[12]

Despite this recommendation, on 23 March 2017 the Government introduced the 2017 Bill, containing proposed amendments to the definition of 'corrupt conduct'.

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[9] Bar Association of Queensland, Submission No 28 to the Parliamentary Crime and Corruption Committee, *Review of the Crime and Corruption Commission,* 11 November 2015, 4.

[10] Attorney-General and Minister for Justice and Minister for Training and Skills
The Honourable Yvette D'Ath, 'Next step to address corrupt conduct in Queensland' (Media Statement), 25 February 2016) <http://statements.qld.gov.au/Statement/2016/2/25/next-step-to-address-corrupt-conduct-in-queensland>; Explanatory Notes, *Crime and Corruption and Other Legislation Amendment Bill 2017* 2.

[11] Parliamentary Crime and Corruption Committee, above n 6, 47-50.

[12] Ibid 50.

The 2017 Bill proposes to amend the definition of 'corrupt conduct' by:

1. removing subsection 15(1)(c);

2. removing the list of non-exhaustive matters which could be 'corrupt conduct' under subsection (2);[13] and

3. inserting a new subsection (2) which is intended to widen the definition of 'corrupt conduct'[14] as follows:

(2) Corrupt conduct also means conduct of a person, regardless of whether the person holds or held an appointment, that—

(a) impairs, or could impair, public confidence in public administration; and

(b) involves, or could involve, any of the following—

(i) collusive tendering;

(ii) fraud relating to an application for a licence, permit or other authority under an Act with a purpose or object of any of the following (however described)—

(A) protecting health or safety of persons;

(B) protecting the environment;

(C) protecting or managing the use of the State's natural, cultural, mining or energy resources;

(iii) dishonestly obtaining, or helping someone to dishonestly obtain, a benefit from the payment or application of public funds or the disposition of State assets;

(iv) evading a State tax, levy or duty or otherwise fraudulently causing a loss of State revenue;

(v) fraudulently obtaining or retaining an appointment; and

(c) would, if proved, be—

(i) a criminal offence; or

(ii) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or were the holder of an appointment.

The 2017 Bill was referred to the LACSS Committee for consideration.

On 15 May 2017, the LACSS Committee tabled its report on the 2017 Bill, *'Report No. 54, 55th Parliament, Crime and Corruption and Other Legislation Amendment Bill 2017'.*

[13] Explanatory Notes, *Crime and Corruption and Other Legislation Amendment Bill 2017* 3.
[14] Ibid.

The LACSS Committee recommended the 2017 Bill be passed in its entirety.[15]

The 2017 Bill has been listed for second reading in the Legislative Assembly on 24 October 2017.[16]

Given 'corrupt conduct' forms part of the definition 'improper conduct' in section 329(4)(c), the Association is of the view that the PCC Committee's review of the operation of section 329 cannot be completed until the outcome of the 2017 Bill, and the proposed amendments to the definition of corrupt conduct, is clear.

As the 2017 Bill is yet to proceed to second reading in the Legislative Assembly, the Association wishes to highlight some deficiencies in the amendments proposed to the definition of 'corrupt conduct' for the benefit of members of the PCC Committee.

The Association supports the removal of subsection 15(1)(c).

However, the Association is concerned that the supposed 'broadening' of the definition of 'corrupt conduct' has been misconceived.

In the Association's view, the 2017 Bill's proposed addition of subsection 15(2) provides the Commission with a broader jurisdiction to investigate and discipline the actions of private individuals more so than individuals working in the public sector.

It is not clear whether this was intended by the 2017 Bill.

The 2017 Bill's proposed addition of subsection 15(2) does not address other fundamental changes made by the 2014 amending Act to narrow the definition of 'corrupt conduct'. To repeat, these are:

a) in relation to section 15(1)(d), the conduct is subject to the higher standard of 'would', rather than the pre-2014 Act 'could';[17] and

b) each sub-section of section 15(1) must be satisfied cumulatively, rather than in the alternative as in the pre-2014 Act.[18]

Instead, the 2017 Bill proposes to add another layer of complexity to the definition of 'corrupt conduct'.

The Association encourages the PCC Committee to undertake a closer review of the definition of 'corrupt conduct' in the event the 2017 Bill is passed, giving effect to the proposed definition of 'corrupt conduct' for the purposes of 'improper conduct' in section 329(4)(c).

2. ***Broadening the definition of 'improper conduct'***

The Association remains concerned about the broadening of the definition of 'improper conduct' by the 2014 amending Act.

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[15] Legal Affairs and Community Safety Committee, Queensland Parliament, *Report No. 54: Crime and Corruption and Other Legislation Amendment Bill 2017* (2017) 3.
[16] Legislative Assembly of Queensland, above n 2.
[17] Parliamentary Crime and Corruption Committee, above n 6, 45.
[18] Ibid.

In Report No. 90, the PCC Committee found:

'... The definition [of improper conduct] *should also expressly include conduct that amounts to, or might amount to, serious maladministration'.*[19]

The Association's previous submission on this point is as follows:

'The new s.329 requires certain designated people on the Commission to refer to the Parliamentary Committee certain incidents of suspected improper conduct. The Association suggests that the obligation to refer should be based on reasonable suspicion not suspicion per se'.[20]

The Association maintains this position.

The Association seeks to ensure that officers of the Commission are provided with an environment in which they can carry out their work in the fearless way one expects of corruption investigators.

Parliament's intention of section 329 was, relevantly, to provide a mechanism of notifying the PCC Committee of suspected 'improper conduct', reflecting *'the obligation on other public officials to notify official misconduct to the commission'.*[21]

The Association is concerned that the 2014 amending Act extends the operation of section 329 beyond its intended purpose.

It is clear that the intention of section 329 was to create a mandatory reporting requirement only for actions akin to 'official misconduct' (now termed 'corrupt conduct'), not actions akin to those listed in sections 329(1)(d) – (g).

The Association hopes this will be considered by the PCC Committee in its review of the operation of section 329 of the Act.

Other matters pertaining to the Act

The Association's most recent submission in relation to the Act was made to the FAC Committee on 24 February 2016.

Since this date, the PCC Committee has released Report No. 97.

In light of this release, the Association takes the opportunity to provide further comments on the operation of the Act as a whole.

Raise the threshold for the criminalisation of complaints

The Association repeats its support to raise the threshold for the criminalisation of complaints in the Act.

The 2014 amending Act implemented the following changes to the complaints process:

[19] Parliamentary Crime and Misconduct Committee, Queensland Parliament, *Report No. 90: Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Inquiry documents* (2013) 89.
[20] Bar Association of Queensland, Submission No 12 to the Legal Affairs and Community Safety Committee, *Crime and Misconduct and Other Legislation Amendment Bill 2014*, 2 April 2014, 6.
[21] Explanatory Memorandum, *Crime and Misconduct Bill 2001*, 87.

1. section 36 was amended to require that a complaint about corruption 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;[22]

2. section 216 was amended to restrict its operation to only matters which appeared to concern frivolous matters;[23] and

3. section 216A was inserted, making it an offence for a person to make a complaint to the Commission which is vexatious, not in good faith, primarily for a mischievous purpose, or made recklessly or maliciously.[24]

The Association reiterates its previous submission in relation to the aforementioned amendments:

> *'The Association is of the view (broadly held in the community) that corruption agencies succeed best when the public is encouraged to provide information. Some of that information may be unconfirmed and some may turn out to be unreliable. It is the role of the agency to sift through the information and, sometimes, it is the pattern that emerges from a number of leads, each one unconfirmed, that leads to an important and effective investigation'.*[25]

In Report No. 97, the PCC Committee notes *'there has been a steady drop in the number of complaints received by the Commission in recent years'*.[26] Relevantly, there has been a 40 per cent decrease of complaints received by the Commission in financial year 2015-16, in comparison to financial year ending 2014-15.[27]

Despite this, the amendments to section 216 and the insertion of section 216A made by the 2014 amending Act remain.[28]

The Association remains concerned that if sections 216 and 216A are not amended to their pre-2014 Act versions, there may be a *'risk of deterring potential informants from making a complaint to the Commission'*.[29]

Remove ambiguity inherent in principles for performing corruption functions

The 2016 amending Act expanded the principles which the Commission is required to apply when performing its corruption functions pursuant to section 34.

The Association repeats its previous submission in relation to this amendment, namely:

> *'The Association is concerned there is substantial tension between these principles. For example, subsection 34(a) provides that the Commission "and units of public administration should work cooperatively to prevent corruption," whereas subsection 34(d) provides that the Commission has an "overriding responsibility for promoting public confidence" in the ways it deals with corruption.*

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[22] *Crime and Misconduct and Other Legislation Amendment Act 2014* (Qld) cl.16.
[23] Ibid cl. 28
[24] Ibid cl. 29.
[25] Bar Association of Queensland, Submission No 28 to the Parliamentary Crime and Corruption Committee, *Review of the Crime and Corruption Commission,* 13 August 2015, 3.
[26] Parliamentary Crime and Corruption Committee, above n 6, 41.
[27] Ibid.
[28] Please note *Crime and Corruption Amendment Act 2016* (Qld) cl. 13 reversed the amendments to section 36 of the Act.
[29] Bar Association of Queensland, Unpublished Submission to the Legal Affairs and Community Safety Committee, *Crime and Corruption Amendment Bill 2015* (Qld), 25 February 2016, 2.

> *In the Association's view, as a general rule, it is preferable to clearly set out circumstances in which powers can be exercised. The existence of mandatory, statutory principles by which the Commission must exercise its corruption powers obscures the Commission's powers and may provide fertile ground for litigation for a reluctant unit of public administration ("UPA") or target individual. This was the case in the recent decision of Lee v Crime and Corruption Commission in which a police officer challenged the Commission's powers to take action against him for corrupt conduct, partly on the basis that the Commission was acting contrary to the principle of "devolution".*
>
> *The Association notes that in Lee v Crime and Misconduct Commission, the Queensland Police Service ("the QPS") dealt with a serious allegation of covering up police violence by way of 'managerial guidance'. The Association notes that although the Commission has a statutory role in overseeing police misconduct proceedings, the Commission cannot review a decision in relation to managerial guidance in QCAT.*
>
> *Members of the Association who practise in criminal law frequently comment on the inadequacy of the police disciplinary processes, including the frequency with which the QPS deals with apparently serious misconduct by way of 'managerial guidance'.*
>
> *The Association suggests that the Act be amended so that it is clear that any principles are for the internal guidance of the Commission and not for the benefit of a UPA or target individual'.*[30]

Since the Association's submission of 24 February 2016, the appeal of *Lee v Crime and Corruption Commission*[31] ('the **appeal case**') has been heard by the Queensland Court of Appeal. His Honour Philip McMurdo JA found in favour of the Commission, and in doing so emphasised the importance of the power of the Commission to monitor the actions of units of public administration:

> *'67. The essential difficulty in that argument* [the appellant's argument] *is that by an implication, it would substantially limit the monitoring role of the CCC as expressed in s 47 and 48. It is inherent in the role of monitoring that, on occasion, the CCC will disagree with the Commissioner in his dealing with a complaint. The notion that the Commissioner of Police, or more generally a public official, could preclude the exercise of the powers conferred in s 47 or 48 simply by announcing his or her own decision as to how to deal with a complaint seems inconsistent with the CCC's monitoring role. The limitation for which the appellant argued is not only not expressed in the legislation; it would compromise "the overriding responsibility* [of the CCC] *to promote public confidence in the way corruption within a unit of public administration is dealt with"'.*

The appeal case reinforces the power of the Commission to primarily perform its corruption functions in a way which achieves its *'overriding responsibility to promote public confidence'* (subsection 34(d) of the Act).[32]

Despite this, the aforementioned tension between subsection 34(a) and 34(d) still exists and there is no legislative guidance as to the prevailing principle in the case of conflict.

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[30] Ibid.
[31] *Lee v Crime and Corruption Commission & Anor* [2016] QCA 145.
[32] *Crime and Corruption Act 2001* (Qld) s 34(d).

Report No. 97 did not consider the adequacy of the principles in section 34, perhaps due to the limited time between the date of commencement of the 2016 amending Act (5 May 2016), and the date of the report (June 2016).

The Association encourages the PCC Committee to carefully consider the Association's previous submissions on the tension between the principles in section 34, which are reinforced by His Honour Philip McMurdo JA's comments on the importance of subsection 34(d) in the appeal case.[33]

Other matters

The Association is concerned that the following subsidiary matters outlined in submissions dated 13 August 2015, 11 November 2015 and 24 February 2016 have not yet been substantively considered:

1. ***Tenure of Commissioner***

   'The Association suggests the current 10 year maximum serving time of commissioners be restored to 5 years'.[34]

2. ***Diversity and skillset of the Commission***

   'Sections 223 and 225 of the Act, which prescribe the membership and appointment requirements of the Commission, have not been restored to the 'pre' Amending Act position, which included a number of community qualification requirements, including the appointment of an experienced Australian lawyer with a demonstrated interest in civil liberties. The Association has previously stated: "It is important that the governance of the Board includes people who bring a wide spread of expertise, and understanding of community expectations and an ability to challenge and question the priorities and ethos that builds up over time among the Commission's professionals."[35]

3. ***Independence of Commission officers***

   'Section 35A of the Act impinges on the independence of Commission staff in "fearlessly carrying out their investigative roles", as it "authorises the CEO (under direction, in turn, from the [chairperson]), to issue directions to the staff about how one identifies cases of serious corrupt conduct and systemic conduct. These are not just guidelines to assist staff. Section 35A creates an obligation to comply with the directions".[36] *Further, "it does not seem that this direction is required to be made public, falling outside those matters in section 35B, (which must be published)".*[37]

   In the Association's view, if these provisions remain in their current form, they will continue to undermine and detract from the Commission's independence and ability to fulfil its role as a key component in the system by which accountability is provided to the government and the public sector. As a minimum, the Association

[33] *Lee v Crime and Corruption Commission & Anor* [2016] QCA 145 [67] (McMurdo JA).
[34] Bar Association of Queensland, above n 48, 2.
[35] Bar Association of Queensland, above n 44, 3-5; Bar Association of Queensland, above n 9, 2; Bar Association of Queensland, above n 20, 3-4.
[36] Bar Association of Queensland, above n 44, 4; Bar Association of Queensland, above n 9, 2.
[37] Bar Association of Queensland, above n 20, 4.

suggests that any directive given under section 35A should be published to the parliamentary commissioner or parliamentary committee'.[38]

The Association respectfully urges the PCC Committee to give attention to these points; particularly when the 2017 Bill is further examined by the Legislative Assembly.

Conclusion

Thank you for the opportunity to provide our comments in relation to the review of section 329 of the Act.

The Association trusts the feedback provided in relation to section 329 of the Act, and the Act as a whole, will be useful for the Committee.

The Association would be pleased to provide further feedback, or answer any queries you may have on this matter.

Yours faithfully

Christopher Hughes QC
President

[38] Ibid.

BAR ASSOCIATION OF QUEENSLAND

2 April 2014

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

Dear Chair,

Crime and Misconduct and Other Legislation Amendment Bill 2014

Introduction

The Association thanks the Committee for the opportunity to make a submission on this Bill.

The Association notes that the government has drawn upon the results of a review conducted by the Honourable Ian Callinan AC and Professor Nicholas Aroney[1] ("the Callinan Aroney Review") and a further administrative review conducted by Michael Keelty[2]. The government has also relied upon an implementation committee of senior government officers.[3]

The Association commends the government for engaging in a process of obtaining expert assistance both in developing policy and in developing legislative proposals. Some of the policy directions evident from a reading of the Bill can be seen to derive from the two reviews.

The More Serious Complaints of Misconduct

The Association notes a concern of the Callinan Aroney Review to avoid circumstances where large amounts of Commission resources were directed to dealing with complaints about comparatively trivial transgressions. The change from "misconduct" to "corruption" as the second task of the Commission with a new name and new definitions is designed to achieve this policy aim. The use of the Commission's resources where they will be most effective in achieving integrity in the public sector is a laudable objective.

The Association considers that it is an appropriate means of achieving this objective to restore an onus on public service leaders including Department heads and the

[1] The report of those authors is at http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2447.pdf

[2] The report may be found at http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T4088.pdf

[3] See the government's response to Callinan Aroney at: http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2923.pdf.

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Public Service Commission to prevent misconduct and to promote integrity within their spheres of responsibility.

But the Association is concerned that the Bill may send signals that promoting integrity and prevention of misconduct or corruption in the public sector are of reduced importance both in the mind of the government and in the law as it is written. In this regard, the Association is concerned by the following proposed changes:

(a) The amendment to s. 4 of the Act by which continuous improvement of integrity and reduction of misconduct is changed to simply the reduction of the incidence of corruption and;
(b) The expression of the amended objective, now in the new subs. 4(1A), as a secondary (rather than a main) objective of the Act;[4]
(c) The amendment to s. 23 where the preventive function of the commission now only relates to major crime and no longer relates to misconduct or corruption, as such, in the public sector;[5] and
(d) The amendment to s. 34 where paragraph (b) which deals with capacity building to prevent and deal with misconduct is deleted and changes to paragraphs (c) and (d) where the prevention of misconduct/corruption is similarly downgraded.[6]

Criminalising Complaints

The policy of ensuring that Commission resources are directed to the most serious matters is pursued in the existing legislation by s. 216 which relates to complaints which concern frivolous or vexatious matter. Section 216 has a two strike policy where a second complaint on the same subject matter may amount to a criminal offence.

The Bill seeks to reinforce this by deleting vexatious from s. 216 and including it in the new offence provision, s. 217A. Section 217A makes it an offence to make a complaint in any of the following manners: vexatiously; not in good faith; for a mischievous purpose; recklessly; or maliciously.

The Association is concerned that this is a heavy handed means of saving Commission resources. The Association is concerned that the provision in this form may intimidate potential complainants a number of whom may be able to provide some evidence of serious corruption. Non-lawyers, in the Association's experience, do have knowledge of matters that are very useful to law enforcement agencies. Laypersons with such information may not always be able to conduct the analysis as to how far their information goes in proving the matters about which their suspicions have been raised. If the public generally have the perception that a mistake on their part may land them a year in jail, many may choose to keep silent. Some of these are likely to have important information that may have triggered successful corruption investigations.

The Association is strengthened in its view that the new s. 216A is too heavy handed by the terms of the existing ss. 217 and 218 which criminalise the provision of material that is false or misleading to the Commission as part of a complaint.

[4] Clause 6 of the Bill
[5] Clause 10 of the Bill
[6] Clause 13 of the Bill

Non-gender specific language

The Association is somewhat puzzled to find that, throughout the Act, the term of "chairperson" has been changed to "chairman".

The Association has a strong policy and important track record in promoting equal opportunities within the bar, itself; within the Association; and in government appointments to institutions that are of importance to administration of the law and the maintenance of the rule of law.

The use of non-gender specific language in legislation and in government publications is important in both reflecting and promoting a mind set in favour of equal opportunity values. The use of such language has been a bi-partisan policy at most levels of government in Australia for several decades. The Association perceives it to have very wide support in the community not just but particularly among women.

The Association strongly recommends that the use of gender specific language be removed from the amending Bill.

Loss of Independence and Authoritarian Structure

The Report of a Commission of Inquiry pursuant to Certain Orders in Council which was received on 3 July 1989 stressed the exclusion of party political considerations and processes from the decision making concerning criminal justice as an important factor in recommending what has become the present Commission.

That was reflected in the legislation which established the Criminal Justice Commission and remains in the Act as it presently stands. The most important element of this is seen in subs. 228(3) which requires that the appointment of any commissioner, including the Chairperson, involve consultation with the Parliamentary Committee and bipartisan support of that Committee.

The Association is concerned with two tendencies reflected in the Bill.

The Bill deletes several of those safeguards placed in the Act to achieve the Commission's independence from partisan considerations and influence that were placed in the Act in the wake of the 1989 report. The deletion of these provisions is the first of the concerning tendencies referred to.

Second, the internal structure of the Commission is changed by the Bill to place increased influence and authority in the Chairman, the Chief Executive Officer (a new position) and in the Minister.

The two developments cause the Association much concern.

Removing the Safeguards

Sections 233-225 in the Act provide for a chairperson and four part-time community representatives. The chairperson must be an experienced lawyer. One of the community representatives must be an experienced lawyer with a demonstrated interest in civil liberties[7] and must be appointed from four persons nominated two each by this Association and the Queensland Law Society[8]. The others must come either from a relevant social science background or a community service background.[9]

[7] Paragraph 225(1)(a) of the Act
[8] Subsection 227(3) of the Act
[9] See ss. 225 and 230 of the Act

At least one part time commissioner must be a woman.[10]

The part time community qualification requirements are deleted including the requirement that one part-time commissioner be a woman. The new structure has a full-time chief executive officer (presumably of a management or financial management background) as well as the full-time chairman. There are three part-time commissioner positions whose background qualifications are undefined. One of these is to be deputy commissioner.[11]

These structural changes take away the informed community expertise input into the Commission's operation. The two full-time positions are likely to weight discussions along pre-ordained lines and limit the questioning and testing of decisions that might have occurred under the previous structure.

The Association supports the creation of a statutory CEO position for the Commission to share the Chairperson's workload and to deal with human resources and budgetary matters in the first instance. However, the inclusion of that position in the Commission as a voting member at the expense of a community position is not supported.

The removal of the community requirements, including the civil liberties position, takes away one important safeguard against the appointment of people (by a government) who are less independent and less questioning of government partisan outlook than the previous structure provided.

Of most concern to the Association is the removal of the requirement that the appointment of all commissioners must be with the bipartisan support of the parliamentary committee.[12] This requirement was both the symbol that the Queensland Parliament was committed to a Commission that was independent of partisan opinion and the single most effective means of achieving that independence.

Authoritarian Structure

The Association notes that some provisions tend to limit the independence of staff of the Commission in going about their role either as lawyers providing advice or police officers exercising the discretions of a constable at common law. In this category falls the new s. 35A[13] which allows the chief executive officer to issue directions as to how officers are to identify serious cases of corruption. It does not seem that this direction is required to be made public, falling outside those matters in s. 35B (which must be published).

A wholly new division 9 of part 1 of chapter 6 of the Act[14] hands full disciplinary powers of commission staff to the chief executive officer. The provisions are similar to the discipline provisions in the *Public Service Act 2008* ("the Public Service Act"). The chief executive officer is required to provide natural justice in exercising these powers.[15] However, there seems to be no equivalent to the appeal provisions in ss. 193-194 of the PSA.

The research function of the Commission has been an important part of its role providing an independent expert voice on matters going to law enforcement. The new s. 52[16] now requires that

[10] Subsection 230(4) of the Act
[11] Clause 34 of the Bill amending or replacing ss. 223-225
[12] Subsection 228(3) of the Act
[13] Clause 15 of the Bill
[14] Clause 62 of the Bill
[15] Subsection 273F
[16] Clause 21 of the Bill

the Commission's research plan must be approved by the Minister. This is a significant loss of independence.

It is noted that Callinan Aroney were critical of the Commission's research performance in recent years. Such a view affords no justification, however, for subjecting this function to ministerial veto. The Association considers that some statutory indicators as to matters that should be covered in the Commission's research may have been appropriate. The requirement of ministerial approval is not supported.

Callinan Aroney were very critical of senior officers of the Commission staying in their roles for long periods. It was said to create a potential for corruption to develop among other things.

Against that background, the Association is surprised that the maximum limit on the time that Commissioners can serve (over more than one term) is lifted from five to ten years.[17] The change is not supported.

The handing of increased power within the Commission to the chairman is brought about by changes to ss. 251[18] and 269[19] of the Act. The new s. 69 delegates the bulk of the Commission's functions to the Chairman[20] and a number to the chief executive officer.[21] Section 251 gives the Commission a strategic leadership role[22] and responsibility for certain planning and reporting documents[23].

Cumulatively, these provisions provide for a more authoritarian structure of the Commission. Combined with the government's ability to appoint Commissioner's as it seems fit without the need to obtain bipartisan support through the Committee, the changes identified create the danger that a future government might appoint pliable supporters to key positions on the Commission and be able to control the way in which the extraordinary powers of the Commission are to be exercised.

In those circumstances, the danger of corruption, may return.

Reviews

Changes to the timing of reviews by the parliamentary committee of the activities of the Commission are effected by amendments to paragraph 292(1)(f) of the Act.[24] The changes appear both to push out the next review and make reviews, thereafter, less frequent.

These changes are not supported.

Meetings of the Parliamentary Committee in Public

The new s. 302A[25] provides that the meetings of the parliamentary committee should be in public unless the Committee, for cause set out in the section, decides otherwise.

Although this maintains in practice the status quo, the Association supports the principle that the Committee's hearings and deliberations should be, as far as possible, in public.

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[17] Clause 39 inserting a new s. 231
[18] Clause 52 of the Bill
[19] Clause 58 of the Bill
[20] Paragraph 269(1)(b)
[21] Paragraph 269(1)(a)
[22] Subsection 251(1)
[23] Subsection 251(3)
[24] Clause 67 of the Bill
[25] Clause 69 of the Bill

Power to the Parliamentary Commissioner

An amendment to s. 318[26] allows the Parliamentary Commissioner to hold a hearing when its auditing of documents powers fall short of solving the issues under consideration.

The Association supports this mild extension of powers to the Commissioner.

The system of governance set up under the Act involves a balance of powers between three institutions. That balance might be inhibited if the Commissioner was dependent on permission from the Committee to be able to hold a hearing.

Reasonable Suspicion

The new s. 329[27] requires certain designated people on the Commission to refer to the Parliamentary Committee certain incidents of suspected improper conduct.

The Association suggests that the obligation to refer should be based on reasonable suspicion not suspicion per se.[28]

The Dr. Levy Clause

Sections 397 and 402[29] seek to confirm the appointment of the present Acting Chairperson, firstly, up to the commencement of the legislation and then until 31 October 2014[30] unless an appointment of a chairman under the new provisions is made before then.

The Association considers that, since certain aspects of Dr Levy's conduct while in office, including his evidence to the Parliamentary Committee, are under scrutiny, this legislative appointment guarantee is inappropriate.

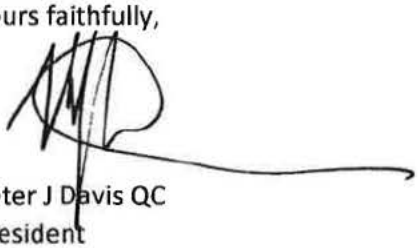
The Association urges that a fresh acting chairperson be appointed with bi-partisan support of the Parliamentary Committee and that the Dr Levy transitional clauses be deleted from the Bill.

Conclusion

The Association repeats its gratitude for the opportunity to comment on the draft legislation.

The Association would request an opportunity to give evidence before the Committee in person.

Yours faithfully,



Peter J Davis QC
President

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[26] Clause 75 of the Act
[27] Clause 77 of the Bill
[28] The Bill makes a similar change to section 38 of the Act. See clause 17 of the Bill.
[29] Part of the transitional provisions of the Bill. See clause 80.
[30] The new paragraph 402(2)(b)

GWD;dgr

13 August 2015

Mr Peter Russo MP
Acting Chair
Parliamentary Crime and Corruption Commission
Parliament House
Brisbane 4000

Dear Mr Russo

Re: Review of the Crime and Corruption Commission ("the Commission")

Thank you for your letter of 9 June 2015 advising of the Committee's call for submissions. The Bar Association of Queensland (the Association) comments as follows:

Context

1. The letter of 9 June 2015 inviting our submission referred to the fact that several inquiries and reviews have occurred during 2013 and that these were followed by legislative changes of which the majority were enacted by the *Crime and Misconduct and Other Legislation Amendment Act,* number 21 of 2014 ("the Amending Act").

2. A press release also dated 9 June 2015 noted that the Amending Act commenced on 1 July 2014.

3. The Association made a submission to the Parliament's Legal Affairs and Community Safety Committee's inquiry into the Bill for the Amending Act.[1] That submission was critical of many of the changes which were nevertheless ultimately made to the principal legislation when the Bill was passed (with only limited changes) and the Amending Act commenced.

4. Generally speaking, however, the matters that concerned the Association at the time of the submission to the Legal Affairs and Community Safety Committee remain matters of concern. This submission will, generally, set out those same concerns, noting changed circumstances where relevant changes have occurred.

5. The letter of 9 June 2015 suggested a number of subject areas on which your Committee invites comment. The Association has addressed those subject areas and found them helpful. Although addressing many of those areas, this

[1] Submission 12 available at https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/CMOLAB2014 (accessed 5 August 2015)

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submission will follow the structure of the Association's earlier document which was, in turn, shaped by the proposed changes in the Bill for the Amending Act.

6. Hopefully, the submission will be no less useful for following that structure.

A Downgraded Importance for Corruption

7. The Amendment Act downgraded the emphasis placed on the importance of attacking corruption by making crucial changes to the Act as it previously stood.

8. The Association urges that the active prevention of corruption be restored to its previous place of importance.

9. The changes included the following:

   a. Section 4 was amended to change "continuous improvement of integrity and reduction of misconduct" as one of the two main purposes of the Act to simply "to reduce the incidence of corruption in the public sector";
   b. Section 23 was amended to remove any reference to corruption or misconduct as part of the Commission's prevention function;
   c. Section 34, which sets out "principles for performing the Commission's corruption functions" was amended to take out any reference to a "capacity building" principle and to downgrade the principles relating to cooperation and public interest.

The Complaints Process: Making it more difficult

10. The Amending Act had the effect of deterring people from making complaints. This was done by requiring that, other than in exceptional circumstances, complaints had to be by statutory declaration. It also expanded the circumstances in which people could face criminal penalties for making incorrect complaints.

11. Section 36 was amended to require that a complaint about corruption 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.

12. Previously, s.36 was not restrictive about how complaints could be made.

13. Prior to the amending Act, s. 216 contained a mechanism by which the Commission could advise a person who had made a compliant that it would not be investigated because it appeared to concern frivolous matters or appeared to have been made vexatiously.

14. The section contained a provision that the making of a second complaint that was substantially the same would amount to an offence. The Commission was required to warn of that when advising that it would not be investigated.

15. The amending Act retained s. 216 but restricted its operation to complaints that appeared to contain frivolous matter.

16. The amending Act inserted a new s.216A which creates a criminal offence (without warning or repetition by the complainant) of making a complaint vexatiously, not in good faith, primarily for a mischievous purpose, recklessly or maliciously. The offence carries a large fine or a maximum of a imprisonment for a year.

17. These new offences are in addition to those which previously existed (and are retained) for providing information that is knowingly false in ss. 217 and 218.

18. The Association is of the view (broadly held in the community) that corruption agencies succeed best when the public is encouraged to provide information. Some of that information may be unconfirmed and some may turn out to be unreliable. It is the role of the agency to sift through the information and, sometimes, it is the pattern that emerges from a number of leads, each one unconfirmed, that leads to an important and effective investigation.

19. The amendments to ss. 36 and 216 (and the insertion of s. 216A) send a message to the public that, if you complain about suspected corruption and do not get your facts exactly right, it will be you who is in big trouble.

20. This may have a significant deterrent effect.

21. These changes should be reversed.

Non-gender Specific Language

22. The use of the terms "chairman" and "deputy chairman" are outdated terms. More significantly the amendment to instate their use is an unnecessary provocation to the very many in the community who think so and an unfortunate use in turn of legislation given that could be its only purpose.

23. The use of gender stereotyping language in legislation should be avoided to reduce the prospect of gender stereotyping in the community.

24. The language should be back to non-gender specific forms.

Structural Changes

25. Prior to the amending Act, the legislation, in ss. 223-225 provided for a chairperson and four part-time commissioners "who were community representatives".

26. Sections 225 and 230 provided for commissioners to have one or more qualifications from a range of specified backgrounds including sociology, criminology, crime and crime prevention research, community service and the standards expected of public service and public sector administration.

27. A particular position required the appointment of an experienced lawyer with a demonstrated interest in civil liberties.

28. Subsection 230(4) required that at least one commissioner must be a woman.

29. The community positions were an important part of the governance structure of the Commission. The role of the Commission was, predominantly, to investigate alleged wrongdoing. Because of its specialist role, the Commission has extensive coercive powers.

30. It is important that the governance of the Board includes people who bring a wide spread of expertise, an understanding of community expectations and an ability to challenge and question the priorities and ethos that builds up over time among the Commission's professionals.

31. The community qualifications, including the requirement that one commissioner be a woman, were removed by the amending act. The qualification requirements should be restored.

32. It may be appropriate to update the language and an even broader set of skill and experience sets might be specified from which appointments may be made.

33. The principle of governance through community representatives should remain paramount.

34. Another set of changes removed authority from the Commission as a body and bestowed it upon either the full-time chairman or the new position of full-time chief executive.

35. The position of the Commission as a body should be restored so that it can provide the governance for which it was originally designed. The idea that a Chair of a private corporation or community organisation should have roles which are not ultimately subject to the governance of the board of directors is quite alarming. It is even more so in the case of a public sector organisation with the special coercive powers enjoyed by the Commission.

36. The Association, in its submission to the Legal Affairs and Community Safety Committee, supported the creation of a full-time CEO position. It was expected that the position would be filled by a person with skills in management and/or financial management.

37. However, the CEO should not be a voting member of the Commission. And the CEO should not carry out statutory roles which are not subject to the governance of the Commission.

38. The last set of changes were directed at reducing the independence of staff in fearlessly carrying out their investigative roles. An example is s. 35A which authorises the CEO (under direction, in turn, from the chairman) to issue

directions to the staff about how one identifies cases of serious corrupt conduct and systemic conduct. These are not just guidelines to assist staff. Section 35A creates an obligation to comply with the directions.

39. Another incursion upon the independence of the Commission was the requirement now contained in s. 52 of the Act that the Commission's research priorities must be set out annually in a plan which is subject to the approval of the Minister.

40. The Association is of the view that the legislation should be reviewed thoroughly with the objective of restoring the independence of the Commission so that it can play its role as a key component of the system by which accountability is provided to government and the public sector. The governance of the body by a body that is reflective of community values and equipped with broad and appropriate expertise is an important part of ensuring that the organisation's independent exercise of coercive powers is, itself, accountable over time.

Performance: Investigating Political Donations

41. Over the last several years, the press has reported significant donations to political parties which have been followed by government decision-making which has benefitted the donor.

42. The Association acknowledges that a correlation between two events does not, of itself, establish a causal relationship.

43. However, where the benefit is significant, a body charged with investigating corruption should be alert to the possibility that political decisions have been influenced by the donations that preceded them.

44. The Association suggests that, as a systemic issue going to the effective performance of the Commission in investigating corruption, the Committee should consider the way in which the Commission has responded to reports (and, in some cases) complaints about these matters.

45. Two of the Association's members, Stephen Keim and Alex Mckean, published an article on 20 August 2014 collating a number of the reported donations and the favourable political decisions associated with them.[2] This article may be a useful resource for an examination of the effectiveness of the Commission's performance in this area.

Conclusion

46. It is acknowledged that there are many other matters which have not been touched upon which are worthy of the Commission's attention. It is acknowledged that, even in terms of the Amending Act, there are other changes which are worthy of consideration.

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[2] See https://www.academia.edu/8093620/Political_Donations_in_Queensland_Move_on_theres_nothing_to_see_here (accessed 5 August 2015)

47. There are also matters that have arisen over time which may require attention and consideration.

48. The Association would point out that there were 37 other submissions from individuals and organisations to the Legal Affairs and Community Safety Committee.[3] Many of the authors have great experience and knowledge. The Association would recommend those submissions as a source of valuable information.

Thank you for your consideration of the submission. The Association appreciates the extension of time it was provided for making this submission.

Yours faithfully

Geoffrey Diehm QC
Vice President

[3] https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/CMOLAB2014

BAR ASSOCIATION OF QUEENSLAND

11 November 2015

Mr Peter Russo MP
Acting Chair
Parliamentary Crime and Corruption Commission
Parliament House
Brisbane 4000

Dear Mr Russo

Re: Review of the Crime and Corruption Commission ("the Commission")

The Bar Association of Queensland expresses its thanks for the opportunity to give evidence in relation to its written submission dated 13 August 2015, before the Parliamentary Crime and Corruption Committee ("the Committee") at the hearing on Monday, 26 October 2015, and to make these further submissions in relation to questions posed by members of the Committee at the hearing.

Further to the evidence of Ms Elizabeth Wilson QC given on behalf of the Association at the hearing, the Association comments as follows in relation to the questions taken on notice. The questions have been paraphrased, as at the time of writing the transcript of the hearing had not yet been released.

Question 1: Can the Association elaborate on its concerns about a "*downgraded importance for corruption*" as discussed in its 2014 and 2015 submissions?

1. The answer to this question is somewhat complex. The Association will answer the question in a discursive manner in order to attempt to address all of its implications. Before doing so, it is emphasised that the submission the Association has made was not intended as a criticism of a political decision. The amendments to the legislation made to which it refers were, it seems, aimed to address real areas of concern. That involved necessarily a rebalancing or change of emphasis. The concern of the Association has been, and is, as to what may have been unintended and undesirable consequences of the changes.

2. First, it is worth noting that the legislation and the Commission have two major roles. The current wording of the objects clause[1] is as follows: *The main purposes of this Act are to combat and reduce the incidence of major crime; and to reduce the incidence of corruption in the public sector.*

[1] Section 4, *Crime and Corruption Act 2001 (Qld)* ("the Act")

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3. Both functions are important. The functions support each other in some respects. They also compete with each other in some respects, including for resources.[2]

4. It was in the context of the two functions competing with one another that the Association perceived, and still perceives, a legislative tilt in the amendments in favour of major crime investigation and away from corruption and misconduct.

5. The words of the legislation are important because the legislation is intended to reflect and to guide decisions concerning conduct, including allocation of resources.

6. A further issue is that money to investigate major crime tends to be politically popular. Money to investigate corruption tends to fall down a government's list of priorities the longer a government is in power.

7. The simple answer to the question, then, is perceived in the legislation that formed part of the amendments in 2014. The answer can be no better stated than in the Association's submission in 2014:

> "*The Association notes a concern of the Callinan Aroney Review to avoid circumstances where large amounts of Commission resources were directed to dealing with complaints about comparatively trivial transgressions. The change from "misconduct" to "corruption" as the second task of the Commission with a new name and new definitions is designed to achieve this policy aim. The use of the Commission's resources where they will be most effective in achieving integrity in the public sector is a laudable objective.*
>
> *The Association considers that it is an appropriate means of achieving this objective to restore an onus on public service leaders including Department heads and the Public Service Commission to prevent misconduct and to promote integrity within their spheres of responsibility.*
>
> *But the Association is concerned that the Bill may send signals that promoting integrity and prevention of misconduct or corruption in the public sector are of reduced importance both in the mind of the government and in the law as it is written. In this regard, the Association is concerned by the following proposed changes:*
>
> *(a) The amendment to s. 4 of the Act by which continuous improvement of integrity and reduction of misconduct is changed to simply the reduction of the incidence of corruption and;*
>
> *(b) The expression of the amended objective, now in the new subs. 4(1A), as a secondary (rather than a main) objective of the Act;*

[2] It can be argued that the two functions gain synergy from one another and should be housed in the one Commission. Others argue that the two functions are better performed by two separate institutions who can each focus on their sole object. That is another argument which is not part of this supplementary submission.

(c) The amendment to s. 23 where the preventive function of the commission now only relates to major crime and no longer relates to misconduct or corruption, as such, in the public sector; and

(d) The amendment to s. 34 where paragraph (b) which deals with capacity building to prevent and deal with misconduct is deleted and changes to paragraphs (c) and (d) where the prevention of misconduct/corruption is similarly downgraded."

8. The Association remains concerned that these legislative signals be reversed so that corruption and misconduct retain their legislative status as equally important aspects of the Commission's function.

9. The Committee's question also appeared to incorporate a number of concerns about the change made to s. 15 of the Act where a simple definition of official misconduct was changed to a complicated definition of corruption. The Association's 2014 and 2015 submissions only touched on marginal aspects of this change included the related matter of deterring complaints by potentially criminalising them (see the inserted s. 217A of the Act).

10. There are resource issues involved in investigating allegations of *"non-serious"* corruption or misconduct. For that reason, the Association supports those changes which placed greater responsibility on the Public Service Commission and the heads of department in terms of investigating official misconduct.

11. In addressing the Committee's questions, the Association is assisted by greater light cast on the changes to s. 15 of the Act as part of the Committee's present inquiry.

12. The Association notes the evidence to the Committee of the Honourable Philip Nase, who has extensive experience as a prosecutor and judge as well as his immediate and more recent involvement with the Commission.

13. Mr Nase pointed out that the "tightening" of the definition was based on a misapprehension by the Callinan/Aroney Inquiry that the Commission received an unusually high level of complaints of official misconduct.

14. Mr Nase also pointed out that since Callinan/Aroney reported, the Victorian approach from which they drew, and from which the amendments to s. 15 were drawn, has been criticised broadly as limiting the analogous Commission, in that State, from investigating corruption, effectively.

15. It would appear that the question which was put to the Association, namely, where does one draw the line, may be answered by concluding that the line has been drawn too far in favour of restricting investigation of corruption rather than drawn appropriately to avoid unnecessary or uncalled for investigations.

16. The Association is reinforced in this view by the evidence of Mr Alan MacSporran QC.

17. Mr MacSporran identified in evidence to the Committee that the element in the s. 15 definition requiring evidence of intention to obtain a benefit (to oneself or another) or intention to cause a detriment to another was unnecessarily restrictive of the Commission's ability to investigate suspected corruption. The Association adopts Mr MacSporran's opinion in this regard.

18. The evidence of Mr MacSporran and Mr Nase provides some explanation for the difficulty experienced by the Commission in investigating corruption as observed in the discussion at paragraphs 41 to 45 of the Association's 2015 submission.

19. The Association urges the Committee to seek a workable definition of corruption (or official misconduct) which will allow the Commission to carry out its investigative work in that field in an effective manner.

Question 2: Can the Association expand on its comments about investigating political donations, as contained in its 2015 submission?

20. This question is related to the matters discussed in response to the first question.

21. There are obvious difficulties in making definitive statements, in the abstract, about which donations may justify being investigated and which may not. Each situation turns on its own circumstances. Each set of circumstances raises its own levels, higher or lower, of suspicion that inappropriate conduct has occurred.

22. It is for that reason that the legislation requires a definition of corruption (or official misconduct) that is not unduly restrictive of the ability to investigate potential corrupt conduct.

23. It is unlikely that the significance or size of a benefit received by a political donee will be determinative however it may be relevant. The nature of a benefit received will be important. There is a distinction between a general political benefit as opposed to an individually focussed personal or corporate benefit.

24. A philanthropist who campaigns in support of effective action to prevent climate change; to prevent terrorist violence; or for the State to build more hospitals is unlikely to be making corrupt donations in support of those campaigns.

25. Many individuals, businesses, trade unions and non-profits make donations to political parties because they perceive a kindred support for broad societal objectives. Donations of this kind are not uncontroversial and may go to other aspects of our political processes. Generally, however, they do not raise issues of corruption or official misconduct.

26. The continuum between broadly conceived political objectives and individual benefits may blur on occasion. However, it is unlikely to provide a substantial difficulty for deciding when to investigate for possible corruption.

27. The manner of payment, to whom the money was paid, the narrowness of interest of the donor and prospect or reality of specific favour being granted are likely factors.

28. The process of analysis and investigation of conduct will look at issues of timing; of communications between different people; and also look at the processes put in place for making important decisions. Expert recommendations and documented processes for making decisions are less likely to give rise to adverse inferences than processes where the decisions are made in private and the only analysis that takes place does so on an *"erasable white board."*

29. In recent times, a former government minister in the Northern Territory was the subject of an inquiry established to inquire into her conduct in granting preferential access to the local trade union council to a heritage building without a proper process in place and ahead of other non-government organisations. The lack of documentation, procedures and transparency in the decision making were matters upon which weight was placed in the inquiry's critical findings. The inquiry made unfavourable comment because of those factors. (That inquiry remains the subject of litigation so one should be cautious about what conclusions are to be reached on its facts, but the principles just described are what the Association relies upon.)

30. In the awarding of government contracts, the State has many procedures in place to ensure probity of conduct. When the procedures are followed, but the outcome of them is not adopted, questions do properly arise as to the motivation for departing from the commended outcome.

31. In this regard, the report of the Queensland Audit Report into *Procurement of youth boot camps* provides interesting and salutary reading.[3]

32. The Association hopes that the canvassing of these various issues is of assistance to the Committee in response to its inquiries.

<u>Question 3:</u> Does the Association have any comments about the money laundering requirements in Queensland, particularly, as they compare with other States, as Queensland seems to carry a requirement for consent of the Attorney-General to prosecution for money laundering offences not shared in other major States?

33. The Association notes that criminal confiscation legislation is a modern crime fighting tool that has become relatively frequently used in recent decades.

34. The Association notes that such legislation raises rule of law issues in that it places restraints upon citizens who have not been convicted of criminal offences on the basis of suspicion that someone has a committed a criminal offence and that assets are the result of such criminal activity.

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[3] QAO, report 13, 2014-5: tabled 9 April 2015: https://www.qao.qld.gov.au/report-13:-2014-15

35. The Association stresses the continuing need for safeguards in legislating and implementing criminal confiscation legislation. The use of such legislation to hinder or prevent the right of free trial is a matter that is particularly concerning.

36. Assuming that the requirement for the consent of the Attorney-General to prosecute for the offence of money-laundering, as provided by s. 251(2) *Criminal Proceeds Confiscation Act 2002*, is unique to Queensland, it is not evident to the Association that this creates a great law enforcement disadvantage to Queensland.

37. Queensland is not, on our understanding of the legislation, dependent on prosecuting the offence of money laundering in order to restrain or forfeit assets. In any event, it would seem that the offence of money laundering is likely to be available to prosecute less frequently than offences involving narcotics or crimes of violence.

38. The Association would be willing to address questions involving criminal confiscation of assets with the Committee in the future.

39. Hopefully the limited discussion above may be of some assistance in respect of this third question.

Please advise if we can be of any further assistance.

Yours faithfully

Geoffrey Diehm QC
Vice President

CLH:dgr

24 February 2016

Research Director
Legal Affairs and Community Safety Committee
Parliament House
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By Email: lacsc@parliament.qld.gov.au

Dear Research Director

Re: Crime and Corruption Amendment Bill 2015

Thank you for the opportunity to provide feedback on the *Crime and Corruption Amendment Bill 2015 (Qld)* ("**the Bill**"), which contains proposed amendments to the *Crime and Corruption Act 2001 (Qld)* ("**the Act**").

We note the Association has previously provided its views on the Bill during its early consultation stages, through its written submissions dated 11 August 2015 and 25 November 2015 and the appearance of Ms Elizabeth Wilson QC before the Parliamentary Crime and Corruption Committee ("**the Committee**") on 25 October 2015.

The Association supports the overall aims of the Bill, including:

- the provision of a Chief Executive Officer ("**CEO**") who is not a commissioner;
- the requirement for bipartisan support for a CEO;
- the limiting of temporary appointments to three months, unless bipartisan support is forthcoming; and
- the reinstatement of anonymous complaints, the full corruption function and research independence.

The Association requests that the Committee consider the following matters which, in the Association's view, would further improve the Act.

1. Raise the threshold for the criminalisation of complaints

As noted in the Association's submissions dated 13 August 2015 and 25 November 2015 (and emphasised by Ms Elizabeth Wilson QC at the Committee's hearing on 26 October 2015):

> "*18. The Association is of the view that corruption agencies succeed best when the public is encouraged to provide information. Some of that information may be unconfirmed and some may turn out to be unreliable. It is the role of the agency to sift through the information and, sometimes, it is the pattern that emerges from a number of leads, each one unconfirmed, that leads to an important and effective investigation.*"

The Association's submission of 25 November 2015 suggested specific changes to sections 216 and 216A of the Act, in order to alleviate the risk of deterring potential informants from making a complaint to the Commission. The Association would encourage the Committee to carefully consider those suggestions.

2. Remove ambiguity inherent in principles for performing corruption functions

The Bill proposes to amend section 34 to further expand the principles which the Commission is required to apply when performing its corruption functions. The Association is concerned there is substantial tension between these principles. For example, subsection 34(a) provides that the Commission "*and units of public administration should work cooperatively to prevent corruption*," whereas subsection 34(d) provides that the Commission has an "*overriding responsibility for promoting public confidence*" in the ways it deals with corruption.

In the Association's view, as a general rule, it is preferable to *clearly* set out circumstances in which powers can be exercised. The existence of mandatory, statutory principles by which the Commission must exercise its corruption powers obscures the Commission's powers and may provide fertile ground for litigation for a reluctant unit of public administration ("**UPA**") or target individual. This was the case in the recent decision of *Lee v Crime and Corruption Commission*[1] in which a police officer challenged the Commission's powers to take action against him for corrupt conduct, partly on the basis that the Commission was acting contrary to the principle of "devolution".[2]

The Association notes that in *Lee v Crime and Misconduct Commission*, the Queensland Police Service ("**the QPS"**) dealt with a serious allegation of covering up police violence by way of 'managerial guidance'. The Association notes that although the Commission has a statutory role in overseeing police misconduct proceedings, the Commission cannot review a decision in relation to managerial guidance in QCAT.[3]

Members of the Association who practise in criminal law frequently comment on the inadequacy of the police disciplinary processes, including the frequency with which the QPS deals with apparently serious misconduct by way of 'managerial guidance'.

The Association suggests that the Act be amended so that it is clear that any principles are for the internal guidance of the Commission and not for the benefit of a UPA or target individual.

3. Tenure of Commissioner

The Association suggests the current 10 year maximum serving time of commissioners be restored to 5 years.

4. Definition of Corrupt Conduct

The Association remains concerned about section 15 of the Act, by which the enactment of the *Crime and Misconduct and Other Legislation Amendment Act, number 21 of 2014* ("**the Amending Act**") changed the simple definition of official

[1] [2015] QCS 226
[2] See [78] of that decision.
[3] *Arndt v Crime and Misconduct Commission and Anor* [2013] QCATA 340

misconduct to a complicated definition of corruption. In this regard, the Association notes the government's commitment to a wider definition of corrupt conduct, and looks forward to the Queensland Government's release of the issues paper, as referred to in your letter of 27 October 2015.

5. Diversity and skillset of the Commission

Sections 223 and 225 of the Act, which prescribe the membership and appointment requirements of the Commission, have not been restored to the 'pre' Amending Act position, which included a number of community qualification requirements, including the appointment of an experienced Australian lawyer with a demonstrated interest in civil liberties. The Association has previously stated: "*It is important that the governance of the Board includes people who bring a wide spread of expertise, and understanding of community expectations and an ability to challenge and question the priorities and ethos that builds up over time among the Commission's professionals."*[4]

6. Independence of Commission officers

Section 35A of the Act impinges on the independence of Commission staff in "*fearlessly carrying out their investigative roles*", as it "*authorises the CEO (under direction, in turn, from the [chairperson]), to issue directions to the staff about how one identifies cases of serious corrupt conduct and systemic conduct. These are not just guidelines to assist staff. Section 35A creates an obligation to comply with the directions*".[5] Further, "*it does not seem that this direction is required to be made public, falling outside those matters in section 35B, (which must be published)*".[6]

In the Association's view, if these provisions remain in their current form, they will continue to undermine and detract from the Commission's independence and ability to fulfil its role as a key component in the system by which accountability is provided to the government and the public sector. As a minimum, the Association suggests that any directive given under section 35A should be published to the parliamentary commissioner or parliamentary committee.

Thank you for the opportunity to provide our comments on the Bill. Please advise if we can be of any further assistance.

Yours faithfully

Christopher Hughes QC
President

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[4] See paragraphs 25 to 40 of the Association's submission dated 13 August 2015, paragraph 5 of the Association's submission dated 25 November 2015 and pages 3 to 4 of the Association's submission dated 2 April 2014.
[5] Paragraph 28 of the Association's submission dated 13 August 2015 and paragraph 6 of the Association's submission dated 25 November 2015.
[6] Page 4 of the Association's submission dated 2 April 2014.