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PARLIAMENTARY CRIME AND MISCONDUCT COMMITTEE

**Report No 64, March 2004**

**Three Year Review of the Crime and Misconduct Commission**

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**Legislative Assembly of Queensland  
Parliamentary Crime and Misconduct Committee**

**Three Year Review of the Crime and Misconduct Commission**

**March 2004**

**Membership of the PCMC<sup>1</sup>**

CHAIRMAN:	Mr Geoff Wilson MP	Member for Ferny Grove
DEPUTY CHAIRMAN:	Mr Howard Hobbs MP	Member for Warrego
MEMBERS:	Hon Desley Boyle MP	Member for Cairns
	Mr Stuart Copeland MP	Member for Cunningham
	Mr Andrew McNamara MP	Member for Hervey Bay
	Mr Kerry Shine MP	Member for Toowoomba North

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**Staff**

RESEARCH DIRECTOR:	Mr Stephen Finnimore
PRINCIPAL RESEARCH OFFICER:	Mr Luke Passfield
SENIOR RESEARCH OFFICER:	Mr Ben McEniery
EXECUTIVE ASSISTANT:	Ms Andrea Musch

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<sup>1</sup> Dr John Kingston, former Member for Maryborough, was discharged from the Committee on 26 March 2003, consequential to his resignation as a Member of the Legislative Assembly. He was replaced on the Committee by Mr Bill Flynn, former Member for Lockyer, who served as a member of the Committee from 26 March 2003 until 18 February 2004.

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## CHAIRMAN'S FOREWORD

I present to the Legislative Assembly the report of the 5<sup>th</sup> Parliamentary Crime and Misconduct Committee (PCMC or Committee) on its Three Year Review of the operations of the Crime and Misconduct Commission (CMC). The review has been carried out as required by section 292(f) of the *Crime and Misconduct Act 2001*. The Act envisages that the review be conducted before the end of each (normally three year) term of the Parliamentary Committee. This review is the first three year review since the *Crime and Misconduct Act 2001* commenced and has been undertaken in compliance with the Act even though only just over two years has elapsed since the formation of the CMC.

The report follows an extensive review process which commenced in February 2003, when the Committee called for submissions from the public and from various stakeholder organisations. Further detail of the process is set out in the next section.

A total of 36 submissions were received, and most of those submissions have been tabled by the Committee. In its review, the Committee has had regard to all submissions received, regardless of whether they were appropriate for tabling.

The Committee held public hearings on 19 and 20 June 2003, at which a number of persons made oral submissions and responded to questions from the Committee.

Various predecessor committees have carried out and reported on similar reviews of the former Criminal Justice Commission. The Criminal Justice Commission merged with the Queensland Crime Commission to form the CMC as from 1 January 2002. The merger was brought about by the *Crime and Misconduct Act 2001*. That Act wrought extensive and comprehensive changes. It repealed the former *Criminal Justice Act 1989* and set out in detail the functions and powers and responsibilities of the CMC, and of the PCMC and the Parliamentary Crime and Misconduct Commissioner. As a result, there were major changes to the structure and functions of the CMC. The Act also introduced a new legislative emphasis on the role of the CMC in building the capacity of public sector agencies to deal with and prevent misconduct themselves and the devolution to agencies of primary responsibility for the investigation of misconduct complaints.

The introduction of the Act followed soon after the report of our immediate predecessor Committee – the 4<sup>th</sup> Parliamentary Criminal Justice Committee – on its Three Year Review. That report was extensive and made many recommendations for legislative and other changes. The bulk of that Committee's recommendations for legislative changes were implemented in the *Crime and Misconduct Act 2001*.

Given this background, and given the relatively short period of time since the commencement of both the new Act and the CMC, the Committee has broadly taken two approaches in developing this report and recommendations.

Firstly, in relation to some of the major changes to the structure and functions of the CMC, the Committee was of the view that it was too early to draw firm and considered conclusions. In many respects while more time is needed before fully informed conclusions can be drawn and recommendations made, the review has been a productive examination of the new regime at this early stage of its development. The Committee has resisted any temptation to recommend change prematurely or gratuitously. The Committee does not make any recommendations for wholesale changes in structure or approach.

Secondly, in relation to a range of matters, for example the powers of the CMC and the operations of sections of the CMC that have remained substantially unchanged from the CJC (such as the office of General Counsel) the Committee has reached a considered position and made appropriate recommendations.

The Committee acknowledges and expresses its appreciation for the extensive assistance provided to it by the CMC, including in the following respects:

- the provision of a comprehensive initial submission;
- the appearance at the Committee's hearings of the CMC's Chairperson, and a number of the CMC's Commissioners and senior officers; and
- detailed and informative responses on various issues raised by the Committee or in submissions to the review.

The Committee wishes to particularly thank all individuals, government agencies and non-government organisations which assisted by providing submissions or evidence for this review. These contributions have been important and helpful to the deliberations of the Committee.

The Committee also wishes to acknowledge and thank the staff of the Committee secretariat for their assistance with its review and in the preparation of this report.

**Geoff Wilson MP**  
Chairman

**NOTES**

References to public hearings refer to the hearings held by the PCMC as part of its Three Year Review process on 19 and 20 June 2003. Transcripts of those hearings are available on the internet at [www.parliament.qld.gov.au/Committees/](http://www.parliament.qld.gov.au/Committees/)

This report and previous reports of the Committee and its predecessors are also available on-line at that address.

Contact details for the PCMC are:

**Address:** Parliamentary Crime and Misconduct Committee  
Parliament House  
George Street  
BRISBANE QLD 4000

**E-mail:** [pcmc@parliament.qld.gov.au](mailto:pcmc@parliament.qld.gov.au)

**Telephone:** 07 3406 7207

**Facsimile:** 07 3210 6011

**ABBREVIATIONS AND TERMS USED IN THIS REPORT**

ACC	Australian Crime Commission
AFP	Australian Federal Police
CJA	<i>Criminal Justice Act 1989</i>
CJC	Criminal Justice Commission
CMA	<i>Crime and Misconduct Act 2001</i>
CMC	Crime and Misconduct Commission
Commission	The five Commissioners of the CMC
DPP	Director of Public Prosecutions
Fitzgerald Report	Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, <i>Report of a Commission of Inquiry Pursuant to Orders in Council</i> , (Commissioner G E Fitzgerald QC), 1989.
FOI	Freedom of information
IRAS	Intelligence Recording and Analysis System
ODPP	Office of the Director of Public Prosecutions
OPSME	Office of Public Service Merit and Equity
Parliamentary Commissioner	Parliamentary Crime and Misconduct Commissioner
PCJC	Parliamentary Criminal Justice Committee
PCMC or Committee	Parliamentary Crime and Misconduct Committee
PIM	Public Interest Monitor
PPRA	<i>Police Powers and Responsibilities Act 2000</i>
PSAA	<i>Police Service Administration Act 1990</i>
QCC	Queensland Crime Commission
QPS	Queensland Police Service
QPUE	Queensland Police Union of Employees
SIU	Strategic Intelligence Unit
SMG	Strategic Management Group
WPA	<i>Witness Protection Act 2000</i>
WPU	Witness Protection Unit



**RECOMMENDATIONS**

<b>RECOMMENDATION 1</b> .....	<b>22</b>
The Committee recommends that the adequacy of the CMC’s funding to meet current and anticipated demands in respect of its civil confiscation function be the subject of ongoing review by the Minister.	
<b>RECOMMENDATION 2</b> .....	<b>27</b>
The Committee recommends that the CMC continue its efforts to enhance the capacity of agencies to deal with misconduct.	
<b>RECOMMENDATION 3</b> .....	<b>27</b>
The Committee recommends that there be careful oversight and monitoring by the CMC of the performance of agencies in dealing with and preventing misconduct.	
<b>RECOMMENDATION 4</b> .....	<b>27</b>
The Committee recommends that the agencies be required to report to the CMC, to the Parliament and to the public as fully and openly as possible regarding their performance in these respects.	
<b>RECOMMENDATION 5</b> .....	<b>27</b>
The Committee recommends that the agencies be adequately resourced to ensure they are able to fulfil their responsibilities to deal with and prevent misconduct.	
<b>RECOMMENDATION 6</b> .....	<b>27</b>
The Committee recommends that the Department of Premier and Cabinet have the primary role in monitoring and ensuring:	
<ul style="list-style-type: none"> <li>• that agencies take up CMC capacity building initiatives in a timely and responsive manner;</li> <li>• that there is adequate public reporting by agencies of information on misconduct prevention initiatives and outcomes; and</li> <li>• the adequacy of the resources of agencies to deal with and prevent misconduct.</li> </ul>	
<b>RECOMMENDATION 7</b> .....	<b>27</b>
The Committee recommends that there be close monitoring by the Department of Premier and Cabinet of the extent (if any) to which the devolution process has reduced the effectiveness of oversight by the PCMC and the Parliamentary Commissioner of the CMC’s misconduct function.	
<b>RECOMMENDATION 8</b> .....	<b>31</b>
The Committee recommends strongly that the timeliness of misconduct assessments and investigations by agencies and by the CMC continue to be rigorously addressed and monitored by the CMC and by the incoming PCMC.	
<b>RECOMMENDATION 9</b> .....	<b>33</b>
The Committee recommends that the CMC continue to take steps to minimise the impact of its investigations on individual subject officers, complainants, and agencies.	
<b>RECOMMENDATION 10</b> .....	<b>33</b>
The Committee recommends that the CMC, as part of its capacity building activities, continue to take steps to educate agencies on strategies to minimise the impact of their investigations.	
<b>RECOMMENDATION 11</b> .....	<b>34</b>
The Committee recommends that the CMC continue to improve its communication strategies, particularly in communicating progress and outcomes to, as appropriate, the complainant, the subject officer, any relevant agency, the media, and the public.	
<b>RECOMMENDATION 12</b> .....	<b>35</b>
The Committee recommends that careful consideration be given to legislative amendment, at an appropriate time, so that the misconduct jurisdiction of the CMC is extended to private entities that exercise public functions and utilise public monies.	
<b>RECOMMENDATION 13</b> .....	<b>35</b>
The Committee recommends any extension of the CMC’s jurisdiction in this regard would need to be accompanied by adequate resourcing of the CMC and of the entities involved.	
<b>RECOMMENDATION 14</b> .....	<b>43</b>

The Committee recommends the *Crime and Misconduct Act 2001* be amended to provide that where the CMC decides that prosecution proceedings should be considered, the CMC must refer the matter to a police officer seconded to the CMC to decide whether criminal charges should be laid and, where appropriate, lay charges.

**RECOMMENDATION 15**.....43

The Committee recommends the *Crime and Misconduct Act 2001* provide an exception to this requirement for those matters that relate to a CMC officer or fall into a limited category of cases that having regard to the nature and seriousness of the misconduct, and/or the public office held by the subject officer, it is necessary in the interests of justice that the matter be referred to the DPP to consider whether to lay criminal charges.

**RECOMMENDATION 16**.....43

The Committee recommends future parliamentary committees closely monitor those matters referred by the CMC to the DPP in accordance with the above exceptions in order to ensure that referrals to the DPP appropriately fall within the exceptions.

**RECOMMENDATION 17**.....47

The Committee recommends that the *Crime and Misconduct Act 2001* and the *Police Powers and Responsibilities Act 2000* be amended to remove the requirement that a report on the exercise of the powers under a covert search warrant be provided to the issuing judge.

**RECOMMENDATION 18**.....48

The Committee recommends that section 326 of the *Crime and Misconduct Act 2001* and section 159 of the *Police Powers and Responsibilities Act 2000* be amended to permit the Public Interest Monitor, whenever the Public Interest Monitor considers it appropriate, to report and apply to the Supreme Court for directions in relation to any matter concerning the exercise of powers under a covert search warrant or surveillance warrant, including:

- anything seized or photographed under a covert search warrant;
- information obtained under a surveillance warrant; and
- transcripts of recordings or photographs made or taken under a surveillance warrant.

**RECOMMENDATION 19**.....49

The Committee recommends that section 326(1)(d) of the *Crime and Misconduct Act 2001* be amended to require that any report by the Public Interest Monitor on non-compliance by the CMC with the *Crime and Misconduct Act 2001* be provided to the CMC and the Committee.

**RECOMMENDATION 20**.....49

The Committee recommends that section 159(2) of the *Police Powers and Responsibilities Act 2000* be amended to include a requirement that a report by the Public Interest Monitor on non-compliance by a police officer who is a ‘commission officer’ be given to the Commissioner of Police, the CMC and the Committee.

**RECOMMENDATION 21**.....52

The Committee recommends that the *Crime and Misconduct Act 2001* and the *Police Powers and Responsibilities Act 2000* be amended to allow a surveillance warrant to be issued in respect of specified premises on the basis that there are reasonable grounds for the believing that:

- a major crime which constitutes a ‘terrorist act’ has been, is being, or is likely to be, committed; and
- the use of a surveillance device at the premises is necessary for the purpose of an investigation into that major crime or suspected major crime or enabling evidence to be obtained of the major crime or suspected major crime.

**RECOMMENDATION 22**.....55

The Committee recommends that the *Crime and Misconduct Act 2001* and the *Police Powers and Responsibilities Act 2000* be amended to provide for the exercise of covert search powers without a warrant where the Chairperson of the CMC (or in the case of the *Police Powers and Responsibilities Act 2000* a police officer of at least the rank of inspector) reasonably believes:

- a major crime which constitutes a ‘terrorist act’ has been, is being, or is likely to be, committed;
- a thing at a place is evidence of the major crime; and
- unless the place is immediately entered and searched the evidence may be concealed or destroyed or its forensic value diminished.

**RECOMMENDATION 23**.....56

The Committee recommends that the *Crime and Misconduct Act 2001* and the *Police Powers and Responsibilities Act 2000* be amended to provide (in terms similar to those applicable to the emergent use of surveillance devices) that:

- within two business days after the emergency use of the covert search powers was authorised, an application must be made to a Supreme Court judge for approval of the exercise of the powers; and

- the Public Interest Monitor must be advised of the application and may appear and make submissions to the judge regarding the approval application.

<b>RECOMMENDATION 24</b> .....	<b>57</b>
The Committee recommends that the present provisions in the <i>Crime and Misconduct Act 2001</i> relating to additional powers warrants be amended so that such warrants may be utilised by the CMC in its major crime investigations.	
<b>RECOMMENDATION 25</b> .....	<b>58</b>
The Committee recommends that the definition of ‘serious indictable offence’ in the <i>Police Powers and Responsibilities Act 2000</i> be amended to include the extensive destruction of property in circumstances that constitute a terrorist act.	
<b>RECOMMENDATION 26</b> .....	<b>60</b>
The Committee recommends that the definition of ‘police officer’ in the <i>Police Powers and Responsibilities Act 2000</i> be amended to include special constables appointed under the <i>Police Service Administration Act 1990</i> who are at the time of appointment serving police officers of the Australian Federal Police or a police force of an Australian State or Territory or the New Zealand Police Force.	
<b>RECOMMENDATION 27</b> .....	<b>60</b>
The Committee recommends that the question of whether other special constables (i.e. those who are not serving police officers as described) should be included in the definition of ‘police officer’ under the <i>Police Powers and Responsibilities Act 2000</i> be the subject of further consideration by the Queensland Government.	
<b>RECOMMENDATION 28</b> .....	<b>61</b>
The Committee recommends that the <i>Crime and Misconduct Act 2001</i> be amended to allow presiding officers at CMC hearings to order the production of documents or things, in terms similar to the power under the <i>Independent Commission Against Corruption Act 1988</i> (NSW).	
<b>RECOMMENDATION 29</b> .....	<b>65</b>
The Committee recommends that the Queensland Government introduce legislation to enable the CMC and QPS to intercept telecommunications.	
<b>RECOMMENDATION 30</b> .....	<b>65</b>
The Committee recommends that any telecommunications scheme should include a role for an Inspector, such as the Public Interest Monitor, in the application process for a telecommunications interception warrant.	
<b>RECOMMENDATION 31</b> .....	<b>65</b>
The Committee recommends that the CMC be able to operate its own telecommunications interception facility and receive adequate funding to allow it to do so.	
<b>RECOMMENDATION 32</b> .....	<b>69</b>
The Committee recommends that the CMC continue to maintain its criminal and misconduct intelligence in a single unit.	
<b>RECOMMENDATION 33</b> .....	<b>70</b>
The Committee recommends that the CMC continue to have a dedicated intelligence unit that is independent of all other agencies.	
<b>RECOMMENDATION 34</b> .....	<b>70</b>
The Committee recommends that the CMC retain its ability to share relevant information with other law enforcement agencies.	
<b>RECOMMENDATION 35</b> .....	<b>70</b>
The Committee recommends that the CMC continue to maintain its own intelligence database independently of other agencies.	
<b>RECOMMENDATION 36</b> .....	<b>88</b>
The Committee recommends that sections 6 and 7 of the <i>Witness Protection Act 2000</i> be amended to allow the CMC to make short-term protection agreements for the purpose of providing court-only protection and that the Chairperson be allowed to delegate the power to enter into such agreements.	
<b>RECOMMENDATION 37</b> .....	<b>88</b>
The Committee recommends that consideration be given to whether the power to enter into short-term protection agreements should also be available in circumstances other than solely ‘court-security only’ situations.	

<b>RECOMMENDATION 38</b> .....	<b>89</b>
The Committee recommends that the <i>Witness Protection Act 2000</i> be amended to give the Chairperson power to suspend a protection agreement where, in the opinion of the Chairperson, the protected witness's conduct is a threat to the integrity of the program, subject to the witness being afforded adequate alternative protection during the period of suspension to ensure the safety of the witness.	
<b>RECOMMENDATION 39</b> .....	<b>90</b>
The Committee recommends that a new section be included in the <i>Witness Protection Act 2000</i> to expressly state that the acquisition and use of assumed identities by witness protection officers may be authorised by the Chairperson.	
<b>RECOMMENDATION 40</b> .....	<b>90</b>
The Committee recommends that section 36 of the <i>Witness Protection Act 2000</i> be amended to provide that it is an offence to disclose or record information about the Witness Protection Program that may compromise its integrity, even in cases where such information does not relate to a protected witness.	
<b>RECOMMENDATION 41</b> .....	<b>92</b>
The Committee recommends that the CMC be given the power to issue notices in terms similar to those in sections 74, 74A and 75 of the <i>Crime and Misconduct Act 2001</i> for the purposes of protecting a person who has been admitted to the Witness Protection Program or of protecting the integrity of the Witness Protection Program.	
<b>RECOMMENDATION 42</b> .....	<b>94</b>
The Committee recommends that witness protection officers be effectively managed, supervised and trained to ensure that officers maintain the highest professional standards in their dealings with protected witnesses.	
<b>RECOMMENDATION 43</b> .....	<b>100</b>
The Committee recommends that the Government give consideration to a full review of whistleblower protection in Queensland and the <i>Whistleblowers Protection Act 1994</i> in accordance with the recommendations of the 4 <sup>th</sup> PCJC in Report No. 55.	
<b>RECOMMENDATION 44</b> .....	<b>103</b>
The Committee recommends the continued retention of the Office of General Counsel as an independent unit within the CMC, answerable directly to the Commissioners.	
<b>RECOMMENDATION 45</b> .....	<b>103</b>
The Committee recommends that the Office of General Counsel be reviewed by the CMC or the Premier, with a view to increasing the capacity of the Office to provide independent, balanced and objective legal advice.	
<b>RECOMMENDATION 46</b> .....	<b>106</b>
The Committee recommends that the <i>Crime and Misconduct Act 2001</i> be amended so that the usual requirements for consultation with, and the bipartisan support of, the Parliamentary Committee apply to any appointment as acting chairperson of the CMC for a period or periods totalling in excess of six months.	
<b>RECOMMENDATION 47</b> .....	<b>107</b>
The Committee recommends that the <i>Crime and Misconduct Act 2001</i> be amended to make it clear that sections 329 and 295 extend to former officers of the former Criminal Justice Commission and former officers of the former Queensland Crime Commission.	
<b>RECOMMENDATION 48</b> .....	<b>107</b>
The Committee recommends legislative amendment so that there is a statutory requirement for the annual report of the Misconduct Tribunals to be tabled by the responsible Minister within four months and fourteen days of the end of the financial year.	
<b>RECOMMENDATION 49</b> .....	<b>112</b>
The Committee recommends that there be no restriction on the persons that can be required by the Parliamentary Crime and Misconduct Commissioner to give evidence at a hearing.	
<b>RECOMMENDATION 50</b> .....	<b>112</b>
The Committee recommends in the event that the last recommendation is not adopted, that the <i>Crime and Misconduct Act 2001</i> be amended to make it clear that former officers of the former Queensland Crime Commission can be required by the Parliamentary Commissioner to give evidence at a hearing.	

## 1. INTRODUCTION

### 1.1. Background

The Parliamentary Crime and Misconduct Committee (PCMC or Committee) is established by section 291 of the *Crime and Misconduct Act 2001* (CMA). The PCMC is a multi-party seven member Committee of the Queensland Parliament.

The Committee is for practical purposes a continuation of the former Parliamentary Criminal Justice Committee (PCJC), established under the now repealed *Criminal Justice Act 1989* (CJA), which had as its principal role the oversight of the former Criminal Justice Commission (CJC).

The CMA merged the former CJC and the former Queensland Crime Commission (QCC) to form the Crime and Misconduct Commission (CMC) which commenced operations on 1 January 2002.

The principal role of the PCMC is to monitor and review the operations of the CMC. The Committee has a number of specific functions, set out in the CMA.<sup>2</sup> These functions include:

- (f) *to review the activities of the commission at a time near to the end of 3 years from the appointment of the committee's members and to table in the Legislative Assembly a report about any further action that should be taken in relation to this Act or the functions, powers and operations of the commission.*

The current Committee was appointed in May 2001 as a committee of the 50<sup>th</sup> Parliament. The Committee was the fifth committee established to monitor and review the then CJC, and was known as the 5<sup>th</sup> Parliamentary Criminal Justice Committee or 5<sup>th</sup> PCJC. With the introduction of the CMA, the Committee underwent a name change and became known as the 5<sup>th</sup> PCMC.

This report is the culmination of this Committee's Three Year Review of the CMC.

Previous similar reviews by predecessor committees resulted in various reports. Details of those reports are set out in Appendix 1. The last review before the current review was carried out by the 4<sup>th</sup> PCJC in 2000, culminating in a detailed report tabled in March 2001. That report contained a number of recommendations for legislative and other change.

Not long afterwards, the government of the day introduced the Crime and Misconduct Bill in October 2001. The resultant CMA heralded extensive change to the structure, responsibilities, and powers of what became the CMC. The CMA implemented a large number of the recommendations for legislative change made by the 4<sup>th</sup> PCJC in its Three Year Review.

Given this background, and given the relatively short period of time since the commencement of both the CMA and the CMC itself, the present Committee believes it is too early to draw any firm and considered conclusions regarding the major changes brought about by the CMA. Accordingly, the Committee has not made any recommendations for wholesale changes in structure or approach. Nonetheless, the Committee has made various recommendations for improvement where necessary.

### 1.2. The review process and this report

The Committee advertised and invited submissions in early 2003. A number of submissions were received from interested members of the public and various organisations.

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<sup>2</sup> Section 292 of the CMA.

The bulk of these submissions were tabled in the Legislative Assembly on 13 June 2003, and further submissions were tabled on 17 October 2003. A list of tabled submissions is at Appendix 2.

As part of its inquiry, the Committee held public hearings on 19 and 20 June 2003. A list of witnesses who gave evidence at those hearings appears as Appendix 3. The transcripts of the hearings can be accessed at the Committee's website.

This report examines the CMC by looking at the various functions of the CMC. It also considers the coercive powers of the CMC. Finally, the report examines the accountability mechanisms governing the CMC and the exercise of its powers.

## 2. RESPONSIBILITIES, FUNCTIONS AND STRUCTURE OF THE CRIME AND MISCONDUCT COMMISSION

### 2.1. Establishment of the Crime and Misconduct Commission

The Fitzgerald Inquiry highlighted the need for the administration of criminal justice to remain independent of Executive controls.<sup>3</sup> Central to the reforms recommended by Fitzgerald QC was the establishment of an independent and impartial Criminal Justice Commission accountable to the public through Parliament. The commission was to be responsible for:

- (a) *monitoring, reviewing, co-ordinating and initiating reform of the administration of criminal justice in Queensland on an ongoing and permanent basis;*
- (b) *discharging those criminal justice functions not appropriately to be carried out by the Police Department or other agencies.*<sup>4</sup>

The CJC was established by the CJA to give effect to these recommendations. The key responsibilities of the CJC were to:

- advise on the administration of the criminal justice system in Queensland with a view to ensuring its efficiency and impartiality;
- continue investigations commenced by the commission of inquiry that related to official misconduct or alleged or suspected misconduct by members of the police service; and
- investigate complaints of official misconduct referred to the CJC and to secure the taking of appropriate action in respect of official misconduct.<sup>5</sup>

Upon inception the CJC was responsible for investigating organised or major crime that could not be appropriately or effectively discharged by the Queensland Police Service (QPS) or other State agencies. In March 1998 this role was transferred to the QCC which was established under the *Crime Commission Act 1997*. The QCC was given the responsibility of investigating criminal paedophilia and major and organised crime referred by its management committee.

On 1 January 2002 the CMA commenced, merging the QCC and the CJC to establish a new entity known as the CMC with responsibility, in broad terms, for performing those functions previously undertaken by the CJC and the QCC.<sup>6</sup>

### 2.2. Responsibilities and functions

The primary responsibilities of the CMC are to:

- (a) combat and reduce the incidence of major crime (i.e. serious crime, criminal paedophilia and organised crime); and
- (b) continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector.<sup>7</sup>

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<sup>3</sup> Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report of a Commission of Inquiry Pursuant to Orders in Council*, (Commissioner G E Fitzgerald QC), 1989, ('Fitzgerald Report'), p. 307.

<sup>4</sup> *Ibid*, p. 372.

<sup>5</sup> Section 2 of the CJA.

<sup>6</sup> Section 220 of the CMA.

<sup>7</sup> Sections 4 and 7 of the CMA.

The CMC also has an additional role under the *Criminal Proceeds Confiscation Act 2002* in relation to the civil confiscation of the proceeds of crime.<sup>8</sup>

To enable the CMC to undertake these responsibilities the CMA:

- provides the CMC with investigative powers, not ordinarily available to police, to enable effective investigation of particular cases of major crime and to support civil confiscation related activities;
- requires the CMC to help build the capacity of units of public administration to deal with misconduct; and
- gives power to the CMC to investigate cases of misconduct itself, particularly more serious matters.<sup>9</sup>

The CMC has the following functions under the CMA:

- prevention function – helping prevent major crime and misconduct;<sup>10</sup>
- crime function – the investigation of major crime;<sup>11</sup>
- misconduct function – raising the standards of integrity and conduct in units of public administration and ensuring that complaints or information about misconduct are dealt with in an appropriate way;<sup>12</sup>
- research function – undertaking research to support its other functions and research into criminal activity and other matters relating to the administration of criminal justice and misconduct;<sup>13</sup>
- intelligence function – undertaking intelligence activities to support the proper performance of its functions;<sup>14</sup>
- witness protection – operating a Witness Protection Program;<sup>15</sup>
- civil confiscation – undertaking civil proceedings for the recovery of proceeds of crime;<sup>16</sup> and
- a function conferred under another Act.<sup>17</sup>

These functions and the extent of the CMC's jurisdiction in respect of each are considered in more detail under the relevant chapters below.

## 2.3. Structure of the CMC

### 2.3.1. Chairperson and part-time commissioners

The CMC is headed by five commissioners, comprising of a full time commissioner, who is the Chairperson, and four part-time commissioners, who are community representatives. Collectively they are referred to as the Commission.<sup>18</sup>

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<sup>8</sup> Section 4(2) of the CMA.

<sup>9</sup> Section 5 of the CMA.

<sup>10</sup> Section 23 of the CMA.

<sup>11</sup> Section 25 of the CMA.

<sup>12</sup> Section 33 of the CMA.

<sup>13</sup> Section 52 of the CMA.

<sup>14</sup> Section 53 of the CMA.

<sup>15</sup> Section 56(a) of the CMA and the *Witness Protection Act 2000*.

<sup>16</sup> Section 56(b) of the CMA and the *Criminal Proceeds Confiscation Act 2002*.

<sup>17</sup> Section 56(c) of the CMA.

<sup>18</sup> Section 223 of the CMC.



The Chairperson must have served or be qualified for appointment as a judge of the Supreme Court of Queensland or another State, the High Court or the Federal Court.<sup>19</sup> Part-time commissioners must fulfil certain criteria:

- at least one commissioner must be in actual practice as a lawyer and have a demonstrated interest in civil liberties (referred to as the ‘civil liberties commissioner’);<sup>20</sup>
- the remaining commissioners must have one or more of the following –
  - (1) qualifications in public sector management and review, criminology, sociology or research related to crime or crime prevention; or
  - (2) community service experience, or experience of community standards and expectations relating to public sector officials and public sector administration.<sup>21</sup>

Section 230(4) also provides that at least one of the part-time commissioners must be a woman.

The Minister<sup>22</sup> is required to advertise nationally for applications for the Chairperson and throughout the State for applications for part-time commissioners with the exception of the civil liberties commissioner.<sup>23</sup> Nominations for the civil liberties commissioner must be sought by the Minister from the Bar Association of Queensland and the Queensland Law Society.<sup>24</sup>

Prior to nominating a person for appointment as a commissioner, the Minister must consult with the Committee and may only appoint the proposed appointee with the bipartisan support of the Committee.<sup>25</sup> In the case of part-time commissioners, the Minister must also consult with the Chairperson prior to any nomination for appointment. A commissioner must not hold office for more than a total of five years.<sup>26</sup>

Current members of the Commission are:<sup>27</sup>

Chairperson: Mr Brendan Butler SC (appointed as Chairperson of the CJC in December 1998 and Chairperson of the CMC from January 2002)

Commissioners:<sup>28</sup> Mrs Sally Goold OAM (appointed July 1999 and reappointed July 2002)  
 Mr Ray Rinaudo (appointed September 1999 and reappointed September 2002)  
 Professor Margaret Steinberg AM (appointed October 2000 and reappointed October 2003)  
 Hon. Bill Pincus QC (appointed December 2001)

### 2.3.2. *Current structure*

The CMC is structured in accordance with its outputs - crime, misconduct and witness protection and the various supporting business units. It has the following functional or work areas:

<sup>19</sup> Section 224 of the CMA.

<sup>20</sup> Section 230(2) of the CMA.

<sup>21</sup> Sections 225 and 230(3) of the CMA.

<sup>22</sup> The Premier is the responsible Minister.

<sup>23</sup> Section 227 of the CMA.

<sup>24</sup> Section 227(2) of the CMA.

<sup>25</sup> Section 228(3) of the CMA. Where there is no Committee in existence at the relevant time the Minister must consult with the Leader of the Opposition and the Leader of any other political party represented in the Legislative Assembly by at least 5 members: section 228(1)(b) of the CMA.

<sup>26</sup> Section 231(2) of the CMA.

<sup>27</sup> CMC, *Annual Report 2002-2003*, pp. 56-57.

<sup>28</sup> Part-time members of the CJC appointed under the CJA continue as part-time commissioners of the CMC: section 358 of the CMA.

- Crime;
- Misconduct;
- Research and Prevention;
- Intelligence and Information;
- Operations Support; and
- Corporate Services.<sup>29</sup>

Appendix 4 to this report outlines the CMC's current organisational structure.

The CMC's corporate policy and strategic directions as set by the Commission are implemented by the Strategic Management Group (SMG). The SMG, which meets fortnightly, is comprised of the Chairperson (as CEO of the organisation), the Assistant Commissioner, Crime, the Assistant Commissioner, Misconduct, and the Directors of Intelligence and Information, Research and Prevention, Complaints Services, Misconduct Investigations, Witness Protection and Operations Support, Crime Operations and the Executive Director.<sup>30</sup>

The CMA established the Crime Reference Committee which has responsibility for referring major crime to the CMC for investigation and coordinating the investigation of major crime undertaken by the CMC in cooperation with other agencies.<sup>31</sup> The Committee is chaired by the Assistant Commissioner, Crime, and comprises the CMC Chairperson, the Commissioner of Police, the Chair of the Australian Crime Commission (ACC), the Commissioner for Children and Young People and two community representatives.<sup>32</sup>

In addition to the SMG, the CMC has a number of committees which focus on particular areas of corporate governance. A brief description of the roles of these committees follows:

- Audit Committee - provides an independent assessment of the adequacy and effectiveness of the CMC's internal controls.
- Commission Consultative Committee - provides a forum for elected employee representatives and senior management to exchange ideas, concerns and points of view.
- Equal Employment Opportunity Consultative Committee - ensures that administrative policies and practices adhere to the principles of equal employment opportunity.
- Finance Committee - oversees the budget process and financial management.
- Information Steering Committee - ensures effective use of information infrastructure and resources.
- Legislation Committee - ensures compliance with relevant legislation and reviews the applicability of the legislation governing the CMC.
- Risk Management Committee - ensures the CMC maintains robust and effective risk management strategies and related practices.
- Workplace Health and Safety Committee - monitors and implements policies and strategies to safeguard health and safety.

The CMC also has four other committees that deal with operational matters:

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<sup>29</sup> CMC submission, pp. 2-3.

<sup>30</sup> CMC submission, p. 84.

<sup>31</sup> Section 275 of the CMA.

<sup>32</sup> Section 278(1) of the CMA.

- the Misconduct Operations Review Committee;
- the Misconduct Assessment Committee;
- the Crime Operational Review Committee; and
- the Witness Protection Advisory Committee.<sup>33</sup>

## 2.4. Resources and staffing

### 2.4.1. Staffing establishment

The CMC employs staff across a broad range of disciplines including police officers, legal officers, financial investigators, intelligence analysts, research officers and librarians. As at 31 December 2003, the CMC had 298 established positions.<sup>34</sup>

The CMC's staffing establishment as at 30 June 2002 and 31 December 2003 is detailed in the following table.

	As at 30 June 2002		As at 31 December 2003	
	Approved establishment	Staff on hand	Approved establishment	Staff on hand
Executive	14	14.2	15	14
Crime	30	34.1	43	39.5
Misconduct	85	82.4	86	85.5
Witness Protection and Operations Support	54	48.4	54	47.0
Research and Prevention	27	24.6	27	27.6
Intelligence and information	52	53.8	54	51.4
Corporate Services	19	19	19	19.4
<b>Total</b>	<b>281</b>	<b>276.5</b>	<b>298</b>	<b>284.4</b>

### 2.4.2. Resource allocation to sub-outputs

The CMC's budget for the six months ending 30 June 2002 was \$16,199,160. The CMC's budget for the 2002-2003 financial year was \$30,720,000. The following tables detail budget allocations to the three outputs across the CMC's functional areas.<sup>35</sup>

<sup>33</sup> CMC, *Annual Report 2002-2003*, p. 59.

<sup>34</sup> Information provided by the CMC by letter to the Committee dated 20 January 2004.

<sup>35</sup> *Ibid.*

Six months to 30 June 2002<sup>36</sup>

Functional area	Crime	Misconduct	Witness Protection	Total
Research and Prevention	577,474	662,870	0	1,240,344
Misconduct	0	4,689,937	0	4,689,937
Intelligence and Information	554,061	894,522	113,487	1,562,070
Witness Protection and Operations support	443,841	1,585,285	540,079	2,569,205
Corporate Services	312,935	1,040,151	524,524	1,877,610
Corporate Costs	360,241	1,197,389	603,816	2,161,446
Crime	2,032,548	0	0	2,032,548
<b>Total</b>	<b>4,281,100</b>	<b>10,070,154</b>	<b>1,781,906</b>	<b>16,133,160</b>

2002-2003

Functional area	Crime	Misconduct	Witness Protection	Total
Research and Prevention	967,000	1,110,000	0	2,077,000
Misconduct	0	7,289,000	0	7,289,000
Intelligence and Information	1,367,000	2,207,000	280,000	3,854,000
Witness Protection and Operations Support	927,000	3,311,000	1,128,000	5,366,000
Corporate Services	670,333	2,228,091	1,123,575	4,022,000
Corporate Costs	771,667	2,564,909	1,293,425	4,630,000
Crime	3,482,000	0	0	3,482,000
<b>Total</b>	<b>8,185,000</b>	<b>18,710,000</b>	<b>3,825,000</b>	<b>30,720,000</b>

<sup>36</sup> Note: the figures for this table were derived by the CMC using the allocation percentages for 2002-2003.

### 3. MAJOR CRIME AND CIVIL CONFISCATION

#### 3.1. Introduction

At the time of its establishment, the CJC was vested with jurisdiction to investigate organised and major crime. Its jurisdiction was however limited to matters, which in the Commission's opinion, were not appropriate to be discharged, or could not be effectively discharged by the QPS. From December 1992, the CJC participated with the QPS in investigating major crime by means of a Joint Organised Crime Task Force, which operated largely under the direction of the CJC.<sup>37</sup>

In March 1998, the CJC's role in respect of the investigation of major and organised crime was transferred to the newly established QCC. The QCC, which was established under the *Crime Commission Act 1997*, was given responsibility for investigating criminal paedophilia and major and organised crime. The operations of the QCC differed from the CJC in a number of ways. In particular, the QCC operated on a referral basis under which matters were referred to it by a nine member management committee. The QCC also made significant use of strategic intelligence with targeted research and risk assessment methodology to monitor and evaluate the criminal environment and to determine investigative priorities and trends in criminal activity.<sup>38</sup>

The merger of the QCC and the CJC in January 2002 saw the establishment of the CMC as a single entity with both major crime and misconduct responsibilities. The CMC's crime function adopts the same operational philosophy that underpinned the QCC. This approach involves using strategic intelligence assessments and risk evaluation processes to proactively identify individuals, networks and activities for investigation.<sup>39</sup>

This chapter examines the CMC's crime function and its associated role in respect of the confiscation of proceeds of crime. In particular the following issues are considered:

- concerns raised in relation to the CMC performing both crime and misconduct functions;
- the CMC's role in relation to paedophilia and terrorism; and
- resourcing of the CMC's civil confiscation role.

#### 3.2. The CMC's crime function

The CMC's crime function involves the investigation of major crime referred to it by the Crime Reference Committee.<sup>40</sup> The CMA defines 'major crime' as:

- (a) *criminal activity that involves an indictable offence punishable on conviction by a term of imprisonment not less than 14 years; or*
- (b) *criminal paedophilia; or*
- (c) *organised crime; or*
- (d) *something that is –*
  - (i) *preparatory to the commission of criminal paedophilia or organised crime; or*
  - (ii) *undertaken to avoid detection of or prosecution for criminal paedophilia or organised crime.*<sup>41</sup>

<sup>37</sup> Butler SC, Brendan, *The Pros and Cons of Amalgamation of Crime and Misconduct*, Joint Standing Committee on the Anti-Corruption Commission, *National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies 2003*, Report No. 7 Legislative Council and Legislative Assembly of Western Australia, p. 93.

<sup>38</sup> *Ibid.*

<sup>39</sup> CMC, *Annual Report 2001-2002*, p. 29.

<sup>40</sup> Section 25 of the CMA.

<sup>41</sup> Schedule 2 of the CMA.

The CMC may only investigate major crime referred to it by the Crime Reference Committee. The Crime Reference Committee, established under section 274 of the CMA, is comprised of the Assistant Commissioner, Crime (who is the chairperson of the committee), the CMC Chairperson, the Commissioner of Police, the Commissioner for Children and Young People, the Chairperson of the ACC and two community representatives appointed by the Governor in Council.<sup>42</sup>

The Crime Reference Committee may refer a matter to the CMC upon its own initiative or at the request of the Commissioner of Police or the Assistant Commissioner, Crime.<sup>43</sup> The committee may, on its own initiative, refer major crime to the CMC only if it is satisfied:

- an investigation into major crime is unlikely to be effective using the powers ordinarily available to the police service; and
- it is in the public interest to refer the major crime to the CMC.<sup>44</sup>

The Crime Reference Committee may refer major crime to the CMC at the request of the Commissioner of Police only if it is satisfied:

- the police service has carried out an investigation into the major crime that has not been effective;
- further investigation into the major crime is unlikely to be effective using the powers ordinarily available to police officers; and
- it is in the public interest to refer the major crime to the CMC.<sup>45</sup>

The CMA does not contain any similar preconditions in respect of major crime referrals made at the request of the Assistant Commissioner, Crime.

The Crime Reference Committee also has authority to:

- give the CMC directions imposing limitations on a crime investigation, including limitations on the exercise of the CMC's powers for an investigation;<sup>46</sup>
- direct the CMC to end a particular crime investigation;<sup>47</sup>
- amend the terms of a referral to the CMC;<sup>48</sup> and
- refer major crime to the Commissioner of Police if it is satisfied that the matter is not appropriate for investigation or continued investigation by the CMC.<sup>49</sup>

### 3.3. Crime references

During 2002-2003 the CMC had some 21 current major crime references. Three were in relation to organised crime, five in relation to criminal paedophilia and 13 in relation to serious crime. Details of these references are contained in the following table.<sup>50</sup>

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<sup>42</sup> Section 278(1) of the CMA.

<sup>43</sup> Section 27 of the CMA.

<sup>44</sup> Section 28(1) of the CMA. Section 28(3) details a number of matters the Crime Reference Committee may have regard to in determining whether it is in the public interest to refer the major crime to the CMC.

<sup>45</sup> Section 28(2) of the CMA.

<sup>46</sup> Section 29(1) of the CMA.

<sup>47</sup> Section 29(2) of the CMA.

<sup>48</sup> Section 30 of the CMA.

<sup>49</sup> Section 31 of the CMA.

<sup>50</sup> CMC, *Annual Report 2002-2003*, p. 20.

<b>Referrals current in 2002-03</b>				
<b>Referral</b>	<b>Date referred</b>	<b>Status</b>	<b>Reference type</b>	<b>Description</b>
Freshnet	August 1998	Current	Organised Crime	An umbrella referral relating to established criminal networks
Tiber	Nov. 1998	Current	Serious crime	Murder
Atrax	Jan. 2000	Current	Criminal paedophilia	An umbrella referral relating to Internet-based child-sex offending
Gatekeeper	April 2000	Current	Organised crime	An umbrella referral relating to money laundering activities
Enchanted	Feb. 2002	Completed Sept. 2002	Serious crime	Attempted murder
Jarvis	Feb. 2002	Current	Serious crime	Suspected murder
Denver	March 2002	Current	Serious crime	Suspected murder
Caribbean	March 2002	Completed March 2003	Serious crime	Receiving in Queensland of property stolen interstate
Verona	April 2002	Current	Criminal paedophilia	Suspected extra-familial paedophile activity in North Queensland
Anvil	April 2002	Completed May 2003	Criminal paedophilia	Suspected extra-familial paedophile activity in South-East Queensland
Alaska	April 2002	Current	Criminal paedophilia	Suspected extra-familial paedophile activity in South-East Queensland
Isle	May 2002	Completed Jan. 2003	Serious crime	Murder
Artemis	July 2002	Current	Criminal paedophilia	An umbrella referral relating to extra-familial offenders who offend against multiple victims
Napier	Nov. 2002	Current	Organised crime	Suspected murder
Caviar	Nov. 2002	Current	Serious crime	Suspected double murder
Counter-terrorism	Dec. 2002	Current	Serious crime	Organised terrorist activities
Abina	Feb. 2003	Current	Serious crime	Murder
St George	Feb. 2003	Current	Serious crime	Riot
Alpha Grapple	Feb. 2003	Current	Serious crime	Suspected arson
Hope	June 2003	Current	Serious crime	Suspected unlawful killing
Bravo System	June 2003	Current	Serious crime	Suspected perjury

The CMC has five umbrella references – two for organised crime, two for criminal paedophilia and one in respect of counter-terrorism. These references permit the CMC to undertake tactical target development investigations without further reference to the Crime Reference Committee. Internal accountability processes require CMC lawyers to provide formal legal advice as to whether a proposed investigation can be undertaken under an umbrella referral. If advice received is in the affirmative, the investigation may

proceed without further formality, otherwise a specific reference must be sought from the Crime Reference Committee.<sup>51</sup>

### **3.4. Performing the crime function**

Section 26 of the CMA provides that the CMC performs its crime function by:

- investigating major crime referred to it;
- gathering evidence for the prosecution of persons for offences;
- gathering evidence for the recovery of the proceeds of major crime; and
- liaising with, providing information to, and receiving information from other law enforcement agencies and prosecuting authorities.

The CMC investigates major crime through the use of multidisciplinary teams comprising police officers, intelligence analysts, financial investigators and legal officers. At present, the CMC has three multidisciplinary investigative teams – two dedicated to organised crime (the Silhouette and Gatekeeper teams) and one dedicated to child sex offending (the Egret team). Despite the existence of these multidisciplinary investigative teams, the CMC does not have capacity to conduct complex and protracted investigations without assistance from other law enforcement agencies. The CMA importantly makes provision for the establishment of police task forces to assist the CMC carry out its crime investigations.<sup>52</sup> These taskforces, which operate under the control and direction of the Commissioner of Police and in partnership with the CMC, are utilised to advance tactical investigations, particularly in relation to organised crime.<sup>53</sup> The joint QPS-CMC Executive team provides strategic direction and oversight for all joint investigations.<sup>54</sup>

Essential to the effectiveness of CMC investigations is the maintenance and continuing development of partnerships with other law enforcement agencies such as the QPS, the ACC, the Australian Federal Police (AFP) and the Australian Customs Service.

During 2001-2002, the CMC was engaged in 43 operations – 21 organised crime operations, 14 serious crime operations and eight criminal paedophilia operations.<sup>55</sup> During 2002-2003, the CMC was involved in a total of 48 investigations. The details are as follows:

- four investigations into organised crime began, five were completed and 12 continued;
- seven paedophilia investigations began and four continued; and
- seven serious crime investigations began, six continued and three were completed.<sup>56</sup>

### **3.5. Concerns about the CMC's major crime role**

#### **3.5.1. Introduction**

The Queensland Opposition in their submission to the Committee contended that the amalgamation of major crime and misconduct functions 'has not been as successful as it might be', and that the differing objectives of the former QCC and former CJC would be better achieved through the existence of two

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<sup>51</sup> CMC submission, p. 22.

<sup>52</sup> Section 32(1) of the CMA.

<sup>53</sup> CMC, *Annual Report 2001-2002*, p. 29; see also section 32(2) of the CMA.

<sup>54</sup> CMC submission, p. 21.

<sup>55</sup> CMC, *Annual Report 2001-2002*, p. 34. The results of some of these operations are detailed at pp. 34-37.

<sup>56</sup> CMC, *Annual Report 2002-2003*, p. 5. The results of some of these investigations are detailed at pp. 21-25.



separate and adequately resourced organisations.<sup>57</sup> While no other submissions urged a similar position to that of the Queensland Opposition, two other submissions did express concerns in respect of the CMC's major crime role.

The first of these concerns relates to the potential for a 'conflict of interest' within the CMC and the adequacy of mechanisms to ensure that CMC officers involved in major crime, particularly organised crime investigations are subject to the same independent scrutiny as those public officers outside the CMC.<sup>58</sup> The second concern identified in submissions was the potential for resource duplication between the CMC and the QPS given the overlap of responsibilities between the two agencies.<sup>59</sup> These matters, and the potential advantages of the CMC's dual role, are discussed below.

### 3.5.2. *Scrutiny of CMC officers involved in major crime investigations*

The principal concern raised in submissions is the potential for a 'conflict of interest' arising from the CMC's role in respect of both major crime and misconduct. Essentially it is suggested that in performing its misconduct function, the CMC may not deal with allegations of misconduct against CMC officers, particularly those facing high corruption risks (such as those involved in organised crime investigations), with a sufficient degree of impartiality and independence because it involves one of its own.<sup>60</sup>

Related concerns were recently considered by the Kennedy Royal Commission in Western Australia which examined the question of whether a proposed body to investigate misconduct should also have the function of investigating serious or organised crime.<sup>61</sup> The Royal Commission referred to a number of factors that would mitigate the perceived risks<sup>62</sup> associated with a single agency being responsible for organised crime and misconduct including:

- the quarantining of that part of the premises and the facilities and system upon which the investigation of serious or organised crime takes place, from the operation involving the investigation of corrupt police conduct; and
- the agency over time gaining a familiarity with officers of the police service and developing the ability to identify and screen out suspect officers from the taskforces which participate in the investigation of serious or organised crime within the agency.<sup>63</sup>

This issue was addressed by a number of witnesses at the Committee's public hearing. The CMC Chairperson, Brendan Butler SC, made the following comments:

*An organisation like the CMC is constantly analysing the risk, maintaining its systems, ensuring that there are good internal reporting processes and maintaining a separation between our misconduct investigation functions and our crime investigation functions so that the two do not interact and where any suspicions arise we bring those to the attention of the committee so that they can be independently investigated or oversighted.*

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<sup>57</sup> Queensland Opposition submission, p. 1.

<sup>58</sup> QPS submission, p. 3 and Office of Public Service Merit and Equity (OPSME) submission, p. 1.

<sup>59</sup> QPS submission, pp. 1-2.

<sup>60</sup> QPS submission, p. 3 and OPSME submission, p. 1

<sup>61</sup> Interim Report, *Royal Commission into whether there has been any corrupt or criminal conduct by Western Australian Police Officers*, December 2002, pp. 70-71.

<sup>62</sup> These risks related to the fact that incorporating a serious or organised crime function within such a body brings police officers physically into the premises of the agency and renders the maintenance of an appropriate level of security more difficult. The CMC utilises police officers in respect of both its crime and misconduct functions and therefore these factors are relevant to ensuring the operational independence of the CMC's misconduct area from its crime area.

<sup>63</sup> Interim Report, *Royal Commission into whether there has been any corrupt or criminal conduct by Western Australian Police Officers*, December 2002, p. 71.

*...there is a risk for investigators investigating organised crime, but our investigators work in teams that involve police officers, civilian investigators, lawyers, civilian intelligence analysts, administrative support and so on. The actual mix of people within those teams provides a degree of accountability in the process and means that if any problem arises the fact that it will be reported is quite certain.*<sup>64</sup>

In a similar vein, the Assistant Commissioner, Crime, Mr John Callanan, stated:

*...police officers who are involved in the crime fighting side of the organisation – and this extends to outside police who become members of police task forces – are subject, because of that, to scrutiny by this committee and, of course, its parliamentary commissioner.*<sup>65</sup>

### Analysis and comment

While CMC officers investigating major crime, particularly organised crime, may be exposed to higher risks of corruption, the Committee considers that there are adequate mechanisms or safeguards in place to ensure that CMC officers involved in major crime investigations, are subject to rigorous scrutiny and oversight.

The first of these safeguards is the multidisciplinary nature of the crime investigation teams, which as noted by Mr Butler, provides one layer of scrutiny or accountability in the CMC's crime area. Secondly, the CMC's crime area operates as a 'unit' separate from the CMC's misconduct area. This separation exists in terms of the physical separation of work areas, access to intelligence and information held by each area and ensuring personnel do not work both in the misconduct and crime area.

A further safeguard is the requirement contained in section 329 of the CMA which requires the Chairperson of the CMC to notify the Committee of all conduct of a CMC officer that the Chairperson suspects involves, or may involve, improper conduct.<sup>66</sup> The Committee, independent of the CMC, is empowered under section 295 of the CMA to determine what action should be taken in relation to any such matters. The Committee may, amongst other available courses of action, ask the Parliamentary Commissioner to investigate and provide a report on the matter to the Committee. In this way, the actions of CMC officers suspected of improper conduct are subject to independent scrutiny.

The Committee observes that the effectiveness of the section 329 process depends on a culture within the organisation which encourages concerns or allegations of improper conduct to be promptly brought to the attention of senior officers and the Chairperson. In the Committee's experience, such a culture generally exists. Under the current *Protocols for Dealing with Misconduct Complaints against personnel of the Criminal Justice Commission*<sup>67</sup> any complaint of misconduct received by a CMC officer must be referred immediately to the Director, Complaint Services, who in turn must refer the complaint to the Chairperson for consideration.

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<sup>64</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 17.

<sup>65</sup> Ibid, pp. 19-20.

<sup>66</sup> Section 329 defines improper conduct to mean –

- (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.

<sup>67</sup> These protocols are under review.

### 3.5.3. *Duplication of resources*

The QPS in its submission raised concerns regarding the potential for duplication of effort on the part of the QPS and the CMC if careful management practices are not applied.<sup>68</sup> The submission states:

*Some concerns about duplication of effort have been expressed at an operational level and this is an aspect of the CMC's operations with the QPS that should be reviewed more closely over time.*

*For example, police officers are used in major crime investigative roles at the CMC. At present there is no provision made for these officers to routinely affect [sic] an arrest or prepare lengthy briefs of evidence. The subsequent referral of matters to the QPS after investigation for prosecution is an example which raises concerns about the effectiveness of resource allocation and use.<sup>69</sup>*

The Assistant Commissioner, Crime, Mr Callanan, addressed this issue in the following terms:

*Perhaps the problem is that operating the way we do – as Mr Butler indicated – as a catalyst for some of these things, we do not have the ability to commit to the full range of arrest and brief preparation activity. That has been addressed. It has been addressed at both OMB [Police Operations Management Board] level and JET [Joint Executive Team] level. It rather touches on some sensitive operational areas, but I can assure the committee that that kind of concern is being addressed and, again, in a cooperative way.<sup>70</sup>*

Subsequent to the hearing the Committee sought further information from the CMC in relation to the extent to which police officers attached to the CMC are involved in effecting arrests, preparing briefs of evidence and preferring charges. The Committee also sought the CMC's views on whether there is further scope for these roles to be undertaken by police officers attached to the CMC's major crime area to minimise the likelihood of resource duplication with the QPS.

The CMC in its response, advised that police officers attached to Office of the Assistant Commissioner, Crime, do not presently effect arrests or prefer charges principally because of the consequential logistical and administrative responsibilities, which include court appearances and organising witnesses.<sup>71</sup> The CMC argued that the involvement of CMC police officers in these tasks would reduce the capacity of the Office of the Assistant Commissioner, Crime to perform its principal investigative role in relation to major crime.

In respect to the preparation of briefs, the CMC informed the Committee that CMC police officers from time to time play a role in brief preparation, depending on the nature of particular operations in which they are involved. CMC police officers are usually more actively involved in brief preparation in proactive complex organised crime investigations or paedophile investigations which have been generated or developed through the CMC's strategic intelligence process.<sup>72</sup>

The CMC submits that the present duties of CMC police officers are consistent with previous arrangements between the QPS and the QCC and best reflect the police taskforce concept provided for in the CMA. Any risks of unnecessary duplication are addressed at senior management level and managed by the CMC/QPS Joint Executive Team and the Police Operations Management Board.

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<sup>68</sup> QPS submission, p. 1.

<sup>69</sup> Ibid, p. 2.

<sup>70</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 19.

<sup>71</sup> CMC response to further issues, 5 November 2003, p. 2.

<sup>72</sup> Ibid, p. 2.

### Analysis and comment

The Committee considers that there will inevitably be some duplication of resources between the CMC and the QPS. The potential for such duplication will exist irrespective of whether the major crime function is performed by the CMC or a body dedicated to major crime as in the case of the former QCC. On this basis, resource duplication itself is not argument against the CMC undertaking a major crime role.

The Committee accepts that the involvement of CMC police officers attached to the Office of the Assistant Commissioner, Crime, in the preferring of charges and effecting arrests could potentially undermine the ability of the CMC to focus on the investigation of major crime through the use of its special powers. Accordingly, the Committee does not recommend that these roles be performed by CMC police officers attached to the Office of the Assistant Commissioner, Crime.

In respect of brief preparation the Committee notes, that in many instances this is a task that may involve input from CMC police officers. The existing level of communication and cooperation between the CMC and the QPS in respect of major crime is, in the Committee's opinion very good. In their submission the QPS point to 'unprecedented levels of cooperation and partnership with the CMC' and the 'positive working' relationship between the two organisations.<sup>73</sup>

The Committee is satisfied that at present, mechanisms exist to address any resource duplication concerns that arise as between the CMC and the QPS, particularly in relation to the preparation of briefs of evidence in major crime matters. The Committee encourages both agencies to develop further their existing partnership and to continue to monitor the use of resources to ensure that they are being utilised effectively, and where necessary address any concerns as they arise.

It should be noted that this analysis relates only to the role of the small number of police officers seconded to the CMC's major crime area. The CMC's role in respect of misconduct operations, and in particular the question of whether the CMC should have a greater role in respect of the laying of charges consequent to its misconduct investigations is examined in Chapter 4.

#### **3.5.4. Advantages of the CMC's dual role**

The CMC is not intended to be an alternative police service. The CMC's focus is on major crime such as organised crime, child sex offending and other serious crimes which may defy ordinary investigative methods. The CMA gives the CMC special coercive powers not ordinarily available to police. These include the power to require the production of documents and things and most importantly, the power to compel persons to attend CMC investigative hearings.<sup>74</sup> In this way the CMC's major crime role differs little from that of the QCC.

One argument often advanced in favour of a single organisation performing crime and misconduct functions is the not infrequent link between major crime and corruption. Often, organised crime thrives because those involved are bribing or otherwise corrupting police officers or public officials.<sup>75</sup> This means that effective dismantling of organised crime syndicates requires the investigative agency to be able to probe the actions not only of members of organised crime syndicates, but also the conduct of corrupt public officials who protect and assist organised crime operations.

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<sup>73</sup> QPS submission, p. 1.

<sup>74</sup> The CMC's coercive powers are discussed in Chapter 5 below.

<sup>75</sup> 4<sup>th</sup> PCJC, Three Year Review, p. 14.

On a broader level, the integration of both functions within the one agency can increase administrative efficiencies and reduce associated costs. In its 2001-02 Annual Report, the CMC identifies the following benefits flowing from the merger:

- the ability to draw upon the expertise of the Strategic Intelligence Unit (SIU) in identifying targets, evaluating markets and assessing the vulnerabilities of criminal networks;
- a greater understanding of the nature of crime problems in society and more focussed investigative activities because of the CMC's crime research capacity;
- access to the CMC's Technical and Surveillance Unit which enhances target identification and development strategies;
- administrative efficiencies; and
- the ability to draw together its research, intelligence and investigative capacities to enhance the crime prevention function.<sup>76</sup>

### 3.5.5. *Conclusion*

The Committee is of the view that there are no concerns of sufficient gravity that would warrant the CMC forgoing its major crime role. While it is too early to obtain a complete picture of the impact of the merger of major crime and misconduct roles, the Committee considers that provided each of these functions remain adequately resourced, the CMC should retain its role in respect of major crime. In relation to the specific concerns raised in submissions and examined above, namely the potential for a 'conflict of interest' because of the CMC's dual roles and the possibility of the duplication of resources between the CMC and the QPS, the Committee, as discussed, considers that there are adequate mechanisms in place to address these potential concerns associated with the CMC investigating major crime.

## 3.6. **Paedophilia**

### 3.6.1. *Background*

Like the former QCC, the CMC may investigate criminal paedophilia. Criminal paedophilia is defined as:

- criminal activity that involves any of the following –*
- (a) *offences of a sexual nature committed in relation to children; or*
  - (b) *offences relating to obscene material depicting children.*<sup>77</sup>

The CMC in its submission to the Committee notes that it does not have the staffing and other resources to assume wide-ranging or overriding responsibility for the investigation of all criminal activity involving child-sex offending. The investigation of such offences remains the primary responsibility of the QPS.<sup>78</sup>

The areas of child sex offending that the CMC has concentrated on to date are:

- offending by networked or recidivist extra-familial child sex offenders; and
- offending by persons who use the Internet as a tool in locating and grooming potential child victims.<sup>79</sup>

This approach of the CMC recognises that the QPS and its regional Juvenile Aid Bureaus are better equipped to respond to complaints of intra-familial offending, which comprises the bulk of offending

<sup>76</sup> CMC, *Annual Report 2001-2002*, p. 29.

<sup>77</sup> Schedule 2 of the CMA.

<sup>78</sup> CMC submission, p. 24.

<sup>79</sup> *Ibid.*

brought to the attention of law enforcement agencies. The CMC's approach is reflective of the former QCC's policy in relation to discharging its criminal paedophilia responsibilities. That policy as approved by the QCC Management Committee stated that the:

*QCC investigates only those criminal paedophilia matters which other agencies, such as the Police Service and other State entities, cannot efficiently or effectively investigate, or where there is significant public interest in the matter to be examined.*<sup>80</sup>

The CMC's paedophilia investigations, including its ongoing Internet based investigations, are undertaken by a multidisciplinary team comprising three police officers, an intelligence analyst, an assistant intelligence analyst and a lawyer. Many of the CMC's paedophilia-related investigations are conducted jointly with officers of the QPS.<sup>81</sup>

### 3.6.2. A standing reference on paedophilia

In the context of the inquiry by the CMC into the abuse of children in foster care, concerns were publicly aired about the fact that the CMC has no standing statutory reference in respect of criminal paedophilia.<sup>82</sup> Under the CMA, the CMC may only investigate matters involving criminal paedophilia if the matter is referred to the CMC by the Crime Reference Committee or it falls within the terms of an existing 'umbrella' paedophilia reference.

This position may be contrasted with that of the former QCC. One of the key reasons for the establishment of the QCC was the need to address criminal paedophilia in Queensland in a more proactive manner.<sup>83</sup> The now repealed *Crime Commission Act 1997* provided that the QCC 'is taken to have a standing reference from the management committee to investigate criminal paedophilia.'<sup>84</sup> The apparent purpose of the QCC's statutory reference was to 'short circuit any delay in dealing with the offences relating to this extremely serious matter.'<sup>85</sup>

Since commencement of the CMA in January 2002 the Crime Reference Committee has made the following references (which includes two relatively broad umbrella references) in respect of criminal paedophilia.<sup>86</sup>

Reference	Date referred	Description
01/02 Atrax	Jan 2002	An umbrella criminal paedophilia reference relating to internet based child sex-offending
02/02 Scorpion	Jan 2002	Previously identified suspected paedophile networks  Completed May 2002
07/02 Verona	April 2002	Suspected extra-familial paedophile activity in North Queensland

<sup>80</sup> QCC, *Annual Report 2000-2001*, p. 24.

<sup>81</sup> CMC submission, p. 25.

<sup>82</sup> Mrs Liz Cunningham MP, who suggested that the new reference based system was 'reactive rather than proactive in this area of protection of our children': Queensland Parliamentary Debates, *Hansard*, 20 August 2003, p. 3086. See also Bottom, Bob 'Something is rotten in the State of Queensland', *The Bulletin*, 23 September 2003.

<sup>83</sup> Queensland Parliamentary Debates, *Hansard*, 30 October 1997, p. 4109.

<sup>84</sup> Section 46(7) of the *Crime Commission Act 1997*.

<sup>85</sup> Minister for Police and Corrective Services, Queensland Parliamentary Debates, *Hansard*, 30 October 1997, p. 4111.

<sup>86</sup> Information sourced from 2001-2002 and 2002-2003 Annual Reports.

08/02 Anvil	April 2002	Suspected extra-familial paedophile activity in South East Queensland
09/02 Alaska	April 2002	Suspected extra-familial paedophile activity in South East Queensland
Artemis	July 2002	An umbrella referral relating to extra-familial offenders who offend against multiple victims

### *Analysis and comment*

As is apparent from the recent achievements noted in the CMC's 2002-2003 Annual Report, these references have been actively pursued by the CMC.<sup>87</sup> It may be argued that a standing reference in respect of criminal paedophilia provides a greater impetus for ensuring the adequate allocation of CMC resources to the investigation of criminal paedophilia.

The Committee is however satisfied that such an impetus exists notwithstanding the absence of a statutory reference. Apart from a number of existing paedophilia related references from the Crime Reference Committee, and the existence of a multi-disciplinary investigative team dedicated to paedophilia, the CMC's 2003-2007 Strategic Plan identifies a commitment to targeting criminal paedophilia. Key deliverables identified for 2003-2004 include to:

- remove from the community individuals who engage in extra-familial child sex-offending or who use the Internet to commit child sex-offences;
- develop and implement strategies to reduce the threat of criminal paedophilia;
- initiate or contribute to prevention programs aimed at increasing public awareness of risks to children; and
- contribute to the development of multi-agency and community based programs to reduce sexual abuse against children in high-risk environments.<sup>88</sup>

The Committee acknowledges the importance of addressing criminal paedophilia in Queensland. It is not however, satisfied that a standing statutory reference would further enhance the CMC's present investigative capacity in respect of criminal paedophilia. There is no evidence to suggest that the requirement to seek a reference from the Crime Reference Committee is unduly restrictive or has been the cause of delay in dealing with paedophilia offences. The Committee does not consider it necessary to amend the CMA to provide for a standing statutory reference to the CMC to investigate criminal paedophilia.

### **3.7. Terrorism**

The events of September 11 and the Bali bombings have heightened the awareness of the possibility of terrorist activity on Australian shores. Consequently, Federal and State law enforcement and intelligence agencies have been forced to examine their capacity to undertake counter-terrorist activities and to respond to potential terrorist incidents.

The CMC in its submission to the Committee notes that most terrorism offences fall within its jurisdiction through the category of major crime.<sup>89</sup> At the request of the Commissioner of Police, the investigation of terrorism related offences is the subject of an 'umbrella' reference by the Crime Reference Committee to

<sup>87</sup> For details of paedophilia related operations, see CMC, *Annual Report 2002-2003*, pp. 22-24.

<sup>88</sup> CMC Strategic Plan, 2003-2007, p. 7.

<sup>89</sup> CMC submission, p. 13.

the CMC. This counter-terrorism referral relates to a wide range of organised criminal activity undertaken to advance a political, religious or ideological cause and with the intention of coercing or intimidating the government, the public or a section of the public.<sup>90</sup>

As the Assistant Commissioner, Crime, Mr John Callanan, explained in his evidence to the Committee:

*The reason it was thought necessary that the CMC have a referral to investigate terrorism was simply that it does take time, if confronted with what we would call a serious crime ... to organise the crime reference committee and to get a referral to the committee and presumably through the committee.*

*The existence of this referral is, again, as Mr Atkinson described it, a reserve that permits us to exercise particularly the coercive hearings power.<sup>91</sup>*

### Analysis and comment

The Committee supports the CMC's current terrorism reference. The Committee considers that the CMC's existing coercive powers, particularly those not available to the QPS, such as its hearing power, are valuable tools that should, if necessary, be available for the purpose of preventing and investigating terrorism offences. These powers should be capable of utilisation in the interests of public safety and security.

In its submission the CMC sought amendments to a number of existing coercive powers in order to enhance its ability to more effectively respond to the unique aspects of terrorism offences. The amendments proposed by the CMC in this regard are discussed in detail in the chapter 5 which deals with the CMC's coercive powers.

## **3.8. Civil confiscation**

### **3.8.1. Background**

The *Criminal Proceeds Confiscation Act 2002*, which commenced on 1 January 2003, is designed to remove the financial gain and increase the financial loss associated with illegal activity, whether or not a person is convicted of an offence because of the activity.<sup>92</sup> It establishes two confiscation schemes. One scheme, which is administered by the DPP, relies on a person being charged and convicted.<sup>93</sup> The other, administered by the CMC, is a civil confiscation scheme which does not depend on a charge or conviction.

The CMC's function in relation to civil confiscation in broad terms involves the investigation of activities which may found the basis of restraining orders, forfeiture orders and proceeds assessment orders under the *Criminal Proceeds Confiscation Act 2002*.<sup>94</sup> In practice, processes under the *Criminal Proceeds Confiscation Act 2002* occur concurrently with investigative activity and are integrated into the overall major-crime strategy of the CMC, particularly in the organised crime area.<sup>95</sup> The DPP acts in all cases brought by the CMC as the solicitor on the record on behalf of the State.

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<sup>90</sup> Ibid, p. 22.

<sup>91</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 20.

<sup>92</sup> Section 4(1) of the *Criminal Proceeds Confiscation Act 2002*.

<sup>93</sup> This conviction based scheme is similar to that contained in the now repealed *Crimes (Confiscation) Act 1989*.

<sup>94</sup> Section 56(b) and Schedule 2 of the CMA.

<sup>95</sup> CMC submission, p. 29.



The CMC supports the present legislative framework in respect of civil confiscation.<sup>96</sup> It identifies the following advantages of the CMC being responsible for administering the civil confiscation scheme:

- it separates proceeds of crime recovery from the police investigation function so that allegations of trade offs between criminal charges and asset forfeiture do not arise;
- it separates the asset confiscation function from the DPP's criminal prosecution function, thus obviating any potential for plea bargaining to seek lesser sentences or charges in exchange for asset forfeiture; and
- it imposes levels of accountability through the oversight of the Crime Reference Committee, the CMC, the Committee and the Parliamentary Commissioner to ensure that powers are used and investigations conducted appropriately.<sup>97</sup>

The Committee supports the current legislative framework and the present role of the CMC in respect civil confiscation. Civil confiscation is an important enhancement to law enforcement powers in Queensland and enables the CMC to attack the profitability of crime and prevent and deter future criminal activity.

### 3.8.2. *Resources and staffing*

In July 2003 the CMC established a separate Confiscation of Proceeds of Crime Unit with six established positions. It was anticipated by the CMC that the staffing levels of the unit would increase to the full complement consisting of a Manager, Principal Financial Investigator, five financial investigators, and one support officer. At present the Principal Financial Investigator position and one financial investigator position are vacant despite ongoing attempts to fill these positions.<sup>98</sup>

The achievements of the unit have been significant in the short time of its operation. In the six month period from commencement of *Criminal Proceeds Confiscation Act 2002* to the 30 June 2003 the CMC obtained 11 restraining orders over property valued at \$7.335 million. This may be contrasted with the six months preceding the commencement of the *Criminal Proceeds Confiscation Act 2002* during which property to the value of \$2.158m was restrained under the repealed *Crimes (Confiscation) Act 1989*.<sup>99</sup>

During the six months to 30 June 2003, a total of 51 matters were referred to the CMC for assessment of confiscation action, the largest referring agency being the QPS. As at 30 June 2003 litigation had commenced in relation to 11 matters and a further 35 were under active consideration.<sup>100</sup>

The unit is however, facing increasing demands due to a significant number of legal challenges by respondents to court orders made under the *Criminal Proceeds Confiscation Act 2002*. As experience in New South Wales suggests, frequent litigation in the early years of operation, particularly in respect of the process by which restraining and forfeiture orders are obtained, is not an uncommon feature of any new civil confiscation legislation. The CMC advises that this impacts on the unit in two ways: firstly, in respect of the need for the DPP to engage external counsel to assist with the preparation and presentation of cases (particularly given the importance of resisting challenges and establishing appropriate precedent); and secondly, the number of cases that the unit can handle at any one time.<sup>101</sup>

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<sup>96</sup> Ibid, p. 30.

<sup>97</sup> Ibid, p. 29.

<sup>98</sup> Information provided by the CMC by letter to the Committee dated 20 January 2004.

<sup>99</sup> CMC, *Annual Report 2002-2003*, p. 29.

<sup>100</sup> Ibid, p. 30.

<sup>101</sup> Information provided by the CMC by letter to the Committee dated 20 January 2004.

At present the costs of engaging external counsel are met from the CMC's existing retained surplus funds. However the issue of funding this legal representation is a matter which is due to receive further consideration by the Government as part of the 2004-2005 budget process.<sup>102</sup>

In light of the significant challenges to the *Criminal Proceeds Confiscation Act 2002*, and the potential for increasing demand on the CMC's financial resources as a result of the need to engage external counsel, the Committee recommends that the adequacy of the CMC's funding to undertake its role in respect of civil confiscation under the *Criminal Proceeds Confiscation Act 2002* be the subject of ongoing review by the Minister.

#### **Recommendation 1**

**The Committee recommends that the adequacy of the CMC's funding to meet current and anticipated demands in respect of its civil confiscation function be the subject of ongoing review by the Minister.**

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<sup>102</sup> Ibid.

## 4. THE MISCONDUCT FUNCTION

### 4.1. Introduction

This chapter examines the misconduct function of the CMC, and in particular the changes in legislative approach brought about by the introduction of the CMA. As well, the following specific issues are considered:

- devolution and capacity building;
- timeliness;
- impact of investigations;
- communication;
- jurisdiction over private entities exercising public functions;
- provision of briefs to subject officers; and
- the respective roles of the CMC and the Office of the Director of Public Prosecutions (ODPP).

### 4.2. The CMC's misconduct function

The investigation (and prevention) of misconduct by police and public officers has been a key function of the CMC, and its predecessor the CJC, since the latter's inception in 1990 in the wake of the Fitzgerald Report.

Under the CMA, the CMC has the following functions regarding misconduct:

- (a) *to raise standards of integrity and conduct in units of public administration;*
- (b) *to ensure a complaint about, or information or matter involving misconduct is dealt with in an appropriate way, having regard to the principles set out in section 34.*<sup>103</sup>

The principles set out in section 34 of the Act include:

- cooperation;
- capacity building;
- devolution; and
- public interest.

The Act thus heralded a new emphasis on devolution and capacity building. These changes are now examined.

### 4.3. Recent changes in approach

#### 4.3.1. Background

In the years immediately prior to the commencement of the CMA, the then CJC had adopted a new approach to its misconduct function, involving:

- an increased emphasis on preventive and proactive approaches by the CJC; and

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<sup>103</sup> Section 33 of the CMA.

- an increased responsibility on the part of agencies to manage misconduct issues themselves.<sup>104</sup>

As part of this more preventive approach, any investigation was aimed not only at determining whether or not misconduct had taken place, but also at whether systems and policies can be improved to prevent a recurrence of the behaviour. Whilst there was an increasing role for agencies themselves to deal with misconduct, this was in a context of the CJC, and later the CMC, having overall and primary responsibility for dealing with misconduct.

A trial program, Project Resolve, under which the QPS gradually assumed greater responsibility for dealing with police misconduct, commenced in July 2000. The trial, and the issue of the appropriateness of giving greater responsibility to the QPS for handling misconduct within its ranks, was considered at length in the 4<sup>th</sup> PCJC's Three Year Review report.<sup>105</sup> That Committee recommended that the CJC continue the policy of gradual devolution of responsibility to the QPS, with the CJC retaining an oversight role, which was to include the power to audit, monitor, review, or take over any investigation by the QPS. The CJC was to make the initial assessment of how a complaint of misconduct was to be handled.<sup>106</sup>

#### 4.3.2. *The changes*

The new legislative scheme introduced by the CMA, with its emphasis on devolution and capacity building, adopts and builds the Project Resolve approach, not only in relation to police officers, but also officers in public sector agencies. The explanatory notes to the Crime and Misconduct Bill expressly stated that one of the objectives of the bill was to legislatively recognise these changes in complaints practices.<sup>107</sup>

Under the new approach, the QPS and the various public agencies now have increased responsibility for taking action to deal with and prevent misconduct within their own agency, and the CMC has the lead role in building the capacity of those agencies to do so effectively and appropriately. The CMC's lead role also gives it the overriding responsibility to promote public confidence in the integrity of public agencies and in the way misconduct is dealt with. In certain circumstances, the CMC is to deal with particular cases of misconduct itself, having regard to:<sup>108</sup>

- the capacity of, and the resources available to, a unit of public administration to effectively deal with the misconduct
- the nature and seriousness of the misconduct, particularly if there is reason to believe that misconduct is prevalent or systemic within a unit of public administration; and
- any likely increase in public confidence in having the misconduct dealt with by the CMC directly.

As the CMC noted in its submission to the review, the new approach involves the CMC in the dual roles of 'watchdog' and 'capacity builder'.<sup>109</sup> The CMC sums up its approach to these responsibilities in this way:

*The thrust of the CMC's new approach to complaints handling is to empower managers to take responsibility for ensuring their officers act ethically. The CMC must support the public sector in this regard in raising the standards of integrity and reducing misconduct. It does this by enabling agencies to deal with misconduct in a timely and appropriate way, through*

<sup>104</sup> See 4<sup>th</sup> PCJC, Three Year Review, pp. 22 and following.

<sup>105</sup> Ibid, pp. 24 – 37.

<sup>106</sup> Ibid, p. 37.

<sup>107</sup> Explanatory notes, Crime and Misconduct Bill 2001, p. 2.

<sup>108</sup> Section 34(d) of the CMA.

<sup>109</sup> CMC submission, p. 34.

*building their capacity to do so, and by facilitating an efficacious and efficient system for handling complaints. Concurrently, it must satisfy the public interest by monitoring the way in which agencies deal with particular cases of misconduct.*<sup>110</sup>

The CMC in its submission expressed its support for the new statutory framework regarding its role in handling complaints.<sup>111</sup>

#### **4.4. Devolution and capacity building**

##### **4.4.1. Introduction**

To fulfil its obligation cast upon it by section 34 of the Act, the CMC has undertaken a wide range of initiatives aimed at building the capacity of agencies to deal with and to prevent misconduct. Some of these initiatives include:

*... the preparation and dissemination of a range of publications and educational materials intended to build the capacity of agencies to undertake investigations and generally to enhance agency integrity and increase their level of misconduct resistance.*

*Capacity-building activities have also included:*

- *the holding of strategic seminars and workshops for agency staff at all levels*
- *the presentation of papers in small-group sessions and larger conferences on public sector misconduct, ethics and the detection and prevention of white collar crime*
- *the preparation of materials for agency induction programs on accountability and public sector ethics*
- *publishing guidelines, manuals, articles and advisory pamphlets on misconduct prevention and the handling of the impact of an investigation*
- *presenting lectures to professional bodies and community groups on the role and functions of the CMC and the reporting of suspected official misconduct.*<sup>112</sup>

##### **4.4.2. Analysis and comment**

The concepts of devolution and capacity building are based on the premise that all relevant agencies, as well as being accountable to external agencies (such as the CMC, the Auditor-General and the courts), also have responsibility for their own integrity, and that good management requires the agencies themselves to develop systems to prevent and deal with any lapses in integrity.

The Committee supports these concepts, and the scheme underpinned by them, established by the CMA. The scheme raises two broad issues:

- the oversight by the CMC of the agencies themselves; and
- the oversight of the CMC by bodies such as the PCMC.

There are advantages in agencies being *primarily* responsible for preventing the incidence of, and dealing with instances of, misconduct by their own officers. This can allow for a more mature and forward looking organisation taking enhanced responsibility for its own development, policies, and personnel. If done properly, it can also enhance public confidence in such agencies, a particularly important consideration in the case of the QPS. At the same time, this can only work if the agencies are adequately equipped and are willing to carry out this responsibility. It is possible that small agencies might be

<sup>110</sup> Ibid.

<sup>111</sup> CMC submission, p. 36.

<sup>112</sup> CMC submission, p. 48.

inadequately resourced to efficiently manage their misconduct matters, and in such cases it would be appropriate for the CMC to assume all or greater responsibility for the task. The Committee acknowledges the initiatives – which are still very much continuing – on the part of the CMC to inform, educate and equip the agencies – that is, to build their capacity – to deal with misconduct. As stated, the CMC has ‘a lead role’ under the CMA to build such capacity.<sup>113</sup>

The CMC is however not responsible for ensuring that the agencies have adequate human and financial resources for the task. It will be necessary for agencies to be adequately resourced in this regard.

An issue regarding the adequacy of external oversight of the CMC also arises from the devolution process. It is generally accepted that bodies such as the CMC, which can exercise a range of coercive and sometimes intrusive powers, ought to be overseen by an independent body. In Queensland, there is now a well-developed system of oversight, involving the Parliamentary Commissioner, the Parliamentary Crime and Misconduct Committee and, in relation to various coercive powers, the Public Interest Monitor. Apart from some jurisdiction of the latter over some functions of the QPS, these bodies do not have any power to directly oversee agencies (other than the CMC) in the performance of their roles in dealing with misconduct.

Such agencies do not have coercive powers at their disposal and in that sense the need for oversight might be argued to be not as strong. At the same time, it is essential that the effectiveness and appropriateness of their activities in dealing with misconduct investigations can be scrutinised. One example is the issue of timeliness, referred to in the next section. Under present arrangements, this scrutiny role falls to the CMC.

From material sighted by it from time to time, the Committee is not yet confident that all agencies are yet able or adequately equipped to deal with misconduct. In this regard there is wide variation in the extent of the corporate experience, structures, and policies of the various agencies. The Committee can, as part of its role of oversight of the CMC, examine the CMC’s own actions in overseeing the actions of an agency. The Committee, for example, could examine a decision by the CMC to refer a matter to an agency, or it could examine the adequacy of the CMC’s review or supervision of the conduct of an investigation by an agency. In this way, it is possible, albeit in a limited and indirect way, for the Committee to ‘drill down’ in pursuit of some oversight.

The Committee does have concerns, however, that some of the CMC’s capacity for oversight of misconduct investigations might be lost under the devolution regime. It is important that the CMC, as well as continuing its initiatives in building capacity, rigorously scrutinise the activities of the agencies in dealing with their own cases of misconduct. Given the relatively short time that has elapsed since the commencement of the CMA, it is too early in the Committee’s experience to reach any firm conclusion as to whether oversight by the CMC has been unduly diminished.

It is critical also that there is adequate disclosure by the agencies of their activities in dealing with and preventing misconduct – not only when reporting to the CMC, but also to the public in, for example, annual reports. Such reporting might not be in as detailed terms as the reporting to the CMC. Nonetheless, it is important that statistical and qualitative information regarding the incidence of misconduct is available to the public. Otherwise, there is a danger of inadequate transparency in the reporting process.

#### **4.4.3. Conclusions**

The Committee supports the new focus on devolution and capacity building. At the same time, the Committee does have concerns that this approach has considerable potential to dilute the level of oversight both by and of the CMC.

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<sup>113</sup> Section 34(b) of the CMA.

**Recommendation 2**

**The Committee recommends that the CMC continue its efforts to enhance the capacity of agencies to deal with misconduct.**

**Recommendation 3**

**The Committee recommends that there be careful oversight and monitoring by the CMC of the performance of agencies in dealing with and preventing misconduct.**

**Recommendation 4**

**The Committee recommends that the agencies be required to report to the CMC, to the Parliament and to the public as fully and openly as possible regarding their performance in these respects.**

**Recommendation 5**

**The Committee recommends that the agencies be adequately resourced to ensure they are able to fulfil their responsibilities to deal with and prevent misconduct.**

**Recommendation 6**

**The Committee recommends that the Department of Premier and Cabinet have the primary role in monitoring and ensuring:**

- **that agencies take up CMC capacity building initiatives in a timely and responsive manner;**
- **that there is adequate public reporting by agencies of information on misconduct prevention initiatives and outcomes; and**
- **the adequacy of the resources of agencies to deal with and prevent misconduct.**

**Recommendation 7**

**The Committee recommends that there be close monitoring by the Department of Premier and Cabinet of the extent (if any) to which the devolution process has reduced the effectiveness of oversight by the PCMC and the Parliamentary Commissioner of the CMC's misconduct function.**

**4.5. Timeliness in investigations****4.5.1. Introduction**

Undoubtedly the strongest theme in submissions to this review, and indeed to the reviews conducted by predecessor committees, is the need for the CMC to complete its assessment and investigation of allegations of misconduct in a timely manner.<sup>114</sup> This issue has also been at the heart of a number of complaints made to the Committee and its predecessors over a number of years, although the number of such complaints is, pleasingly, less now than previously.

It is trite to say that the mere existence of a misconduct investigation, regardless of the ultimate outcome, can have serious impacts upon any subject officer, a complainant, any victim, and the particular agency involved. It is in the public interest that such matters be resolved as expeditiously as possible, always having regard of course to the necessity for a thorough and competent investigation.

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<sup>114</sup> Submissions to this review which raised concerns regarding timeliness included those from the Department of Local Government and Planning, Queensland Health, the Department of Tourism, Racing and Fair Trading, the Queensland Bar Association, the Queensland Opposition, the Queensland Teachers' Union of Employees, the Queensland Police Union of Employees, the Department of Emergency Services, and the Office of Public Service Merit and Equity, Dr Noel Preston, and Education Queensland. The Department of Main Roads commented that the turn around time for referrals to the Commission had improved over the 'past 3 years'.

(The issue of the impact of an investigation is considered in more detail in the next section.)

The CMC has stated that it is aware of the need for better performance in this regard and that it has implemented a number of steps to improve the timeliness of its investigations and assessments. The Committee is regularly provided with statistics from the CMC regarding the timeframes for resolution of complaints made to the CMC. Those statistics show that improvements have been made in this area in recent times. A number of the submissions to the Committee's review also noted recent improvement.

It is encouraging that there has been this improvement, particularly in light of the increasing numbers of complaints of misconduct made to the CMC. For example, the CMC reported that the months of November and October 2003 and February 2004 were the three highest months on record in terms of complaints received per month (in the history of both the CMC and the CJC). Under the devolution principle, following assessment by the CMC, a larger number of complaints are passed on to the agencies themselves to deal with, subject to oversight by the CMC.

#### **4.5.2. Background**

The 3<sup>rd</sup> PCJC in its Three Year Review concluded that the timely investigation of complaints should be an extremely high priority for the then CJC in developing its systems and allocating its resources.<sup>115</sup> The 4<sup>th</sup> PCJC in its Three Year Review, whilst satisfied that the CJC was placing a very high emphasis on the timely resolution of complaints, and was continuing to improve its performance in that regard, stated that the CJC must continue to work towards an even better result.<sup>116</sup>

The 4<sup>th</sup> PCJC recommended that its successor - this Committee - closely monitor the performance of the CJC regarding the time taken to finalise the investigation of complaints. This Committee has done so throughout its term. The Committee has tabled a number of reports which include consideration of the issue.<sup>117</sup>

#### **4.5.3. The submissions**

Queensland Health, in its submission, referred to delays on the part of the CMC in assessing how a complaint ought to be dealt with, between the time the matter is referred by Queensland Health to the CMC and the time the department is advised of how the CMC intends to deal with the complaint. The submission notes that section 46(1) of the CMA requires this assessment to be made 'expeditiously', but notes that it can in practice extend to over a month. The Queensland Teachers' Union of Employees similarly expressed concern about the period of time the CMC took to 'examine/investigate' matters prior to their referral back to the department, in this case, Education Queensland, expressing the view that 'there does appear to be a lack of resources within the CMC to enable it to respond quickly to matters which are eventually referred back to the department'.<sup>118</sup>

The Queensland Police Union of Employees stated that delays by the CMC (and presumably the CJC before it) had been an issue of longstanding concern to the Union.<sup>119</sup> Whilst the Union believed there has been improvement over recent years,

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<sup>115</sup> 3<sup>rd</sup> PCJC, Three Year Review, pp. 73-74.

<sup>116</sup> 4<sup>th</sup> PCJC, Three Year Review, p. 44.

<sup>117</sup> These include: Report No. 58, *A report on an investigation by the Parliamentary Crime and Misconduct Commissioner into the performance of the Crime and Misconduct Commission in dealing with four matters* (Tabled 25 March 2003); Report No. 59, *A report on an investigation by the Parliamentary Crime and Misconduct Commissioner into the actions of the Crime and Misconduct Commission in its handling of allegations against Ms C M Greer* (Tabled 19 August 2003); and Report No. 60, *A report on an investigation by the Parliamentary Crime and Misconduct Commissioner, into the actions of the Crime and Misconduct Commission in its handling of allegations against Magistrate Brian Murray* (Tabled 19 August 2003).

<sup>118</sup> Queensland Teachers' Union of Employees submission, p. 2.

<sup>119</sup> QPUE submission, p. 2.



*... it remains a consistent complaint from [its] members that investigations are too slow, not infrequently hanging over their head for a year or more.*

The Department of Tourism, Racing and Fair Trading also expressed concern at the lack of a timely turnaround of investigation assessments and reporting, stating that the department's CMC liaison officer had to make numerous calls to the CMC to ascertain the status of matters.<sup>120</sup>

#### **4.5.4. The CMC's response**

The CMC in its submission to the review referred to the issue of timeliness, and stated:

*A key priority in the investigation of allegations of misconduct is not only to effectively investigate an allegation or suspicion of misconduct, but to do so in a timely fashion. This helps reduce the stress that may be suffered by complainants, subject officers and departmental representatives during the course of an investigation. It is also important to conclude investigations, and where necessary implement misconduct-prevention strategies, as soon as possible in order to restore confidence in the institution in question.*

*For this reason the CMC has developed various strategies to enhance the timeliness of its investigations including:*

- *case-management plans in every investigation and operation*
- *operation plans in all operations*
- *embedding in the CMC's complaints system (COMPASS) an alarm that automatically alerts officers to the age of the matter at 2, 5, 8 and 11 months*
- *inclusion in the sample audit of investigations an examination of whether all investigative steps that were taken were necessary.*<sup>121</sup>

The CMC went on to outline its *Backlog Reduction Project*:

*In July 2001, a project team was established to finalise some of the older matters, resulting in a 42 per cent decrease in the number of outstanding investigations more than 12 months old (104 investigations in December 2000 reduced to 60 in December 2001). Further vigilance and focus reduced this figure to 22 as at the end of May 2002 and, since then, the number of older cases on hand at any one time has remained at this level. At the end of March 2003, 11 investigation cases on hand were more than 12 months old.*

*There has been an overall decrease in the number of investigations on hand from 159 in June 2001 to 88 in July 2002. Again, continued vigilance has kept the overall number of outstanding investigations at this manageable level. There were 67 investigations in progress as at the end of March 2003.*

*However, while there are fewer matters being investigated by the CMC, because of the change in our legislative focus the proportion of sensitive and complex matters since early 2002 requiring investigation has increased. This is mainly because we do not do as many of the 'routine' matters as previously undertaken. The CMC now refers more matters back to the QPS, subject to CMC monitoring, which has the capacity to handle such matters. With the rest of the public sector, the CMC has had to be more circumspect in returning matters, as many agencies still do not have the requisite capacity to conduct investigations. Whilst we are*

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<sup>120</sup> Department of Tourism, Racing and Fair Trading submission, p. 1.

<sup>121</sup> CMC submission, p. 56.

*acutely aware of the importance of timeliness in the conduct of investigations, we are always mindful of achieving a balance between timeliness and quality. This is particularly the case when the matters raised are controversial, subject to extensive public scrutiny, or involve senior government or political figures. The CMC must remain fiercely independent and be thorough in its work, often in the light of criticism of its perceived tardiness, in order to maintain public confidence in our role of overseeing the public sector. In this regard, the CMC's approach has been largely vindicated by the recent report of the Parliamentary Crime and Misconduct Commissioner.*

*The time taken to complete our investigations is also affected by reporting and other obligations under our Act, which means that our operations will invariably take longer than an equivalent investigation carried out by the QPS. For example, an investigating police officer would usually lay charges without a brief of evidence having been finalised. Normally QPS investigations continue after charges are laid. The extent of the QPS investigation will be limited if after the charges are laid it is apparent that the accused may plead guilty. Certainly, the QPS does not have to obtain the kind of internal and external approval required of the CMC by legislation.<sup>122</sup>*

In oral submissions to the Committee, the Assistant Commissioner, Misconduct was refreshingly candid in his concession that some matters dealt with by the CMC in the past had done the CMC little credit.<sup>123</sup> He stated that such matters were a very small number in terms of the total matters dealt with by the CMC. He urged the Committee to look at the improvement in performance over the last three years.

#### **4.5.5. Analysis and comment**

The experience of this Committee and of its predecessors over many years has been that issues of timeliness and delay, and the resultant exacerbation of adverse impacts on persons involved, have been at the root of numerous complaints regarding the CMC and the former CJC. In some instances, the complaints have been warranted.

The Queensland Opposition submitted that there ought to be a statutorily imposed limit in which the CMC must complete investigations, and that if the CMC could not complete its investigations in that time it could only proceed to complete them with the permission of an external authority, such as a judge in chambers or this Committee. The submission stated that this would avoid the present 'dragging on of matters' and encourage the CMC to pass matters back to relevant investigative authorities where appropriate at an earlier stage.<sup>124</sup>

The Committee does not favour such a legislative prescription. As the Commission has pointed out,<sup>125</sup> many of the matters considered by it are complex, and a proper and professional assessment or investigation can be time-consuming. Also, in many instances, the actions – or inaction – of other entities can cause delays over which the CMC does not always have control. On occasion, strains are placed on the CMC's operations and usual systems when large projects suddenly arise and require the CMC's attention, often with resultant large demands upon the resources of the CMC.

The interposition of another agency such as a court or the Committee in the manner suggested by the Opposition would likely add another layer of 'red tape' and in many cases only exacerbate delay.

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<sup>122</sup> Ibid, p. 57.

<sup>123</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 26.

<sup>124</sup> Queensland Opposition submission, p. 2.

<sup>125</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 27.

The CMC has candidly acknowledged the deficiencies in its performance and has taken many steps to rectify these problems. Perhaps as a consequence, the incidence of complaints to the Committee regarding delay is decreasing. It is critical that the CMC continue its focus in this area, to build public confidence in its operations and to lessen the adverse impacts on those affected by its investigations.

It is worth noting that the CMA provides for the CMC to report to the responsible Minister regarding, inter alia, issues of timeliness. The Act provides:<sup>126</sup>

- (1) *The Minister has a responsibility to ensure that the commission operates to best practice standards.*
- (2) *To help the Minister discharge that responsibility, the commission must report to the Minister, when and in the way required by the Minister, on the efficiency, effectiveness, economy and timeliness of the commission and its systems and processes, including operational processes.*
- (3) *The report must be accompanied by any financial or other reports the Minister requires to enable the Minister to assess the efficiency, effectiveness, economy or timeliness of the commission, including, in particular, the timeliness with which the commission deals with complaints.*

With the increasing emphasis on devolution, it is also important that the CMC closely monitor the performance of the agencies themselves in relation to timeliness. There is a real danger that overall time-lines will increase as a result of matters being assessed by the CMC, then in many cases referred to an agency, followed by a final report, of varying degree, to the CMC.

The CMC is aware of this concern, as acknowledged by the CMC Chairperson before the Committee.<sup>127</sup> The perception, whether or not it is the reality, might be that any delay is the responsibility of the CMC. It is in the CMC's interests, as well as that of the parties involved and the public, that the process be as timely as possible. The CMC, as part of its role of oversight of the agencies' performance, must rigorously scrutinise the timeliness of the agencies' investigations and reporting.

#### **Recommendation 8**

**The Committee recommends strongly that the timeliness of misconduct assessments and investigations by agencies and by the CMC continue to be rigorously addressed and monitored by the CMC and by the incoming PCMC.**

## **4.6. Impact of CMC investigations**

### **4.6.1. Background**

An issue which to a large extent is connected with questions of timeliness, is that of the impact of CMC investigations on various affected parties. Such parties can include a subject officer, a complainant, colleagues, and work units and agencies generally. The impact can extend to family and friends of subject officers and complainants. It is clearly desirable that negative impacts of a misconduct investigation, whilst impossible to eradicate completely, be minimised as much as possible.

<sup>126</sup> Section 260 of the CMA.

<sup>127</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 28.

#### 4.6.2. *The submissions*

Queensland Health in its submission noted that delays usually impact on the individuals concerned and their work units.<sup>128</sup> The QPUE and the Queensland Teachers' Union of Employees both referred to negative impacts, particularly where there is delay in an investigation. The Queensland Teachers' Union of Employees and Dr Noel Preston referred to a well-known example:

*Such delays cause our members considerable stress and anxiety and have an impact not only on our members but other employees and school communities in general, for example, in 2002 a school principal had to wait for some months while the CMC determined what action would be taken regarding a matter which had been referred to the CMC from the Queensland Police. Eventually this matter was referred back to the Department of Education for review but the delay was not helpful to the well-being of the officer concerned and the particular school community.*<sup>129</sup>

The OPSME<sup>130</sup> noted that negative impacts can include reduced productivity and high stress levels.

The Queensland Opposition submitted the delay in resolving complaints 'causes unnecessary concern and worry as well as expense both for complainant and person complained against'.<sup>131</sup>

In oral submissions to the Committee, Mr Anderson from Education Queensland stated:<sup>132</sup>

*I would like to turn to a separate point about the prioritising of cases and their management. Education Queensland seeks to give priority to the management of cases where officers are suspended from duty, usually on full remuneration. Clearly there is a significant cost to the taxpayer while an officer is absent from duties while continuing to receive their normal salary. There is also the individual impact on an officer, on their career being placed on hold during the period of the suspension. Education Queensland would support the CMC's prioritising its involvement in and completion of cases that involve an officer who is suspended from duty.*

CMC Chairperson, Mr Butler, informed the hearing.<sup>133</sup>

*One of the things we are introducing into capacity building is this component of how to deal with an investigation, both whether it is an internal investigation within the organisation or whether it is a CMC investigation. You would be aware that some time ago the CJC produced a booklet on how to manage a CJC investigation and we are in the process of upgrading that. It is going to be incorporated into comprehensive guidelines about investigations, providing assistance to departments by way of a manual, if you like, of how they can go about investigations. A component of that will be how to manage it so that the impact upon staff who might be the subject of allegations, complainants and other workers generally is taken into account.*

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<sup>128</sup> Queensland Health submission, p. 2

<sup>129</sup> Queensland Teachers' Union of Employees submission, p. 2, Dr Noel Preston submission, pp. 1-2.

<sup>130</sup> OPSME submission, p. 2.

<sup>131</sup> Queensland Opposition submission, p. 2.

<sup>132</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 67.

<sup>133</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 49.

#### **4.6.3. Analysis and comment**

As the OPSME noted in its submission, ‘CMC policy and staff in Prevention and Misconduct, especially those dealing with allegations, need to demonstrate a clear appreciation’ of these implications for agencies and individuals.<sup>134</sup> The issue has been the subject of discussion between the CMC and the Committee on a number of occasions in the last three years. The CMC has shown it is aware of the difficulties.

#### **Recommendation 9**

**The Committee recommends that the CMC continue to take steps to minimise the impact of its investigations on individual subject officers, complainants, and agencies.**

#### **Recommendation 10**

**The Committee recommends that the CMC, as part of its capacity building activities, continue to take steps to educate agencies on strategies to minimise the impact of their investigations.**

### **4.7. Communication**

#### **4.7.1. Background**

In a number of matters considered by the Committee, the Committee came to the view that the CMC could have significantly improved the manner in which it communicated its decisions or details regarding the progress of a matter being assessed or investigated.

The parties with whom there need to be communication by the CMC can include:

- complainants to the CMC
- persons who are the subject of a complaint or of a CMC investigation
- superior officers of such persons
- the public
- the media.

#### **4.7.2. Analysis and comment**

The Committee has discussed with the CMC the need for improved communication on a number of occasions and in various contexts. The CMC has been responsive and is aware of the necessity for good communication, especially in the context of managing the impact of CMC investigations, considered in the preceding section. It is important that there be regular communication by the CMC with individual complainants and, as appropriate, subject officers.

Having regard to the nature of its activities, there will often be constraints on what the CMC can properly divulge regarding an investigation. The Committee accepts that it is not always easy to achieve a balance between the desirability of open communication and the need to ensure the integrity of its investigations. The CMC is also unable to control what other entities do with the information provided by it.

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<sup>134</sup> OPSME submission, p. 2.

**Recommendation 11**

**The Committee recommends that the CMC continue to improve its communication strategies, particularly in communicating progress and outcomes to, as appropriate, the complainant, the subject officer, any relevant agency, the media, and the public.**

**4.8. Jurisdiction over private bodies exercising public functions****4.8.1. Introduction**

As noted in the Three Year Review by the 4<sup>th</sup> PCJC,<sup>135</sup> there has been an increasing trend towards the privatisation of many bodies that carry out public functions. One such body is Energex. As well, a lot of functions previously carried out by public bodies are now outsourced to private entities. These bodies are beyond the reach of the CMC's jurisdiction regarding public sector misconduct. The issue is whether this ought to be the case.

In reporting on its review of the CJC, the previous Committee recommended that the present Committee give consideration to this complex issue.<sup>136</sup> At the time of that review, the then CJC did not have a final position on the issue. The issue was not addressed in the CMA.

As the previous Committee noted, there are difficulties in drafting an appropriate definition that would extend to all bodies that ought to be caught by the jurisdiction, without also extending to other bodies.

**4.8.2. The CMC's submission**

In its submission to the present review, the CMC refers to the fact that the Independent Commission Against Corruption in New South Wales has a broader jurisdiction in respect of bodies that carry out public functions or are publicly funded.<sup>137</sup> The CMC refers to the broad definitions in the *Independent Commission Against Corruption Act 1988*. The definition of 'Public authority' includes:

*A person or body in relation to whom or to whose functions an account is kept of administration or working expenses, where the account:*

- i) is part of the accounts prepared under the Public Finance and Audit Act 1983, or*
- ii) is required by or under any Act to be audited by the Auditor-General, or*
- iii) is an account with respect to which the Auditor-General has powers under any law, or*
- iv) is an account with respect to which the Auditor-General may exercise powers under a law relating to the audit of accounts if requested to do so by a Minister of the Crown.*

As well, the definition of 'public official' includes private or commercial entities that carry out public functions by including as a public official:

- (m) an employee of or any person engaged by or acting for or on behalf of, or in the place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs.*

The CMC stated its position as follows:

*The CMC is of the view that entities that carry out public functions should be subject to*

<sup>135</sup> 4th PCJC, Three Year Review, p. 18.

<sup>136</sup> Ibid, p. 19.

<sup>137</sup> CMC submission, p. 13

*scrutiny by the CMC, especially where public funding is involved. Consideration should be given to adopting a definition similar to that employed by ICAC. While concern has previously been raised that such a definition may then include the CMC, that particular consequence could easily be avoided by use of an exclusory provision in the definition, as in the present Act.*

In oral submissions to the Committee, the CMC's Assistant Commissioner, Misconduct, Mr Stephen Lambrides, cautioned that any amendment would require 'very careful consideration' and a 'lot more resources'.<sup>138</sup>

#### **4.8.3. Analysis and comment**

This issue raises difficult questions of policy, as well as issues of the practicality of provision of adequate resources. As a matter of principle, the Committee believes that entities that carry out public functions utilising public monies ought to be subject to external scrutiny by a body such as the CMC. It is difficult to justify the result that the actions of such agencies and their staff should be beyond the jurisdiction of the CMC, simply by virtue of the private nature of the organisation.

However, any legislative amendment would need to be carefully drawn, to avoid any unintended result. It is also inevitable that any legislative amendment would increase the workload of the CMC, with resourcing consequences. This would be the case not only for the CMC, but also for the various entities that would become 'caught' by the increased jurisdiction, having regard to the principles of devolution and capacity building underpinning the current legislative regime. Whilst it is likely that some of the larger government-owned corporations already have well-developed internal and external audit and accountability processes, and could adapt relatively easily to a regime governed by the CMA, it is by no means certain that this could be said of all the bodies that would come within the wider net cast by any increase in jurisdiction.

The Committee is concerned that it is too soon after the commencement of the CMC to make what would be another major change regarding the jurisdiction of the CMC. The CMA added jurisdiction over major and organised crime to the functions of what was the CJC. It also introduced significant changes in the approach of the CMC to its misconduct role, as seen from the discussion earlier in this chapter on capacity building and devolution. Those changes are still relatively recent, and are important and worthwhile changes. They have had, and continue to have, significant impact on the processes and operations of the CMC. The Committee does not support any further significant change to the jurisdiction of the CMC until such time as these changes are fully implemented, assessed, and where necessary 'fine-tuned'.

#### **Recommendation 12**

**The Committee recommends that careful consideration be given to legislative amendment, at an appropriate time, so that the misconduct jurisdiction of the CMC is extended to private entities that exercise public functions and utilise public monies.**

#### **Recommendation 13**

**The Committee recommends any extension of the CMC's jurisdiction in this regard would need to be accompanied by adequate resourcing of the CMC and of the entities involved.**

<sup>138</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 35.

## 4.9. Providing briefs of evidence to subject officers

### 4.9.1. *The issue*

In its written submission to the Committee, the Bar Association of Queensland raised concerns regarding aspects of the practices of the CMC when providing a brief of evidence to the ODPP for that office to consider possible prosecution proceedings. The CMC does not at the time of forwarding such a brief to the ODPP, forward a copy of the brief to the person the subject of the investigation. That person is notified that a brief has been provided to the ODPP, but is not provided with a copy.

The Bar Association submitted that:

*[T]here can be no proper basis to withhold the brief of evidence from the person under investigation... [who] ought to be given the right to make a submission against prosecution at the earliest opportunity. There can be no benefit to anyone in proceeding to charge a person (with all the disadvantages to the person that that involves) when a submission on the brief of evidence may have obviated the need for charging the person in the first place.*

*Unless a copy of the brief of evidence is provided, the person under investigation is limited to making submissions to the DPP on public interest criteria.*

*If provided with the brief of evidence, the person under investigation may well demonstrate that a prima facie case does not exist, or, at the very least, that, on the evidence, there is no reasonable prospect of securing a conviction. The person under investigation may be able to provide documentary and/or independent evidence which unequivocally destroys an essential part of the prosecution case.*

*It is respectfully submitted that the practice of withholding the brief of evidence in these circumstances cannot be justified and such practice is indisputably unfair to persons under investigation.*

The CMC indicated it did not support this proposal, responding to the submission thus:<sup>139</sup>

*It is not usual practice for investigation agencies, including the Queensland Police Service, to provide a copy of the brief of evidence to the person under investigation until after they are charged. In fact, in many instances, the brief of evidence is not compiled until some time after the charges have been laid. The CMC should not be placed under a more onerous obligation, than other investigation agencies, to show its entire hand to the subject officer before a decision in respect of charges or disciplinary action has been made. The DPP may decline to support charges against a person unless further investigation is conducted. Premature disclosure to the defence may prejudice such investigation. Further, there may be instances where criminal charges are not [to] be proceeded with and the premature release of the brief of evidence may prejudice the ability to institute disciplinary charges.*

*Firstly, all subject officers are provided with the opportunity to be interviewed prior to charges being laid. At the interview natural justice is provided, as the case against them is explained and there is ample opportunity for them to present to the CMC their side of the story, including exculpatory evidence. Secondly, it is open to the DPP to invite submissions from the defence on any issue.*

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<sup>139</sup> CMC's supplementary submission, p. 3.



#### **4.9.2. Analysis and comment**

The Committee understands the concerns raised by the Bar Association. However, the points made by the CMC have merit. There are potential adverse consequences for possible further investigations or disciplinary proceedings in providing briefs as proposed by the Bar Association. The Committee is satisfied that the alternative mechanisms for input by the defence, referred to by the CMC, are adequate. The Committee does not recommend any change to the present practice.

#### **4.10. The respective roles of the CMC and the Office of the Director of Public Prosecutions**

##### **4.10.1. The issue**

The CMC itself investigates more serious misconduct matters with a view to gathering evidence for the prosecution of criminal offences or disciplinary proceedings against individuals involved in misconduct. Section 49 of the CMA provides:

*Reports about complaints dealt with by the commission*

- (1) *This section applies if the commission investigates (either by itself or in cooperation with a public official), or assumes responsibility for the investigation of, a complaint about, or information or matter involving, misconduct and decides that prosecution proceedings or disciplinary action should be considered.*
- (2) *The commission may report on the investigation to any of the following as appropriate-*
  - (a) *the director of public prosecutions, or other appropriate prosecuting authority, for the purposes of any prosecution proceedings the director or other authority considers warranted; ...*

It is the CMC's practice to refer to the Director of Public Prosecutions (DPP) all cases in which it decides that prosecution proceedings should be considered. As the CMC notes, apart from rare emergent situations where police officers may rely on their extant powers to effect arrests, the only part the CMC may play in determining whether charges will be laid, are set out in section 49 of the CMA.<sup>140</sup>

This section considers the issue of whether the CMC should lay criminal charges without seeking prior advice from the DPP and/or undertake the prosecution of misconduct matters.

##### **4.10.2. Department of Justice and Attorney-General submission**

The submission by the Department of Justice and Attorney-General, which incorporated the views of the DPP, Ms Leanne Clare, raised concerns that the current practice adopted by the CMC in obtaining advice from the DPP prior to charging a person had significant resource implications for the ODPP and resulted in delays by the ODPP in responding to briefs referred by the CMC. The submission suggests that the CMA 'be amended to enable the CMC to make its own decisions about prosecutions.'<sup>141</sup> The Committee understands this to mean the CMC making the decision itself, about whether or not criminal charges should be laid.

The submission quotes the following observation by Ms Clare:

*While the briefs can be complex or at least lengthy, the key issue, as to whether there is a proper case to be tried, is generally obvious on a summary consideration. However the*

<sup>140</sup> CMC supplementary submission, p. 2.

<sup>141</sup> Department of Justice and Attorney-General submission, p. 2.

*professional obligation to advise is much broader, so that the quality of the evidence and the possible need for further investigation of a particular area to strengthen the case is also necessary. The upshot is that some matters will languish for months before a person is charged because my office is unable to provide timely advice, advice which for the most part does not value add but is repetitious.*<sup>142</sup>

The department's submission further notes that most of the matters referred by the CMC to the DPP relate to low level criminal activity and that in many instances CMC legal officers who have prepared the briefs are senior to the Crown Prosecutors reviewing and ultimately prosecuting the matters.<sup>143</sup>

#### **4.10.3. Other submissions**

The submission by the Department of Justice and Attorney-General, and more particularly the question of whether the CMC should lay criminal charges without seeking prior advice from the DPP and/or undertake prosecutions, was canvassed extensively during the Committee's public hearings. The Assistant Commissioner, Misconduct, Mr Stephen Lambrides, stated:

*There is no doubt that our police officers have the competence and experience to be the prosecutors themselves. But my view is this: I think it is very important to maintain the separation of the investigative from the prosecutorial function...I think it is important that we do the investigations and somebody else determines, first of all, whether there is a prima facie case and, secondly, whether prosecution is warranted.*<sup>144</sup>

The Parliamentary Commissioner, while agreeing that it was appropriate that the CMC remain 'aloof' from the *prosecutorial role*, commented:

*If the commission was to use its own internal police officers to lay charges, I would not see that as the taking over of a prosecutorial role. All they would be doing is finalising the investigation by laying the charge and then handing over the brief to the appropriate organisation that would then pursue that charge through prosecution ...Serious matters, matters involving politicians, judges, prominent people, matters in which the commission itself feels there could be the need for the exercise of prosecutorial discretion as to whether or not to prosecute – I could understand those being referred to the DPP, because it would not be much sense to have the commission commencing a charge which it is thought might eventually be dropped by the DPP. That could reflect in fact quite unfavourably on the commission.*

*However, with the run of the mill matters, the matters of, say, a public servant who has been investigated and has been found to be embezzling money, stealing in effect as a public servant – a run of the mill sort of case – I can see no real reason why that charge could not be commenced by a police officer within the commission exercising the powers that he retains as a police officer, then the brief is forwarded to the appropriate prosecution authority to take the matter on to committal and on from there.*<sup>145</sup>

In respect of arguments advanced by the CMC that the present process provides a necessary level of separation between the decision to prosecute and the investigative function, the Parliamentary Commissioner observed:

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<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 31.

<sup>145</sup> Ibid, p. 58.

*In so far as the CMC needs a vetting process on its decision to prefer a charge, that process is already there within our criminal justice system. Any of the more serious matters will go through at committal, and that in itself is a vetting process. If the magistrate forms the opinion that there is not a prima facie case, then the matter is not sent on for trial. Then when it goes on to the DPP, there is always the discretion in the DPP that even though the matter might perhaps have an arguable prima facie case, it is a matter that should not go to trial. Those checks and balances are there anyway. I do not really see why it needs particular approval from the DPP before the charge is commenced except, as I say, for those particular individual matters that I referred to earlier, the more serious matters.*<sup>146</sup>

#### **4.10.4. CMC's response**

During the Committee's public hearing the CMC Chairperson, Mr Butler, directed attention to the distinction between the bringing of charges and the arrest of a person on the one hand and the prosecution of the matter before the court. He explained:

*I would have thought the submission from Justice and Attorney-General was not talking about the prosecution function as such. I do not think there is any suggestion that officers of the CMC should be going into court advancing prosecutions before the court...The issue that is a problem for the Director of Public Prosecutions is this issue of an investigation report being referred to her office and then needing to be considered by one of her officers in order to indicate that a charge is appropriate.*<sup>147</sup>

He continued:

*I feel that there is more a matter of principle involved here in separating out the exercise of the discretion to prosecute, the decision as to whether or not the matter should proceed by way of the person being charged, from the investigative function.*<sup>148</sup>

The CMC in its supplementary submission to the Committee argued (with reference to an advice from Cedric Hampson QC in 1993 regarding similar provisions of the CJA) that the relevant provisions of the CMA, namely sections 49 and 50, in effect 'make it clear that the CMC has no power to institute or conduct criminal proceedings of its own initiative.' In its view, legislative change would appear necessary 'to enable the CMC of its own right to institute proceedings of a criminal nature in the courts' (i.e. to lay criminal charges). The CMC does not support such a legislative change.<sup>149</sup>

The CMC advanced the following reasons in support of this position:

- the importance of maintaining the separation of the investigation function from the prosecutorial function as it is part of the accountability fabric which covers the CMC;
- the small number of matters referred to the DPP - between 10-18 per year;
- the majority of matters referred to the DPP by the CMC involve sensitive, complex or serious issues, which as the Parliamentary Commissioner suggested, should be referred to the DPP; and
- if proceedings were initiated by the CMC and the DPP elected to discontinue proceedings, this would adversely affect public confidence in the CMC, increase allegations of political bias and

<sup>146</sup> Ibid, p. 59.

<sup>147</sup> Ibid, p. 31.

<sup>148</sup> Ibid.

<sup>149</sup> CMC supplementary submission, pp. 2-3. The Committee invited further submissions from the DPP in response to the CMC's submissions at the public hearing and the CMC's supplementary submission. No further submissions were provided by the DPP.

expose the subject officer to unnecessary publicity arising from the commencement of proceedings.<sup>150</sup>

The CMC advised that it had taken steps to address the concerns raised by the Department of Justice and Attorney-General in its submission. In particular the CMC had approached the DPP with suggestions to assist in alleviating the extra work arising from the CMC's referral of reports to the DPP under section 49. The CMC also advised that:

*Consideration is being given to referring certain categories of matters to the Queensland Police Service as an alternative prosecuting authority. Further, the possibility of obtaining advice from the DPP, based on a summary of the evidence rather than a full analysis of the entire brief of evidence is being canvassed.*<sup>151</sup>

The Committee is aware that discussions have subsequently taken place between the Chairperson and the DPP. As the Committee understands it, under the arrangement it has been agreed that the DPP will attempt to provide advice on matters referred by the CMC within a two month period. The CMC has agreed to forward briefs on more straightforward matters to the QPS.

#### **4.10.5. Analysis and comment**

Presently where the CMC investigates a misconduct matter and decides that prosecution proceedings should be considered, it provides a report to the DPP. The DPP then undertakes the task of determining whether criminal charges are warranted. As the DPP points out, this process is duplicitous and for the most part does not 'value add.' In many instances the material provided to the DPP for advice has been compiled and extensively considered by CMC legal officers who are often more senior than the Crown Prosecutor tasked with reviewing and prosecuting the matter.<sup>152</sup>

Further, the lack of timeliness in the ODPP providing advice delays the administration of justice. This has a significant impact on subject officer. It also creates a perception within the public arena that the CMC has failed to deal with an investigation matter in a timely and efficient manner. This undermines public confidence in the CMC. The present question for the Committee is how best to address these concerns.

#### CMC's proposed administrative solution

The new administrative arrangement between the DPP and the CMC attempts to overcome the delays in obtaining advice from the DPP. The Committee is not satisfied that this arrangement is adequate to address its concerns. The Committee is conscious of the likelihood of similar delays in the QPS considering matters and laying charges. Further, there is by no means any surety that the DPP will achieve its target in respect of the two month turn around period.

#### Separation of prosecutorial function and the investigative function

The prosecution itself - that is, the appearance before the courts to prosecute the criminal charges - is in most cases undertaken by the ODPP (or in minor matters by the QPS). In respect of the prosecution of matters before the courts, the Committee is in no doubt that this should remain a role undertaken by the ODPP or the QPS as the case might be. This leaves however the narrower question of whether the CMC should in appropriate circumstances decide whether a misconduct matter should proceed by way of criminal proceedings and lay charges. This task can be undertaken by police officers seconded to the

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<sup>150</sup> Ibid.

<sup>151</sup> Ibid, p. 3.

<sup>152</sup> Department of Justice and Attorney-General submission, p. 2.

CMC who have the power to decide whether to lay charges, and proceed to lay any necessary charges as part of their normal authority as police officers.

The CMC maintains that it is essential to ensure the separation of investigative functions and prosecutorial functions. It argues that the present approach of providing a report to the DPP prior to charges being laid ensures this separation and is an important part of the 'accountability fabric'.

The question of whether the laying of the charges is part of the 'prosecutorial function' or in some part usurps the role of the prosecutor is a matter which could be subject to much debate. The CMC submission implicitly suggests that the laying of charges is part of the prosecutorial function. On the other hand, the Parliamentary Commissioner expressed the view that using CMC police officers to lay charges is not taking over a prosecutorial role.<sup>153</sup> In the Committee's opinion, an analysis of whether or not the laying of charges is part of the prosecutorial function does not usefully advance the matter. The issue is whether prior advice of the DPP is essential in all misconduct matters in which the CMC forms the view that prosecution proceedings should be considered.

It is true that the present process adopted by the CMC provides an added layer of protection, and a means of dispelling criticisms of a lack of impartiality on the part of the CMC in the decision to lay charges. The decision to prosecute is made by the DPP, an impartial office, independent of the CMC. The Parliamentary Commissioner in his evidence to the Committee suggested there are some serious matters, such as those in relation to judges, politicians and prominent public figures where it is advisable, and probably necessary to refer the matter to the DPP to consider the laying of charges. This leaves however, as the Parliamentary Commissioner suggests, 'run of the mill' cases in which charges could be commenced by police officers within the CMC misconduct area.

The CMC argues in its submission that the majority of matters referred to the DPP are 'sensitive, complex or serious issues' which fall within the special category of matters that should be referred to the DPP in accordance with the Parliamentary Commissioner's suggestion. This would appear to be at odds with the submission by Department of Justice and Attorney-General which suggests that most of the matters referred by the CMC to the DPP relate to low level criminal activity.<sup>154</sup> In any event, there remain a number of matters (albeit as the CMC suggests in the minority) in which charges could appropriately be laid by CMC police officers.

In his evidence to the Committee, the Parliamentary Commissioner expressed the opinion that the necessary checks and balances in respect of a decision to lay a charge already exist within our criminal justice system. He referred to the committal process applicable to more serious charges and the ultimate discretion of the DPP to discontinue proceedings.<sup>155</sup> The CMC however argues that if it laid charges and the DPP later exercised her discretion not to continue proceedings this would damage public confidence in the CMC and increase criticism of the CMC. This would as the CMC argues, also expose the subject officer to unnecessary publicity arising from the commencement of criminal proceedings.

The Committee is conscious of the importance of promoting public confidence in the CMC and of ensuring that unnecessary impact on subject officers is minimised. It is abundantly clear that delays arising under the current system of seeking and awaiting advice from the DPP also have a major impact on public confidence in the CMC and the administration of criminal justice generally. The delays also have an adverse impact upon the subject officer. It should also be noted that the DPP may exercise a discretion not to proceed with a matter at any time during criminal proceedings. Advice from the DPP that criminal proceedings are warranted does not necessarily mean that this opinion will not change at a

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<sup>153</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 58.

<sup>154</sup> Department of Justice and Attorney-General submission, p. 2.

<sup>155</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 59.

later stage, in light of further evidence. The Committee is not persuaded by this argument advanced by the CMC.

A further matter of note is that while the CMA does not expressly provide for the CMC to lay criminal charges, it does provide that where the CMC reports to the chief executive officer of a unit of public administration that there is evidence supporting a charge of a disciplinary nature of official misconduct, the CMC may charge the person by way of disciplinary charge.<sup>156</sup> While this provision relates to disciplinary charges which are brought before the Misconduct Tribunal and not criminal charges before a court, it does illustrate that the CMC may lay charges (though of a disciplinary nature) post investigation without any legislative requirement to obtain prior advice from the DPP.

In the CMC's opinion, the CMA does not permit officers of the CMC to institute criminal proceedings and accordingly legislative change would be necessary to permit it do so. While this interpretation is not unequivocal, it is clear that the CMA does not expressly provide that the CMC may institute criminal proceedings in misconduct matters. Legislative amendment would be necessary to put this matter beyond doubt.

#### **4.10.6. Conclusion**

The Committee considers that the present delays to the administration of justice flowing from the CMC's practice of seeking advice from the DPP require addressing. It is not satisfied that the administrative arrangements proposed by the CMC are an adequate solution to the problem.

The Committee considers that where the CMC decides that prosecution proceedings should be considered, CMC police officers should be responsible for deciding whether to lay charges and where appropriate lay charges. The Committee envisages that the matter would then be forwarded to the DPP or QPS for prosecution of the matter. In the Committee's opinion this process would eliminate to some extent the current duplication of work and waste of resources and the consequent delays in the administration of justice.

The Committee considers that it is necessary to provide for an exception in respect of those matters that relate to a CMC officer or fall into a limited category of cases that having regard to the nature and seriousness of the misconduct, and/or the public office held by the subject officer, it is necessary in the interests of justice that the matter be referred to the DPP to consider whether to lay criminal charges. The Committee recommends amendment of the CMA to give effect to these conclusions.

The Committee is aware that the second category of exception is open to a flexible interpretation. Accordingly, on the assumption that the Committee's recommendations are implemented, the Committee recommends that future parliamentary committees carefully monitor those matters referred by the CMC to the DPP to ensure that they appropriately fall within the terms of the limited exception.

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<sup>156</sup> Sections 50(1) and (2) of the CMA.

**Recommendation 14**

The Committee recommends the *Crime and Misconduct Act 2001* be amended to provide that where the CMC decides that prosecution proceedings should be considered, the CMC must refer the matter to a police officer seconded to the CMC to decide whether criminal charges should be laid and, where appropriate, lay charges.

**Recommendation 15**

The Committee recommends the *Crime and Misconduct Act 2001* provide an exception to this requirement for those matters that relate to a CMC officer or fall into a limited category of cases that having regard to the nature and seriousness of the misconduct, and/or the public office held by the subject officer, it is necessary in the interests of justice that the matter be referred to the DPP to consider whether to lay criminal charges.

**Recommendation 16**

The Committee recommends future parliamentary committees closely monitor those matters referred by the CMC to the DPP in accordance with the above exceptions in order to ensure that referrals to the DPP appropriately fall within the exceptions.

## 5. THE CMC'S COERCIVE POWERS

### 5.1. Introduction

Coercive powers are essentially those special investigative powers available to the CMC to facilitate its investigation of misconduct and major crime. While the CMC's coercive powers are provided for in the CMA, police officers attached to the CMC also have access to similar powers under the *Police Powers and Responsibilities Act 2000* (PPRA). The CMC however has certain powers under the CMA that are not ordinarily available to the police service.

This chapter examines the existing powers of the CMC, reforms recommended by the Public Interest Monitor (PIM) and extensions to existing coercive powers sought by the CMC. Many of the extensions of power sought by the CMC are in the context of concerns to ensure that law enforcement agencies such as the CMC and the QPS have adequate powers to investigate offences which fall within the rubric of terrorism. For the purposes of this chapter, the terms terrorism or 'terrorist acts' are used to describe criminal acts undertaken to advance a political, religious or ideological cause and with the intention of coercing or intimidating the government, the public or a section of the public.

### 5.2. The present powers of the CMC

The CMC has an array of coercive powers available to facilitate its investigation of major crime and misconduct. Under the CMA, the CMC has power to:

- issue notices requiring a person to produce documents or things relevant to a CMC investigation (sections 72, 74, 74A and 75);
- enter a unit of public administration, inspect any document or thing in those premises and seize or make copies of any document or thing that is relevant to a misconduct investigation (section 73);
- apply to a Magistrate or the Supreme Court for a warrant to undertake a search and enter premises (overt search warrant) (section 86);
- seize evidence related to a CMC investigation (sections 110, 110A and 111);
- apply to the Supreme Court for monitoring and suspension orders in respect of a person's financial transactions (sections 119C and 119I);
- apply to the Supreme Court or the Magistrates Court for a warrant authorising the use of a surveillance device (surveillance warrant) (sections 121 and 137);
- apply to the Supreme Court for a warrant to enter a place covertly and to search for evidence in respect of a major crime being investigated by the CMC (covert search warrant) (section 148);
- apply to the Supreme Court for a warrant to apprehend a person (arrest warrant) (section 167);
- apply to the Supreme Court for a warrant authorising the use of additional powers (i.e. to enter and inspect financial records, seize passports and travel documents, etc.) in respect of misconduct investigations (additional powers warrant) (section 158); and
- issue a notice requiring a person to attend at a hearing to give evidence and/or produce a document or thing referred to in the notice (section 82).

The CMA makes special provision for the CMC to exercise search powers without a warrant where it is necessary to prevent the loss or destruction of evidence.<sup>157</sup> Subsequent approval must however be sought from a Magistrate.<sup>158</sup> The CMA also provides for the emergency use of surveillance devices for a major

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<sup>157</sup> Section 96 of the CMA.

<sup>158</sup> Section 97 of the CMA.



crime investigation where there is a risk of serious injury to a person.<sup>159</sup> Similarly subsequent approval must be sought from a Supreme Court judge.<sup>160</sup>

The CMC may also access powers available under the PPRA through police officers attached to the CMC.

### **5.2.1. Judicial controls on coercive powers**

#### Introduction

As outlined above, there are a number of coercive powers that the CMC may exercise without prior judicial approval. These principally include notices to produce or discover documents or things, the power to enter and search a unit of public administration and the power to hold hearings. The exercise of these powers is not subject to scrutiny by the PIM whose role is confined to surveillance warrants and covert search warrants.

In their submission the Queensland Police Union of Employees (QPUE) referred to the Fitzgerald Report and argued that:

- the CMC should be required to apply to a Supreme Court judge for specific approval to exercise any coercive powers; and
- the PIM should have jurisdiction to scrutinise and challenge all such applications.<sup>161</sup>

The President of the Australian Council for Civil Liberties, Mr Terry O'Gorman, also indicated his support for judicial monitoring of the CMC in relation to the use of its coercive powers, particularly in relation to investigative hearings.<sup>162</sup>

#### Analysis and comment

The CMC makes extensive use of its power to issue notices to produce or discover documents.<sup>163</sup> It maintains registers relating to the exercise of its notice to produce or discover powers, notices to attend hearings and the exercise of its power to enter a unit of public administration. These registers can be audited, at the request of the Committee, by the Parliamentary Commissioner for the purpose of deciding whether the CMC has exercised power in an appropriate way and whether the registers are up to date and complete and all required documentation is on the file and correctly noted on the registers.<sup>164</sup> The Committee also receives regular bimonthly updates from the CMC which contain statistics on the CMC's use of its coercive powers.

The 4<sup>th</sup> PCJC in its Three Year Review considered the question of whether judicial controls should exist in respect of all coercive powers exercised by the CMC.<sup>165</sup> The 4<sup>th</sup> PCJC observed that oversight mechanisms, while important, must not be unduly cumbersome. Noting the audit role of the Parliamentary Commissioner, and the less intrusive nature of these powers, the 4<sup>th</sup> PCJC concluded that

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<sup>159</sup> Section 130 of the CMA.

<sup>160</sup> Section 131 of the CMA.

<sup>161</sup> QPUE submission, p. 2.

<sup>162</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 79.

<sup>163</sup> In 2002-03 the CMC issued a total of 415 notices to produce or discover - 184 in relation to crime investigations and 231 in relation to misconduct investigations: CMC, *Annual Report 2002-2003*, p. 12.

<sup>164</sup> Section 314(2) of the CMA. An audit was conducted by the Parliamentary Commissioner at the Committee's request for the 2001 calendar year and 2002-2003 financial year. The results of the audit are referred to in the Committee's report *Report on Activities* Report No. 63, Legislative Assembly of Queensland, 2003, p. 2.

<sup>165</sup> 4<sup>th</sup> PCJC, Three Year Review, pp. 71-72.

judicial approval and monitoring by the PIM was unnecessary in respect of these powers.<sup>166</sup> This Committee concurs with that view.

In the case of more intrusive coercive powers, particularly the CMC's hearings power,<sup>167</sup> the Committee is satisfied that the existing safeguards are adequate. In particular, it is the five member Commission, not the Chairperson alone, that determines whether to hold a hearing. Further, the CMA provides a right to legal representation to all witnesses required to attend CMC hearings.

### Conclusion

The Committee is satisfied that the CMA contains adequate safeguards to ensure the appropriate use by the CMC of coercive powers that may be exercised without prior judicial imprimatur or monitoring by the PIM.

## **5.3. Monitoring of surveillance warrants and covert search warrants**

### **5.3.1. Introduction**

The CMA establishes the office of the PIM whose role is to monitor applications for, and the use of, surveillance warrants and covert search warrants.<sup>168</sup> The PIM has the same role in respect of surveillance warrants and covert search warrants issued under the PPRA.<sup>169</sup> The functions of the PIM are specifically:

- to monitor compliance by the CMC or police officers with the provisions of the CMA and the PPRA;
- to appear at any hearing of an application for a surveillance warrant or covert search warrant to test the validity of the application;
- to gather statistical information about the use of and effectiveness of surveillance warrants and covert search warrants;
- whenever the PIM considers it appropriate, to give a report of non-compliance to the CMC or in the case of a police officer, the Commissioner of Police; and
- to provide an annual report to the Minister for tabling in Parliament.<sup>170</sup>

The PIM, Mr Robert Sibley, in his submission to the Committee made a number of recommendations for reform in respect of the current monitoring regime under the CMA and the PPRA. These recommendations are considered below.

### **5.3.2. Reports on covert searches**

Section 156 of the CMA provides that after execution of a covert search warrant, a CMC officer must give a report on the exercise of the powers under the warrant to the issuing judge and the PIM.<sup>171</sup> A number of Supreme Court judges have expressed the view that the provision of a report to the issuing judge is unnecessary. In particular, they are concerned that the issuing judge often has little opportunity to assess the search and that the provision of a report tends to involve the judiciary further in the

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<sup>166</sup> Ibid.

<sup>167</sup> The CMC makes significant use of its hearings power with a total of 127 hearing days (190 witnesses) across crime and misconduct investigations during 2002-2003: CMC, *Annual Report 2003-2003*, pp. 11-12.

<sup>168</sup> Section 324 of the CMA.

<sup>169</sup> Section 159 of the PPRA.

<sup>170</sup> See sections 326 and 328 of the CMA and sections 159 and 160 of the PPRA.

<sup>171</sup> Section 156 of the PPRA makes similar provision.

investigative process. In light of these concerns, the PIM in his submission proposed the following amendments to the CMA and PPRA:

- removal of the requirement to provide a report to the issuing judge; and
- inclusion of a right for the PIM to apply to a Supreme Court judge for directions.<sup>172</sup>

In other jurisdictions such as New South Wales there is a general requirement that a report in respect of a search warrant be provided to the issuing judge.<sup>173</sup> However this requirement exists in the absence of an independent auditor such as the PIM, who under the CMA and the PPRA has responsibility for scrutinising an agency's compliance with the relevant legislative requirements.<sup>174</sup> Arguably, in light of the PIM's functions and the limited opportunity for Supreme Court judges to properly scrutinise reports, little purpose is served in requiring that a report be furnished to the issuing judge.<sup>175</sup> It is also noteworthy that the CMA and the PPRA do not contain a similar requirement in respect of the exercise of powers under a surveillance warrant. A judge issuing a surveillance warrant has discretion to impose conditions regarding reporting to the court.<sup>176</sup> The PIM has however, adopted a practice of requesting that the court impose a condition requiring that the PIM be provided with an affidavit of compliance by the relevant agency.<sup>177</sup>

In light of the experience possessed by the PIM in scrutinising reports on covert search warrants and compliance affidavits in respect of surveillance devices, and the limited opportunity for judges to review reports, the Committee is satisfied that it is unnecessary to maintain the requirement that a covert search warrant report be also provided to the issuing judge. It is further noted that the issuing judge retains discretion under section 151(2) of the CMA and section 151(2) of the PPRA to impose a reporting condition if considered appropriate.

#### **Recommendation 17**

**The Committee recommends that the *Crime and Misconduct Act 2001* and the *Police Powers and Responsibilities Act 2000* be amended to remove the requirement that a report on the exercise of the powers under a covert search warrant be provided to the issuing judge.**

#### **5.3.3. A right to report to the Supreme Court and apply for directions**

In light of the above recommendations in respect of reports to the issuing judge, the PIM recommended the amendment of section 156 of the CMA and section 156 of the PPRA to provide for a right for the PIM to apply to the Supreme Court for directions. Such directions may relate to a range of matters pertaining to the exercise of powers under a covert search warrant including the storage, use, destruction or otherwise, of anything seized or photographed under the warrant.

The PIM also recommended the inclusion in section 326 of the CMA and section 159 of the PPRA (which deals with the functions of the PIM) of a more general provision giving the PIM liberty to report generally to, and seek directions from, a judge of the Supreme Court.<sup>178</sup> This would enable the PIM to raise before the court issues of concern that may arise regarding the exercise of powers either under a covert search warrant or a surveillance warrant.

<sup>172</sup> PIM submission, p. 1.

<sup>173</sup> Section 21 of the *Search Warrants Act 1985* (NSW).

<sup>174</sup> The PIM under section 326 of the CMA and section 159 of the PPRA may report non-compliance to the CMC or the Commissioner of Police respectively.

<sup>175</sup> PIM submission, p.1.

<sup>176</sup> Section 124 of the CMA and section 127 of the PPRA.

<sup>177</sup> PIM, *Sixth Annual Report of the Public Interest Monitor delivered pursuant to the Police Powers and Responsibilities Act 2000 & the Crime and Misconduct Commission Act 2001*, p. 11.

<sup>178</sup> PIM submission, p. 2.

The Committee considers that the inclusion of a right to report to and apply to the Supreme Court has merit. It would appear that an amendment to section 326 of the CMA and section 159 of the PPRA, if appropriately drafted would remove the need for a specific provision in respect of covert search warrants as originally contemplated by the PIM. Accordingly, the Committee recommends that section 326 of the CMA and section 159 of the PPRA be amended to permit the PIM to report and apply to the Supreme Court for directions.

#### **Recommendation 18**

**The Committee recommends that section 326 of the *Crime and Misconduct Act 2001* and section 159 of the *Police Powers and Responsibilities Act 2000* be amended to permit the Public Interest Monitor, whenever the Public Interest Monitor considers it appropriate, to report and apply to the Supreme Court for directions in relation to any matter concerning the exercise of powers under a covert search warrant or surveillance warrant, including:**

- **anything seized or photographed under a covert search warrant;**
- **information obtained under a surveillance warrant; and**
- **transcripts of recordings or photographs made or taken under a surveillance warrant.**

#### **5.3.4. Reporting on non-compliance**

The CMA provides that the PIM has the function, whenever considered appropriate, of giving to the CMC a report on non-compliance by the CMC with the CMA.<sup>179</sup> Under the previous CJA, the PIM had a similar role in relation to the then CJC. However, under that Act, any report by the PIM as to non-compliance was to be given to the Parliamentary Committee, rather than to the CJC.<sup>180</sup>

It is unclear why this reporting arrangement was changed in the CMA.<sup>181</sup> The change to the present requirement perhaps came about a result of the CMA's imposition of a new statutory obligation upon the Chairperson of the CMC to notify the Committee of all conduct of a CMC officer that the Chairperson suspects involves, or may involve, improper conduct.<sup>182</sup> Thus, if upon consideration of a report of non-compliance received from the PIM, the Chairperson suspected improper conduct on the part of a CMC officer, the Chairperson would be obliged to notify the Committee.

However, this is not an entirely satisfactory position. A report of non-compliance by the PIM might contain no evidence of improper conduct by a CMC officer such as would require the CMC Chairperson to notify the Committee. It might however, identify deficiencies in the CMC's policies and procedures. It is important that the Committee is aware of any such deficiencies and any action taken by the CMC to rectify them, and that the Committee is in a position to follow up the CMC to ensure adequate remedial action is taken if necessary.

Whilst the current PIM, Mr Robert Sibley, has adopted the practice of providing reports of non-compliance to the Committee as well as to the CMC Chairperson, he submitted to the Committee that it would be more desirable for the CMA to prescribe that such reports be given to the Committee as was the position previously.<sup>183</sup>

<sup>179</sup> Section 326(1)(d) of the CMA.

<sup>180</sup> Section 84B(2)(d) of the CJA.

<sup>181</sup> The second reading speeches and explanatory notes for the *Crime and Misconduct Bill 2001* make no reference to the point.

<sup>182</sup> Section 329 of the CMA.

<sup>183</sup> PIM submission, p. 2.

In practice, it is possible for either the PIM or the Chairperson of the CMC to provide the report to the Committee. This is however dependent on the actions of the incumbents of those positions. As Mr Sibley noted in oral submissions, 'from a matter of first principles' the present statutory position was 'undesirable'.<sup>184</sup>

It is incongruous that a report by an oversight officer regarding non-compliance by the CMA (on matters of potential seriousness) is not provided to the Committee, which is the principal oversight mechanism, and has a wider oversight role than the narrower, though important, role of the PIM. The Committee believes it is appropriate that any report on non-compliance be provided to both the CMC Chairperson and to the Committee.

A related question is whether any amendment is necessary to the equivalent provision of the PPRA which requires the PIM to give any reports of non-compliance by police officers to the Commissioner of Police.<sup>185</sup> A police officer who is seconded to the CMC or authorised by the Chairperson under section 272(2) is a 'commission officer' for the purposes of the CMA. Such police officers often utilise the coercive powers contained in the PPRA. However, as the PPRA presently stands a report of non-compliance on the part of these officers is only required to be given to Commissioner of Police. While the Commissioner of Police may forward the report to the CMC, there is no guarantee that this will occur or further that the Committee will be provided with a copy of the report. An amendment of the PPRA would appear necessary to ensure that non-compliance reports regarding police officers who are also 'commission officers' under the CMA are provided to the CMC and the Committee, in addition to the Commissioner of Police.<sup>186</sup>

#### **Recommendation 19**

**The Committee recommends that section 326(1)(d) of the *Crime and Misconduct Act 2001* be amended to require that any report by the Public Interest Monitor on non-compliance by the CMC with the *Crime and Misconduct Act 2001* be provided to the CMC and the Committee.**

#### **Recommendation 20**

**The Committee recommends that section 159(2) of the *Police Powers and Responsibilities Act 2000* be amended to include a requirement that a report by the Public Interest Monitor on non-compliance by a police officer who is a 'commission officer' be given to the Commissioner of Police, the CMC and the Committee.**

### **5.4. Possible extension of coercive powers**

The CMC in its submission sought the expansion of a number of its existing coercive powers. Each of the particular submissions are considered in the following section.

#### **5.4.1. *Surveillance warrants for places***

##### *Introduction*

The CMA and the PPRA provide for the issue of surveillance warrants by a Supreme Court judge, or in the case of class B surveillance warrants (i.e. a tracking device), a Magistrate. Upon application by a CMC officer or a police officer, the court may issue the surveillance warrant if it is satisfied that there are

<sup>184</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 26.

<sup>185</sup> Section 159(2)(d) of the PPRA.

<sup>186</sup> It is noted that members of a police task force who are 'authorised commission officers' under section 272(2) of the CMA are under the control and direction of the Commissioner of Police: see section 32(2) of the CMA.

reasonable grounds for believing the relevant person (i.e. the person proposed to be placed under surveillance):

- has been, is, or is likely to be, involved in misconduct or the commission of major crime (or indictable offence in the case of the PPRA); and
- is likely to be at a place or at a class of place mentioned in the application.<sup>187</sup>

The CMC argued that the requirement to establish that a 'relevant person' is likely to be at a place is problematic, particularly for example, if certain premises were being used by unknown individuals to prepare for or plan terrorist activities. The CMC submitted that an application for a surveillance warrant should not have to specify that a 'relevant person' is likely to be at a place. Rather, the grounds for issuing a surveillance warrant should be similar to covert search warrants, that is, based upon a belief that evidence about a terrorist act or plans for a terrorist act would be obtained through the use of the surveillance device.<sup>188</sup> While the example provided by the CMC relates to the prevention and investigation of terrorist related activities, the CMC argued further that:

*The grounds for issuing surveillance warrants should also be broadened to include cases where there are reasonable grounds for believing that evidence of the commission of a major crime is likely to be obtained by use of surveillance devices at a place.*<sup>189</sup>

#### Comparative schemes in other Australian jurisdictions

The current scheme in relation to the issue of surveillance warrants under the CMA and the PPRA differs from that of a number of other Australian jurisdictions. The *Surveillance Devices Act 1999* (Vic) and the *Surveillance Devices Act 1998* (WA) give the courts in those states power to issue warrants authorising the use of listening devices, optical surveillance devices, tracking devices and, in the case of Victoria, data surveillance devices. Under the *Surveillance Devices Act 1998* (WA), a court may issue the warrant if it is satisfied that there are reasonable grounds for believing that:

- (a) an offence has been or may have been, is being or is about to be, or likely to be, committed; and
- (b) the use of the device would be likely to assist an investigation into that offence or suspected offence, or to enable evidence to be obtained of the commission of that offence, or the identity or location of the offender.<sup>190</sup>

The *Surveillance Devices Act 1998* (WA) permits the court to authorise the use of a surveillance device in relation to a person whose identity is unknown.<sup>191</sup> The warrant must where practicable, specify the name of any person whose conversation or activity may be monitored.<sup>192</sup>

A more elaborate scheme is contained in the *Surveillance Devices Act 1999* (Vic) which provides that the law enforcement officer may apply to the court for the issue of a surveillance warrant if the officer suspects or believes:

- (a) that an offence has been, is being, is about to be or is likely to be committed; and

<sup>187</sup> Sections 124 and 140 of the CMA and sections 127 and 141 of the PPRA.

<sup>188</sup> CMC submission, p. 14.

<sup>189</sup> *Ibid.*

<sup>190</sup> Section 13(1) of the *Surveillance Devices Act 1998* (WA).

<sup>191</sup> Section 13(5) of the *Surveillance Devices Act 1998* (WA).

<sup>192</sup> Section 13(8)(b) of the *Surveillance Devices Act 1998* (WA).

- (b) that the use of a surveillance device is necessary for the purpose of an investigation into that offence or enabling evidence to be obtained of the commission of the offence or the identity or location of the offender.<sup>193</sup>

A court may issue a warrant authorising the use of a surveillance device if the court is satisfied that there are reasonable grounds for the suspicion or belief founding the application for the warrant.<sup>194</sup> The warrant must if practicable, specify the name of any person whose private conversations may be monitored or recorded through the use of a listening device or optical surveillance device.<sup>195</sup> The warrant may authorise the use of a surveillance device on specified premises.<sup>196</sup>

The Report of the Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers contains a model Bill to facilitate the use of surveillance devices by law enforcement authorities in cross-border investigations.<sup>197</sup> The Bill to a large extent reflects the provisions of *Surveillance Devices Act 1999* (Vic). Clause 11 of the Bill provides that a surveillance device warrant issued under the Bill may authorise any one or more of the following:

- the use of a surveillance device on specified premises;
- the use of a surveillance device in or on a specified object or class of object; or
- the use of a surveillance device in respect of the conversations, activities or geographical location of a specified person or a person whose identity is unknown.

If the warrant authorises the use of a surveillance device on specified premises, these premises must be specified in the warrant. There is however no requirement to name any persons that may be the subject of surveillance.<sup>198</sup>

#### Analysis and comment

The CMC submission at its broadest, seeks amendment to the grounds for issuing surveillance warrants to include cases where there are reasonable grounds for believing that evidence of the commission of a major crime is likely to be obtained by the use of surveillance devices at a place.<sup>199</sup> The Parliamentary Commissioner supported this submission.<sup>200</sup> On the other hand the PIM and Mr O’Gorman, the President of the Australian Council for Civil Liberties, raised concerns with this proposal.<sup>201</sup> Both argued that any extension of surveillance powers to permit the issuing of surveillance warrants in respect of premises should be confined to terrorist related offences. Mr O’Gorman in his evidence to the Committee submitted:

*I would have serious reservations about the proposed power for surveillance of places rather than individuals in relation to ordinary criminal offences. I think the civil liberties balance, in my submission, should be struck in favour of the civil liberties side of the law and order equation for ordinary criminal offences. But in relation to terrorism, we can see that there have to be some increases in police powers to deal with terrorism. We think the case is made*

<sup>193</sup> Section 15(1) of the *Surveillance Devices Act 1999* (Vic).

<sup>194</sup> Section 17(1) of the *Surveillance Devices Act 1999* (Vic).

<sup>195</sup> Section 17(3)(b)(i) of the *Surveillance Devices Act 1999* (Vic).

<sup>196</sup> Section 18(1) of the *Surveillance Devices Act 1999* (Vic).

<sup>197</sup> *Cross-Border Investigative Powers for Law Enforcement*, Report of the Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigative Powers, November 2003.

<sup>198</sup> Clause 10(1)(b)(v) of the Bill.

<sup>199</sup> CMC submission, p.14.

<sup>200</sup> Parliamentary Commissioner submission, pp. 2-3.

<sup>201</sup> PIM submission, p. 4 and PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 82.

*out in relation to surveillance of places for terrorism.*<sup>202</sup>

The Committee is not satisfied, having regard to the nature of the surveillance devices and their potential for interference with the privacy of individuals, that surveillance warrants for places should be available for all major crime investigations. The present provisions of the CMA and the PPRA, which ground an application in the existence of a relevant person, provide some safeguard regarding the possible extent of individuals whose privacy may be subjected to interference by the use of surveillance devices. These should remain applicable in the circumstances of ordinary criminal offences.

Recent experiences throughout the world have brought to the attention of the Australian community the impact of acts of terrorism. Terrorist acts are removed from the level of ordinary criminal offences by the nature of their immediate and devastating effects in terms of destruction of property and loss of human life. This potentiality does provide the necessary impetus to ensure that law enforcement agencies are adequately equipped to investigate terrorism related offences.

### Conclusion

The Committee is satisfied that surveillance powers under the CMA and the PPRA should be amended to allow the surveillance of premises for the purposes of investigating a major crime or suspected major crime<sup>203</sup> which constitutes a terrorist act. A major crime constitutes a 'terrorist act' when it is undertaken to advance a political, religious or ideological cause and with the intention of coercing or intimidating the government, the public or a section of the public.<sup>204</sup>

### **Recommendation 21**

**The Committee recommends that the *Crime and Misconduct Act 2001* and the *Police Powers and Responsibilities Act 2000* be amended to allow a surveillance warrant to be issued in respect of specified premises on the basis that there are reasonable grounds for the believing that:**

- **a major crime which constitutes a 'terrorist act' has been, is being, or is likely to be, committed; and**
- **the use of a surveillance device at the premises is necessary for the purpose of an investigation into that major crime or suspected major crime or enabling evidence to be obtained of the major crime or suspected major crime.**

### **5.4.2. Emergent covert searches**

#### Background

A covert search warrant, as the name suggests permits the entry and search of the place stated in the warrant, covertly or through subterfuge. A covert search warrant may be issued under the CMA by a Supreme Court judge if the judge is satisfied there are reasonable grounds for believing evidence of the commission of a major crime is at the place or is likely to be taken to the place within 72 hours.<sup>205</sup>

Unlike in the case of overt search powers, neither the CMA nor the PPRA provide for the exercise of covert search powers without a warrant. The CMC submitted that both the CMA and the PPRA should be amended to allow an authorised CMC officer to conduct a covert search without a warrant. It submitted

<sup>202</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 82.

<sup>203</sup> Under the PPRA this would refer to indictable offences in the case of class B surveillance devices and serious indictable offences in the case of class A surveillance devices.

<sup>204</sup> Section 100.1 of Part 5.3 of the *Criminal Code Act 1995* (Cth) contains a comprehensive definition of 'terrorist act'.

<sup>205</sup> Section 151 of the CMA. Section 151 of the PPRA makes similar provision.



that an authorised CMC officer should be permitted to conduct an emergent covert search if the officer reasonably suspects:

- that a thing at a place is evidence of a major crime; and
- unless the place is immediately entered and searched, the evidence may be concealed or destroyed or its forensic value diminished.<sup>206</sup>

These requirements are in the same terms as section 96 of the CMA which authorises the overt search of a place without a warrant. The CMC notes in its submission that the exercise of such a power would be subject to appropriate post search approval provisions, which in the case of emergent overt searches requires a post search application to a Magistrate for an approval order.<sup>207</sup>

### The submissions

The Parliamentary Commissioner, Mr Robert Needham, in his submission to the Committee considered that the inclusion of a provision permitting an emergent covert search, as proposed by the CMC, was unnecessary. In his view, the power under the CMA and the PPRA to conduct an emergent search are sufficiently wide to encompass an emergent covert search. The CMC however is of the opinion that a number of provisions of the CMA indicate that the legislature did not intend emergent searches to also encompass covert searches.<sup>208</sup> Having regard to these arguments, the Committee is satisfied that neither the CMA nor the PPRA presently provide for emergent covert searches. Accordingly, legislative amendment would be necessary if emergent covert search powers were to be made available to the CMC and QPS.

The PIM, Mr Robert Sibley did not support the introduction of emergent covert searches for use in investigating all major crime.<sup>209</sup> He expressed the view however, that 'arguably what is proposed is necessary and reasonable in the face of a real terrorist situation'.<sup>210</sup> On the other hand, Mr Terry O'Gorman, President of the Australian Council for Civil Liberties, noting the relatively recent origin of covert search warrants submitted:

*...it is in our view totally preposterous that the CMC be given a power to covert search without a warrant...I just cannot conceive of a legitimate situation where the CMC would need in any area, including so-called terrorism, to have to do a covert search where there was not an opportunity for a warrant to be obtained. The concern I have is that, if you allow covert searches without a prior judicial warrant, then the protection that flows from a warrant just simply is not there...I urge this committee to look with great wariness at the desirability of it.<sup>211</sup>*

### Analysis and comment

The question of whether it is appropriate to provide for emergent covert searches involves a careful consideration of the competing public interests of protecting personal privacy on the one hand and the need for effective law enforcement powers on the other. The present scheme in respect of covert search warrants under the CMA and the PPRA includes a number of important safeguards to protect the privacy of individuals. Importantly, a covert search may only be undertaken pursuant to a warrant issued by a

<sup>206</sup> CMC submission, p. 14.

<sup>207</sup> Section 97 of the CMA.

<sup>208</sup> CMC response to further issues, 5 November 2003, pp. 1-2. Section 96 of the CMA, for example, authorises the use of 'search warrant powers' which do not include a power to enter the place stated in the warrant 'covertly or through subterfuge' as is the case with covert search warrants. See also sections 112 of the CMA and 380 of the PPRA which require the provision of a receipt in relation to anything seized.

<sup>209</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 53.

<sup>210</sup> PIM submission, p. 4.

<sup>211</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 78.

Supreme Court judge. The judge may issue the warrant if satisfied there are reasonable grounds for believing that evidence of the commission of the major crime is at the place.<sup>212</sup> The judge also has power to impose any conditions on the warrant that are considered necessary in the public interest.<sup>213</sup> The PIM is involved in the application process, and may appear at any hearing of the application, ask questions and make submissions. The CMA and the PPRA further require that a report on the exercise of the powers under the warrant be given to the issuing judge and the PIM.<sup>214</sup>

In the case of emergent powers under the CMA and the PPRA there is no requirement to seek judicial imprimatur prior to exercising the powers. The CMA and the PPRA, for example provide for the emergent use of surveillance devices where the Chairperson, or in the case of the PPRA, a police officer, reasonably believes:

- there is a risk of serious injury to a person; and
- using the surveillance device may help reduce the risk.<sup>215</sup>

An application must be made to a Supreme Court judge for approval of the exercise of the powers within two business days after the use of the surveillance device was authorised.<sup>216</sup> The PIM must be advised of the application and may appear and make submissions to the judge regarding the approval application.<sup>217</sup>

While covert search warrants have existed in Queensland for a number of years they appear to be a new concept in other States and Territories. Part 2 of the *Terrorism (Community Protection) Act 2003* (Vic) which commenced on 16 October 2003 introduced covert search warrants which may be issued by the Supreme Court to assist in preventing or responding to a terrorist act or suspected terrorist act.<sup>218</sup> No provision is made for emergent covert searches, though section 10 of the *Terrorism (Community Protection) Act 2003* (Vic) makes provision for applications to be made by telephone in urgent circumstances.

The *Terrorism (Police Powers) Act 2002* (NSW) which commenced in December 2002 establishes a scheme which allows authorisation to be given to police for the use of 'special powers' where:

- there are reasonable grounds for believing that there is an imminent threat of a terrorist act or that a terrorist act has been committed; and
- the exercise of special powers will substantially assist in preventing the terrorist act or apprehending the person responsible for committing the terrorist act.<sup>219</sup>

The special powers include certain powers to enter and search premises without a warrant and seize and detain things.<sup>220</sup>

The Committee considers that the use of emergent covert powers may be justified in the context of preventing or responding to a terrorist act or suspected terrorist act. The public interest considerations shift in favour of ensuring that adequate powers are available to enable law enforcement agencies to adequately investigate terrorist acts, given the potential for significant property damage and loss of life.

<sup>212</sup> Section 151 of the CMA and section 151 of the PPRA.

<sup>213</sup> Ibid.

<sup>214</sup> See however the Committee's recommendation at section 5.3.2 above regarding reporting to the issuing judge.

<sup>215</sup> Section 130 of the CMA and 132 of the PPRA.

<sup>216</sup> Section 131 of the CMA and section 133 of the PPRA.

<sup>217</sup> Sections 131 and 326 of the CMA and sections 133 and 159 of the PPRA.

<sup>218</sup> Sections 6 and 8 of the *Terrorism (Community Protection) Act 2003* (Vic).

<sup>219</sup> Sections 5 and 6 of the *Terrorism (Police Powers) Act 2002* (NSW).

<sup>220</sup> Sections 19 and 20 of the *Terrorism (Police Powers) Act 2002* (NSW).

The Committee is however concerned with the proposal to permit the exercise of emergent covert search powers for all major crime investigations. It is not satisfied that the present protections regarding covert search warrants should be disbanded to permit covert searches without a warrant. In the Committee's view the existing powers in respect of covert searches are adequate for the investigation of major crime that does not constitute a terrorist act. The potential interference with the privacy of individuals through the exercise of emergent covert searches for all major crime investigations cannot, in the Committee's opinion, be adequately justified.

### Conclusion

The Committee, having regard to the existing provisions of the CMA, the PPRA and the *Terrorism (Community Protection) Act 2003* (Vic) and *Terrorism (Police Powers) Act 2002* (NSW), recommends that the CMA and the PPRA be amended to provide for the exercise of covert search powers without a warrant where the Chairperson of the CMC (or in the case of the PPRA a police officer of at least the rank of inspector) reasonably believes:

- a major crime<sup>221</sup> which constitutes a 'terrorist act'<sup>222</sup> has been, is being, or is likely to be, committed;
- a thing at a place is evidence of the major crime; and
- unless the place is immediately entered and searched the evidence may be concealed or destroyed or its forensic value diminished.

The Committee further recommends that the CMA and PPRA be amended to provide (in terms similar to those applicable to the emergent use of surveillance devices) that:

- within two business days after the emergency use of the covert search powers was authorised an application must be made to a Supreme Court judge for approval of the exercise of the powers; and
- the PIM must be advised of the application and may appear and make submissions to the judge regarding the approval application.

### **Recommendation 22**

**The Committee recommends that the *Crime and Misconduct Act 2001* and the *Police Powers and Responsibilities Act 2000* be amended to provide for the exercise of covert search powers without a warrant where the Chairperson of the CMC (or in the case of the *Police Powers and Responsibilities Act 2000* a police officer of at least the rank of inspector) reasonably believes:**

- **a major crime which constitutes a 'terrorist act' has been, is being, or is likely to be, committed;**
- **a thing at a place is evidence of the major crime; and**
- **unless the place is immediately entered and searched the evidence may be concealed or destroyed or its forensic value diminished.**

<sup>221</sup> In the case of the PPRA this should refer to serious indictable offences.

<sup>222</sup> Section 100.1 of Part 5.3 of the *Criminal Code Act 1995* (Cth) contains a comprehensive definition of 'terrorist act'.

**Recommendation 23**

**The Committee recommends that the *Crime and Misconduct Act 2001* and the *Police Powers and Responsibilities Act 2000* be amended to provide (in terms similar to those applicable to the emergent use of surveillance devices) that:**

- **within two business days after the emergency use of the covert search powers was authorised, an application must be made to a Supreme Court judge for approval of the exercise of the powers; and**
- **the Public Interest Monitor must be advised of the application and may appear and make submissions to the judge regarding the approval application.**

**5.4.3. Additional powers warrants**

The CMA makes provision for an authorised CMC officer to apply to a Supreme Court judge for an 'additional powers warrant'.<sup>223</sup> An additional powers warrant which is only presently available for use in misconduct investigations, enables CMC officers to:

- enter premises where the records of a financial entity or associate of a person being investigated are held and to inspect and copy such records;
- seize passports, travel documents, instruments of title etc., which are found in the possession of a person concerned in an investigation; and
- compel a person to furnish an affidavit or statutory declaration relating to the property, financial transactions or movements of money or other assets of a person holding an appointment in a unit of public administration or of any person associated with the holder.<sup>224</sup>

The CMC submitted that additional powers warrants should also be made available for crime investigations due to their potential utility in a counter-terrorism investigation.<sup>225</sup> This submission was supported by the Parliamentary Commissioner, Mr Robert Needham.<sup>226</sup>

*Analysis and comment*

The Committee is satisfied that it is reasonable to extend the present provisions relating to additional powers warrants so that such warrants may be utilised by the CMC in its major crime investigations. There are no apparent concerns which suggest that the use of such powers should be confined to misconduct investigations only. The Committee recognises the potential utility of these powers in relation to the investigation of organised crime, money laundering and terrorism related offences. In the terrorism context, the Committee notes the observation of the Assistant Commissioner, Crime, Mr Callanan that one of the principal vulnerabilities of terrorist organisations is that 'they have to get money'.<sup>227</sup> The ability to obtain access to financial records and examine the financial transactions of suspected individuals and organisations is thus vital.

The Committee notes that section 165(1)(c) of the CMA in its present form permits the CMC to compel a person to provide, broadly speaking, information about the financial affairs of a holder of an appointment in a unit of public administration or a person associated with the holder. To enable application of this provision to crime investigations it will obviously need to be amended to allow the CMC to obtain

<sup>223</sup> Section 158 of the CMA.

<sup>224</sup> Section 165 of the CMA.

<sup>225</sup> CMC submission, p. 14.

<sup>226</sup> Parliamentary Commissioner submission, p. 3.

<sup>227</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 21.

information about the financial affairs of any person being investigated or any person associated with them.

#### **Recommendation 24**

**The Committee recommends that the present provisions in the *Crime and Misconduct Act 2001* relating to additional powers warrants be amended so that such warrants may be utilised by the CMC in its major crime investigations.**

#### **5.4.4. Definition of 'serious indictable offence'**

##### Introduction

The CMC in its submission referred to the possibility of an act of terrorism involving extensive destruction of property, in circumstances which do not endanger the safety of any person, or involve a serious risk of, serious injury to a person or loss of life. It submitted that the definition of 'serious indictable offence' accordingly requires extension to include instances where there is only extensive damage to property.<sup>228</sup>

'Serious indictable offence' is relevantly defined in schedule 4 of the PPRA to mean an indictable offence involving:

- (a) *serious risk to, or actual loss of, a person's life;*
- (b) *serious risk of, or actual serious injury to a person;*
- (c) *serious damage to property in circumstances endangering the safety of any person;*
- ...

##### Analysis and comment

The effect of extending the definition of serious indictable offence under the PPRA is to enable police to exercise certain powers under the PPRA in relation to these types of serious property offences. In particular police would be able to:

- obtain a class A surveillance device (i.e. a listening device or a combination of a listening device and a tracking device); and
- obtain a covert search warrant where the extensive damage to property was part of organised criminal activities.

The extended definition would also permit CMC and QPS officers to engage in controlled operations and controlled activities in relation to offences involving the extensive damage to property only.<sup>229</sup>

While the amendment proposed by the CMC is principally designed to deal with the potentiality of terrorist activities involving only extensive property damage, the CMC's position is that the expanded definition should not necessarily be limited to acts of terrorism. In other words, all indictable offences which involve extensive property damage should be included.<sup>230</sup> This broader position was not supported by the Parliamentary Commissioner or the PIM. Both were however willing to support the proposed amendment provided that it was confined to a situation that involved a terrorist act.<sup>231</sup> As the Parliamentary Commissioner, Mr Robert Needham stated in his submission:

<sup>228</sup> CMC submission, p. 14.

<sup>229</sup> See Chapter 5 of the PPRA.

<sup>230</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 23.

<sup>231</sup> Ibid, pp. 59-60 and 54 respectively.

*I support the CMC's submission but only insofar as the definition would be extended to include instances of extensive destruction of property involving a terrorist incident. ...*

*To extend the definition as suggested by the CMC, without limiting it to a destruction of property in a terrorist incident, would have the unintended result of extending police powers to cases involving the extensive destruction of property unrelated to a terrorist incident.<sup>232</sup>*

It is, as the Parliamentary Commissioner observed,<sup>233</sup> difficult to conceive of the possibility of an indictable offence involving serious damage to property in circumstances where the safety of a person is not endangered. The possibility does however exist.

The Committee is not satisfied that the expanded use of these coercive powers for all indictable offences involving extensive damage to property can be justified, particularly given the intrusive nature of these powers. The balance between the need to adequately equip law enforcement agencies with appropriate investigative powers on the one hand, and the need to protect the right of individuals to privacy on the other, arguably shifts in relation to offences that are part of orchestrated terrorist activities. The Committee supports therefore the extension of the definition of serious indictable offence to include indictable offences involving extensive destruction of property which occurs as a result of terrorist activity. Broadly speaking this means that the property destruction must be undertaken to advance a political, religious or ideological cause and with the intention of coercing or intimidating the government, the public or a section of the public.

#### **Recommendation 25**

**The Committee recommends that the definition of 'serious indictable offence' in the *Police Powers and Responsibilities Act 2000* be amended to include the extensive destruction of property in circumstances that constitute a terrorist act.**

#### **5.4.5. Special constables**

##### Background

The CMC uses civilian operatives to carry out some of its surveillance and investigative duties. In the past these operatives were appointed as 'special constables' under section 5.16 of the *Police Service Administration Act 1990* (PSAA), which according to the CMC allowed them to assist in carrying out certain police activities (such as the execution of search warrants) and also protected them from criminal liability on the same basis as sworn police officers.<sup>234</sup> The present definition of 'police officer' in the PPRA does not however include special constables. This means that the powers and protections available to police officers under the PPRA (eg permission to trespass on private land in the execution of their duty) and other Acts arguably do not extend to special constables. The CMC submitted therefore that the definition of police officer in the PPRA should be amended to include special constables within the definition.<sup>235</sup>

##### Analysis and comment

The Parliamentary Commissioner in his submission to the Committee stated that while he had no difficulty with amendments designed to grant the protections sought by the CMC, he was concerned with

<sup>232</sup> Parliamentary Commissioner submission, p. 3.

<sup>233</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 59.

<sup>234</sup> CMC submission, p. 15.

<sup>235</sup> Ibid.

the suggestion that the PPRA definition of police officer be simply amended to include special constables.<sup>236</sup> He observed that:

*As well as providing protection to special constables, such an amendment would give them all the powers of a police officer conferred under the PPRA. I would not consider such a total conferral of power to be appropriate for persons who have not received the specialised training of a police officer.*<sup>237</sup>

The Committee sought the CMC's response to the Parliamentary Commissioner's concerns. The CMC advised the Committee that all appointments of special constables at the CMC have been in accordance with a 1991 delegation by Commissioner Newnham, notwithstanding the revised delegation issued by Commissioner O'Sullivan in 1995.<sup>238</sup> The Newnham delegation authorised Assistant Commissioners to appoint a person as a special constable provided that the appointee is:

- a serving police officer from the AFP or a police force of an Australian State or Territory or the New Zealand Police Force; or
- employed on a full time basis with a law enforcement body working within Queensland.

The CMC submitted that these conditions of appointment provide the appropriate limitations on the powers of special constables.

The Committee is not satisfied that this is a complete answer to the concerns identified by Mr Needham. In the case of a person who is appointed as a special constable because they meet the first condition, that is, they are a serving police officer from the AFP or a police force of an Australian State or Territory or the New Zealand Police Force, it is arguable that as police officers they would have a sufficient degree of training and awareness in relation to police powers generally. On this basis the Committee is satisfied that the definition of 'police officer' should be amended to include special constables appointed under the PSAA who are serving police officers of the AFP or a police force of an Australian State or Territory or the New Zealand Police Force. In endorsing this aspect of the CMC's proposal, the Committee would hope that that upon appointment, special constables are provided with specific training in relation to police powers in Queensland and in particular the provisions of the PPRA.

The appointment as special constables of those who are not serving police officers as described, but simply employed on a full time basis with a law enforcement body working within Queensland is more problematic. To include such special constables within the definition of police officer under the PPRA, without any apparent limitation on the powers that they may exercise is, in the Committee's view, unsatisfactory, particularly given that these officers are not trained as police officers. While it may be possible to define 'police officer' in such way as to overcome these concerns, further detailed consideration is required to determine the full extent of powers and protections actually required by these officers.<sup>239</sup>

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<sup>236</sup> Parliamentary Commissioner submission, p. 4.

<sup>237</sup> Ibid.

<sup>238</sup> CMC response to further issues, 5 November 2003, p. 5.

<sup>239</sup> It is also noted that under section 5.16(2)(c) of the PSAA limitations on the powers and duties of a special constable may be imposed by the instrument of appointment.

**Recommendation 26**

**The Committee recommends that the definition of 'police officer' in the *Police Powers and Responsibilities Act 2000* be amended to include special constables appointed under the *Police Service Administration Act 1990* who are at the time of appointment serving police officers of the Australian Federal Police or a police force of an Australian State or Territory or the New Zealand Police Force.**

**Recommendation 27**

**The Committee recommends that the question of whether other special constables (i.e. those who are not serving police officers as described) should be included in the definition of 'police officer' under the *Police Powers and Responsibilities Act 2000* be the subject of further consideration by the Queensland Government.**

**5.4.6. Ability to order the production of documents at CMC hearings***Introduction*

Section 82 of the CMA permits the Chairperson to issue a notice requiring a person to attend at a CMC hearing for one or more of the following purposes:

- to give evidence;
- to produce a document or thing stated in the notice; or
- to establish a reasonable excuse or a claim of privilege.

Often during the course of a witness giving evidence at a hearing, the CMC is made aware of the existence of additional documentation or things possessed by the witness that are relevant to its investigation.<sup>240</sup> Under the CMA a witness must answer a question put to them at a hearing by the presiding officer<sup>241</sup> and is required to produce any document or thing stated in the attendance notice.<sup>242</sup> There is however no specific provision obliging a witness to produce, at the request of the presiding officer, any document or thing, other than that identified in an attendance notice.

While the CMC can prepare a notice to produce requiring immediate production of the document or thing, this, in the CMC's submission, is a cumbersome process which could afford the witness time to destroy the item sought.<sup>243</sup> The CMC thus seeks amendment of the CMA to allow presiding officers at CMC hearings to order the production of documents or things, in terms similar to the power under the *Independent Commission Against Corruption Act 1988* (NSW).

The relevant power in the *Independent Commission Against Corruption Act 1988* (NSW) is found in section 35(2) which provides as follows:

*The person presiding at a hearing before the Commission may require a person appearing at the hearing to produce a document or other thing.*

<sup>240</sup> CMC submission, p. 16.

<sup>241</sup> Sections 190 and 192 of the CMA.

<sup>242</sup> Sections 185(1) and 188(2) of the CMA.

<sup>243</sup> CMC submission, p. 16.



### Conclusion

The Committee is satisfied that the power sought is reasonable and necessary to avoid the cumbersome process of preparing a notice to produce and the risk that the document or thing sought may be destroyed by the witness in the interim. The Committee notes that Parliamentary Commissioner agrees with the CMC's concerns regarding the present position under the CMA and supports the proposed amendment.<sup>244</sup> Any amendment should however also include in terms consistent with the CMA, an appropriate mechanism for dealing with claims by a person that he or she is not required to produce the document or thing because of a reasonable excuse.

### **Recommendation 28**

**The Committee recommends that the *Crime and Misconduct Act 2001* be amended to allow presiding officers at CMC hearings to order the production of documents or things, in terms similar to the power under the *Independent Commission Against Corruption Act 1988* (NSW).**

#### **5.4.7. Telecommunications interception**

##### Introduction

Telecommunications interception in Australia is principally governed by the *Telecommunications (Interception) Act 1979* (Cth). The *Telecommunications (Interception) Act 1979* permits State law enforcement authorities that are 'eligible authorities' to apply for a warrant to conduct telephone interception. In order for State law enforcement authorities such as the QPS and CMC to be declared as 'eligible authorities', the State must pass complementary legislation complying with the requirements in section 35 of the *Telecommunications (Interception) Act 1979* relating to record keeping and destruction, reporting and inspection by an independent State authority.

Queensland is the only Australian jurisdiction without telephone interception powers. Accordingly, the CMC in its submission reiterates its previous calls for the introduction of telecommunications interception legislation in Queensland and funding for the CMC to establish its own secure and effective interception facility.<sup>245</sup>

##### Background

In a report entitled *Telecommunications Interception and Criminal Investigations in Queensland: A report* (CJC Report), the CJC considered whether the QPS and the CJC should have the power to intercept telecommunications in certain prescribed circumstances.<sup>246</sup> The CJC recommended that the Queensland Government take the necessary steps to enable the QPS and the CJC to intercept telecommunications as they pass over the telecommunications system.<sup>247</sup>

The CJC Report was reviewed by the 2<sup>nd</sup> PCJC which issued a report in May 1995.<sup>248</sup> The 2<sup>nd</sup> PCJC was satisfied that with further safeguards, the power to intercept telecommunications should be granted to the QPS and the CJC.<sup>249</sup>

<sup>244</sup> Parliamentary Commissioner submission, p. 4.

<sup>245</sup> CMC submission, pp. 17-19.

<sup>246</sup> CJC, *Telecommunications Interception and Criminal Investigation in Queensland: A Report*, 1995, p. 1.

<sup>247</sup> *Ibid*, p. 39.

<sup>248</sup> PCJC, *A Review of the Criminal Justice Commission's Report on Telecommunications Interception and Criminal Investigation in Queensland*, Report No. 29, 1995.

<sup>249</sup> *Ibid*, p. 32.

In December 1999 the 4<sup>th</sup> PCJC examined the issue of telephone interception extensively in its report entitled *A report on the introduction of the telecommunications power in Queensland – balancing investigative powers with safeguards* (Report No. 50).<sup>250</sup> The 4<sup>th</sup> PCJC recommended:

1. the introduction of legislation conforming with the *Telecommunications (Interception) Act 1979* to enable the CJC and the QPS to intercept telecommunications;
2. that the State legislation adopt the template provided in the *Telecommunications (Interception) Act 1979* and not contain any further safeguards with the possible exception referred to in recommendation three;
3. every consideration be given to the establishment, if possible, of a scheme providing for an involvement by the entity given the inspector role at a stage prior to an application for an interception warrant being made, along the lines set out in the report;
4. that the inspection role be given to the PIM; and
5. that the CJC be able to operate its own separate interception facility, but should wherever appropriate co-operate with other agencies to the fullest extent possible, with a view to the maximisation of efficiencies and the minimisation of costs.<sup>251</sup>

These recommendations were further endorsed by the 4<sup>th</sup> PCJC in its Three Year Review.<sup>252</sup>

#### Ministerial responses to recommendations

On 8 November 2000 the then Minister for Police and Corrective Services, Hon Tom Barton MP, tabled an interim response to Report No. 50 which stated that options for the possible introduction of telecommunications interception powers in Queensland through a State legislative scheme were still under consideration and that no proposal had been put to Cabinet at that time.<sup>253</sup> In his response to Report No. 55 tabled on 30 October 2001 the Premier provided the following reasons for not adopting the 4<sup>th</sup> PCJC's recommendations:

*The matter of telecommunications remains quite distinct from the reforms to the legislation establishing the CJC and QCC. The Government has been supportive of equipping our law enforcement agencies with the powers they need to fight crime ... These do not extend to telecommunications interception. The Government is mindful of the need to balance such powers with the need to safeguard civil liberties and ensure that those powers are not abused.*<sup>254</sup>

In April 2002 the Committee wrote to the Hon Tony McGrady MP, Minister for Police and Corrective Services noting that a final response to Report No. 50 had not been tabled. The Minister advised in response that the State was awaiting the outcome of the Commonwealth government's new arrangements for its crime agencies to see what implications this may hold for Queensland.<sup>255</sup>

In June 2002 the Committee wrote to the Premier seeking a response to the recommendations in Report No. 50 and 55. The Premier responded on 17 December 2002, stating that the establishment of the new

<sup>250</sup> PCJC, *A Report on the Introduction of the Telecommunications Power in Queensland – balancing investigative powers with safeguards*, Report No. 50, 1999.

<sup>251</sup> *Ibid*, pp. 2-3.

<sup>252</sup> 4<sup>th</sup> PCJC, Three Year Review, p. 74.

<sup>253</sup> Letter from Hon. Tom Barton MLA, Minister for Police and Corrective Services to the Clerk, Queensland Parliament, 30 October 2000.

<sup>254</sup> Government Response to Parliamentary Criminal Justice Committee's Report No. 55, 30 October 2001.

<sup>255</sup> Letter from Hon. Tony McGrady MP, Minister for Police and Corrective Services and Minister Assisting the Premier on the Carpentaria Minerals Province, to the PCMC, 5 June 2002.

ACC may have implications for the CMC's ability to access intercepted information and that this and other relevant issues were under consideration.<sup>256</sup>

In October 2003 the Leader of the Opposition introduced into the Queensland Parliament as a Private Members' Bill the Telecommunications (Interception) Queensland Bill 2003. The objective of the Bill is to establish a recording, reporting and inspection regime to complement the *Telecommunications (Interception) Act 1979* so that the QPS and CMC may use telecommunications interception as a tool for the investigation of particular serious offences prescribed under the *Telecommunications (Interception) Act 1979*.<sup>257</sup> As a result of the dissolution of Parliament on 13 January 2004, the Bill has now lapsed.

### The submissions

The CMC argued that telephone interception has the following benefits:

- it minimises the need to use covert operatives, who are often exposed to high levels of risk, particularly without the benefit of intelligence obtained through telephone interception;
- in contrast to listening devices, telecommunications interception consistently produces high-quality product which is often far more effective because it records both sides of the conversation;
- it allows specific targeting of an individual, is efficient and safe and allows more informed and selective use of other surveillance strategies; and
- it removes any potential concerns regarding limitations on the use of data-surveillance devices on computers connected to the internet.<sup>258</sup>

The CMC submitted that should telecommunications interception powers be introduced, it will be necessary for the CMC to establish a suitably secure and independent telephone interception facility, rather than a shared facility with the QPS, or a Commonwealth agency. Anything less, in the CMC's view, would compromise the investigation of police corruption.<sup>259</sup>

The Parliamentary Commissioner, the PIM and the Opposition gave unqualified support to the introduction of telephone interception legislation in Queensland and the granting of interception powers to the CMC.<sup>260</sup>

However, the President of the Australian Council for Civil Liberties, Mr Terry O'Gorman argued:

*...in areas where telephone interception is needed, in most cases that can be achieved by joint operations with federal law enforcement agencies. But if telephone interception is to be introduced ... it should only be introduced if there is a role for the Public Interest Monitor.*<sup>261</sup>

Mr O'Gorman said that he could not see any legitimate argument against the involvement of the PIM. He described the PIM's role in the following terms:

*...it will allow the Public Interest Monitor ... to put a public interest argument up before the judge as to whether in fact a telephone interception warrant is justified. But more importantly, it allows the Public Interest Monitor, once a warrant is issued, to in fact examine*

<sup>256</sup> Letter from Hon Peter Beattie MP, Premier and Minister for Trade, to the PCMC, 17 December 2002.

<sup>257</sup> Section 3 of the Telecommunications (Interception) Queensland Bill 2003.

<sup>258</sup> CMC submission, pp. 18-19.

<sup>259</sup> Ibid, p. 19.

<sup>260</sup> Parliamentary Commissioner submission, pp. 4-5, PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 56 and Opposition submission, p. 3.

<sup>261</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 78.

*the product of the warrant over the period of 30 or 60 days that it is in existence.*<sup>262</sup>

### Analysis and comment

The effectiveness of telecommunications interception as an investigative tool and its potency in counteracting misconduct and crime is well recognised by agencies with access to telecommunications interception powers.<sup>263</sup> According to these agencies, telecommunications interception enables the gathering of evidence where alternative evidence is uncorroborated, unavailable or insubstantial. Further, telephone interception product continues to make a significant contribution to many investigations despite the increasing levels of technical sophistication among offenders.<sup>264</sup>

A recent report to the Commonwealth Attorney on the operation and use of named person warrants under the *Telecommunications (Interception) Act 1979* identifies two further important features of telecommunications interception as an investigative tool.<sup>265</sup> First, it is safe. It limits the need to expose law enforcement operatives, particularly those involved in undercover operations, to considerable danger. Second, telecommunications interception makes a significant contribution to the more effective utilisation of other investigative resources and enables complex investigations to be conducted more efficiently and more cheaply than would otherwise be the case. It also helps to avoid reliance on less satisfactory forms of evidence from sources such as informants and witnesses who may be exposed to threats or intimidation.<sup>266</sup>

As noted above, it was suggested by Mr O'Gorman that the present position by which the CMC and the QPS have access to telephone interception through joint operations with agencies such as the ACC and AFP, is adequate and should be maintained.<sup>267</sup> The CMC however strongly rejected this view and submitted that:

*The CMC can only access these powers were (sic) they are involved in joint investigations with either the AFP, ACC or other agency with similar powers. Therefore, the investigations must involve either Commonwealth crimes or serious criminal activity spanning more than one state...There are many instances of serious criminal activity which is contained solely within Queensland and not subject to telephone interception. Paedophilia is one area which does not fall within the investigative interests of either Commonwealth agency ...Further, corruption within the Queensland public sector would not of itself fall within the jurisdictions or investigative priorities of either of the Commonwealth agencies, therefore there is limited opportunity for the CMC to access telephone interception powers in respect of its Misconduct function.*<sup>268</sup>

The Committee considers that the present position with respect to access to telephone interception powers by the CMC and the QPS in Queensland is not adequate. It is of the opinion that to maintain the present position in Queensland would be to deny the CMC and QPS access to what has proved in other jurisdictions to be an extremely useful investigation tool. The Committee is strongly of the view that telecommunications interception powers should be granted to the CMC and the QPS.

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<sup>262</sup> Ibid.

<sup>263</sup> Commonwealth Attorney-General's Department 2003, *Telecommunications (Interception) Act 1979, Report for the year ending 30 June 2002*, p. 11.

<sup>264</sup> Ibid.

<sup>265</sup> Sherman, T, *Report of Review of Named Person Warrants and Other Matters*, June 2003, p. 18.

<sup>266</sup> Ibid.

<sup>267</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 78.

<sup>268</sup> CMC supplementary submission, August 2003, p. 4.

Telecommunications interception powers, like other covert investigative powers, impact upon civil liberties. They interfere with the privacy of individuals and are open to possible misuse. Accordingly, safeguards are necessary. The *Telecommunications (Interception) Act 1979* contains a number of safeguards that must be incorporated into any complementary State legislation. Mr O'Gorman however, in his evidence, urged that the involvement of the PIM in the warrant application process and consequent examination of the execution of the warrant was a necessary additional safeguard that should be incorporated into any Queensland telecommunications interception legislation.

In Report No. 50, the 4<sup>th</sup> PCJC considered what safeguards should be contained in State legislation governing the use of telephone interceptions. The 4<sup>th</sup> PCJC recommended the adoption of the safeguards contained in the *Telecommunications (Interception) Act 1979* and further that the inspection role under any State legislation be given to the PIM. The 4<sup>th</sup> PCJC was however concerned, that unlike the PIM's role in relation to covert search warrants and surveillance warrants under the PPRA and the CMA, the inspector under the *Telecommunications (Interception) Act 1979* had no role in relation to the application stage of an interception warrant. As a consequence, the 4<sup>th</sup> PCJC - recognising possible constitutional limitations in establishing such a role for the inspector in Queensland - recommended that every consideration be given to the establishment of a scheme providing for involvement by the entity given the inspector role at a stage prior to an application for an interception warrant being made.

The Committee believes that it is desirable for the inspector or oversight agency to be involved at the early stage of making the application for the telecommunications warrant. A scheme which in general terms, requires that the inspector be served with the application and permits the inspector to appear and make submissions at the hearing of an application for a telecommunications warrant, should be incorporated into any State telecommunications legislation. The Committee is however cognisant of the possible constitutional limitations in establishing such a scheme. It therefore recommends that any telecommunications scheme, if possible, provide for involvement by the entity given the inspector role at a stage prior to an application for an interception warrant being made.

The 4<sup>th</sup> PCJC in Report No. 50, further recommended that the CJC be able to operate its own separate interception facility, but should wherever appropriate co-operate with other agencies to the fullest extent possible, with a view to the maximisation of efficiencies and the minimisation of costs. This Committee endorses that recommendation. In respect of co-operation between agencies, the Committee notes that since the merger of the QCC and the CJC, the CMC and the QPS are the only remaining Queensland agencies. The Committee supports appropriate co-operation between the CMC and the QPS, subject to any restrictions arising from the CMC's investigation of allegations of misconduct by police officers.

**Recommendation 29**

**The Committee recommends that the Queensland Government introduce legislation to enable the CMC and QPS to intercept telecommunications.**

**Recommendation 30**

**The Committee recommends that any telecommunications scheme should include a role for an Inspector, such as the Public Interest Monitor, in the application process for a telecommunications interception warrant.**

**Recommendation 31**

**The Committee recommends that the CMC be able to operate its own telecommunications interception facility and receive adequate funding to allow it to do so.**

## 6. THE INTELLIGENCE FUNCTION

### 6.1. Introduction

The CMC's intelligence function is an integral element in its operations. To properly investigate and prevent crime and misconduct, law enforcement officers must have access to accurate and timely intelligence data. This assists agencies in their ongoing operations, such as the investigation of criminal offences. Further, a study of long-term trends can allow an assessment of possible future threats. The accumulation of intelligence information allows the development of strategies to prevent and deal proactively with crime and misconduct.

The primary purpose of the CMC's intelligence function is to support the work of the crime and misconduct areas of the organisation. In addition to the CMC using intelligence in support of its own work, it also shares intelligence data that is suitable for dissemination to other agencies and the public, where appropriate.

The issues considered in this review of the CMC's intelligence function are whether:

- it is appropriate for the CMC to continue to have an intelligence function that operates separately and independently of all other agencies;
- it is appropriate that the responsibility for gathering both criminal and misconduct intelligence is combined in a single unit within the organisation;
- there has been appropriate sharing of intelligence with other agencies and the public where appropriate; and
- there has been unnecessary duplication in the intelligence held internally by the CMC itself and in conjunction with the QPS.

### 6.2. Background

The CJA established an intelligence function for the CJC in line with the recommendations made in the Fitzgerald Report.<sup>269</sup> The responsibility for intelligence relating to major and organised crime was transferred from the CJC to the QCC when it was established in 1997. During the time the QCC was in existence, the CJC's role was limited to gathering information and investigating matters related to official misconduct.

When the CJC and the QCC merged to form the CMC, the intelligence capabilities of both the CJC and QCC were brought together and the CMC was given responsibility for performing the functions previously undertaken by both. This brought responsibility for organised crime and criminal paedophilia (collectively described as 'major crime') and official misconduct within the single agency.<sup>270</sup>

Under the CMA, the CMC has the following intelligence functions:

- to undertake intelligence activities to support the proper performance of its functions;
- to analyse the intelligence data collected to support its functions;
- to minimise unnecessary duplication of intelligence data; and
- to ensure that intelligence data collected and held to support its functions is appropriate for the proper performance of its functions.<sup>271</sup>

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<sup>269</sup> Section 58 of the CJA; Fitzgerald Report, pp. 317-318.

<sup>270</sup> Section 220 of the CMA.

<sup>271</sup> Section 53 of the CMA.

### 6.3. Strategic Intelligence Unit

The CMC's intelligence function is performed by the Strategic Intelligence Unit (SIU). The SIU is a multidisciplinary unit of experts in strategic intelligence, research and financial investigation.<sup>272</sup> It is an independent unit of the CMC, separate from the CMC's crime and misconduct investigation areas and from all other government agencies. It is intended to be a secure, centralised source from which CMC officers can obtain comprehensive, accurate and timely intelligence information necessary to properly perform their functions.<sup>273</sup>

The SIU is responsible for:

- providing an effective intelligence service for the CMC to support the proper performance of its functions;
- maintaining a database of intelligence information;
- providing the CMC with a centralised point from which a wide range of internal and external data sources can be accessed by authorised officers;
- sharing intelligence information with appropriate entities; and
- providing a security management service to the CMC.

The SIU draws together the research, investigative and intelligence capacities of the CMC and allows it to gain a more comprehensive understanding of the nature of crime problems in our society and provides a basis for focusing investigative activities on worthwhile pursuits. For example, the SIU allows the CMC to draw on intelligence expertise in identifying targets, evaluating crime markets and assessing the vulnerabilities of criminal networks.

The SIU is primarily staffed by intelligence personnel, but also has a research officer, a financial investigator and a civilian investigator. In addition, tactical intelligence analysts, who play an active role in supporting crime and misconduct investigations, are located in each of the operational teams within the crime and misconduct functions.<sup>274</sup>

#### 6.3.1. Strategic intelligence

Much of the CMC's intelligence work depends on strategic intelligence. Strategic intelligence involves the assessment of current and emerging trends in the criminal environment. This work is of assistance when determining broader organisational objectives and in the selection of appropriate strategies to achieve those objectives. The CMC uses strategic intelligence to monitor various crime markets in Queensland to identify emerging trends or changes in threat levels. Where matters are viewed as being of concern, projects are run to produce timely, accurate and useful intelligence to assist the CMC or other agencies, where appropriate.<sup>275</sup>

The SIU produces strategic intelligence assessments and reports for internal and external clients to support decision-making processes. It also identifies targets for investigation by the CMC's investigation teams and recommends methods for the proactive investigation of major crime and official misconduct.<sup>276</sup>

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<sup>272</sup> CMC submission, p. 30.

<sup>273</sup> CMC submission, pp. 30-31; PCMC, Transcript of Public Hearing, 19-20 June 2003, pp. 40-41.

<sup>274</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 40.

<sup>275</sup> CMC submission, p. 30.

<sup>276</sup> Ibid.

### 6.3.2. *Target development*

Strategic intelligence also involves target development. Target development involves identifying potential significant criminal activity by one or more individuals and the planned collection and analysis of data to determine its nature and extent. Where the SIU identifies matters of concern, it either provides advice or, alternatively it may develop a target proposal recommending the commencement of an investigation. Target development usually involves liaison with the QPS, ACC and AFP and other interstate agencies.<sup>277</sup>

### 6.3.3. *Intelligence sharing*

In addition to the CMC using intelligence to support its own work, it also shares intelligence with other agencies and the public, where appropriate. In particular, the CMC produces:

- *Crime Bulletins*, which are unclassified documents for public dissemination, designed to heighten awareness of organised crime issues, trends and forecasts; and
- *Intelligence Digests*, which are classified documents for ‘in-confidence’ law-enforcement use only. These digests provide information about emerging trends in Queensland and the risks they pose.<sup>278</sup>

According to the CMC, both the bulletins and digests have received positive feedback and frequently result in successful enforcement action. In May 2003, the CMC’s intelligence bulletins and digests were recognised internationally with an award for Excellence in Law Enforcement Intelligence Publications at a State Level by the International Association of Law Enforcement Intelligence Analysts.<sup>279</sup>

In addition to the bulletins and digests, the CMC also provides strategic intelligence assessments on specific issues which potentially might affect law enforcement in Queensland. These assessments are also used to prioritise the deployment of resources.<sup>280</sup>

### 6.3.4. *Tactical intelligence*

Tactical intelligence involves the provision of ongoing intelligence advice and support to investigations. Operational activities in the CMC usually involve intelligence staff working directly within a multidisciplinary team of investigators. Intelligence reports are collated and inserted in the CMC’s Intelligence Recording and Analysis System (IRAS). They are then used by the CMC or disseminated to other agencies. No other agencies have direct access to IRAS, so they rely solely on selective disseminations by the CMC. The CMC reports that feedback on these disseminations indicates that they are regarded by recipients as being of value and successful enforcement action has resulted on a number of occasions.<sup>281</sup>

Representatives from the SIU also meet with representatives from other agencies to discuss intelligence needs and criminal targets to determine what is an appropriate sharing of resources.<sup>282</sup>

## 6.4. **Combined criminal intelligence and misconduct intelligence in the one unit**

As the CMC’s Director of Information and Intelligence, Mr Paul Roger, explained at the Committee’s public hearing, the CMC is careful to maintain a strict separation between its crime investigation unit and its misconduct investigation unit. However, the same division is not maintained within the SIU, which does not separate its crime and misconduct intelligence functions. The SIU is intended to be a single unit

<sup>277</sup> CMC submission, pp. 30-31; PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 40.

<sup>278</sup> CMC, *Annual Report 2002-2003*, p. 25; CMC submission, p. 30.

<sup>279</sup> CMC, *Annual Report 2002-2003*, p. 26; CMC submission, p. 31.

<sup>280</sup> CMC, *Annual Report 2002-2003*, pp. 25-26.

<sup>281</sup> CMC submission, p. 31; PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 41.

<sup>282</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 41.



that sits between the two areas and acts as a bridge between them. This is an advantage when a major crime investigation uncovers activities that might constitute misconduct, or an investigation into misconduct uncovers evidence of organised crime activities. This is particularly so in cases involving possible corruption within the police service.<sup>283</sup>

### **Recommendation 32**

**The Committee recommends that the CMC continue to maintain its criminal and misconduct intelligence in a single unit.**

## **6.5. The CMC's separate intelligence role and separate intelligence database**

Due to the sensitive nature of the intelligence information the CMC requires to perform its functions, it is essential that it have an intelligence unit that is separate from all other agencies. That intelligence unit must also maintain its own database of intelligence information that cannot be accessed by outsiders who do not have a legitimate interest in the information it contains.

Maintaining the security of sensitive information is critical to avoid the CMC's activities being compromised and to protect the privacy of individuals. In accordance with section 54 of the CMA, the CMC maintains a database of intelligence information for use in support of its functions. The CMC's internal database is not accessible by other agencies, because it contains current operational data as well as data relating to official misconduct.

The problem with not keeping the CMC's intelligence unit separate from all other agencies is controlling access to information. For example, given that the CMC's jurisdiction may require the investigation of officers of the QPS, or officers of other government agencies, it is essential that those officers not have access to information stored in the CMC's intelligence database.

Intelligence held in the database is continually upgraded as data is made available from investigations and through cooperative relationships with other law enforcement agencies. Intelligence analysts use the CMC's internal database, IRAS, to create associations between diverse pieces of data, such as persons of interest, their criminal associates, activities and other identifying information. The CMC electronically accesses and obtains information from the Australian Criminal Intelligence Database (ACID), which is utilised by a number of other agencies in Australia, including the QPS.<sup>284</sup>

The CMC disseminates its intelligence information where it is appropriate to do so. Source documents that consist of intelligence and information reports, offender profiles and criminal and post-operational assessments focusing on organised crime, criminal paedophilia and other criminal activity are selectively copied from IRAS and contributed to the ACID database.<sup>285</sup>

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<sup>283</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 40.

<sup>284</sup> CMC, *Annual Report 2001-2002*, p. 33; CMC, *Annual Report 2002-2003*, p. 25.

<sup>285</sup> CMC submission, p. 31.

**Recommendation 33**

**The Committee recommends that the CMC continue to have a dedicated intelligence unit that is independent of all other agencies.**

**Recommendation 34**

**The Committee recommends that the CMC retain its ability to share relevant information with other law enforcement agencies.**

**Recommendation 35**

**The Committee recommends that the CMC continue to maintain its own intelligence database independently of other agencies.**

**6.6. Oversight of the intelligence function by the Parliamentary Crime and Misconduct Commissioner**

Under section 320 of the CMA, the Parliamentary Commissioner is required to conduct an annual review of the intelligence data held by the CMC and the QPS.

The purposes of the review are to consider whether:

- intelligence data held by each agency is appropriate having regard to the agency's functions;
- there is unnecessary duplication of intelligence data;
- the agencies are working cooperatively; and
- either agency is placing inappropriate restrictions on access to intelligence data by the other agency.<sup>286</sup>

The Parliamentary Commissioner must provide written advice on the outcome of the review to the CMC, the PCMC and the Commissioner of Police. The advice must be in general terms and must not disclose intelligence data or other confidential information.

Previously, there was no legislative requirement that a copy of the report be provided to the PCMC. The 4<sup>th</sup> PCJC recommended legislative amendment to require a copy of the report of the Parliamentary Commissioner to be provided to the PCMC.<sup>287</sup> This recommendation was accepted and was implemented in the CMA.<sup>288</sup>

In his 2003 report on his review of the intelligence data held by the CMC and the QPS, the Parliamentary Commissioner found that:

- all intelligence data reviewed was appropriately held by the CMC having regard to its functions;
- there was no evidence of unnecessary duplication of intelligence data held by the CMC and the QPS and that there are mechanisms in place to avoid duplication;
- both the CMC and the QPS were working cooperatively to achieve optimal use of available data and the resources used to record data; and

<sup>286</sup> Section 320(2) of the CMA.

<sup>287</sup> 4<sup>th</sup> PCJC, Three Year Review, pp. 84 and 379.

<sup>288</sup> Section 320(3)(b) of the CMA.

- neither the CMC nor the QPS placed improper restrictions on access to intelligence data by the other.

The following four sections provide more detail of the Parliamentary Commissioner's findings.

### **6.7. Whether intelligence data is held appropriately**

The SIU has strict guidelines to ensure that only intelligence data relevant to the CMC's functions are held in the database. Intelligence data must be of the highest quality and poor quality data may adversely affect the integrity of the SIU. To ensure quality and appropriateness of the data held, regular quality control checks of the intelligence databases are conducted. These tests ensure that the stored data is relevant to the CMC's functions, the data is accurately recorded and there are no duplicate entries.

The process by which data is entered into the CMC's database is such that only intelligence that is accurate and appropriately held by the CMC is retained. Analysts are responsible for timely and accurate preparation of intelligence documents for entry into the CMC's database.

The Parliamentary Commissioner stated that all items of intelligence data reviewed at the CMC were appropriately held by the CMC having regard to its functions. He also stated that the systems in place at the CMC make it virtually impossible that the resources of the CMC could be used to store inappropriate material without the knowledge of a number of staff within the agency.

### **6.8. Security of material**

Section 55 of the CMA provides for the sharing of intelligence information by and with the CMC. The section provides that the CMC must limit access to intelligence information in its database to those persons the CMC Chairperson considers have a legitimate need to access the information.<sup>289</sup> Accordingly, the CMC's intelligence database can only be accessed by authorised staff deemed to have a legitimate need to access the information. In addition, the SIU is bound by the accountability measures that apply to the whole of the CMC.

### **6.9. Unnecessary duplication of intelligence material**

There are very limited circumstances in which the possibility of the CMC and the QPS duplicating intelligence holdings can arise and there are mechanisms in place to reduce the possibility of duplication. The Parliamentary Commissioner has stated that there has been no evidence of unnecessary duplication of intelligence data held by the CMC itself or in conjunction with the QPS.

### **6.10. Intelligence sharing with other agencies and the public**

In addition to the CMC using intelligence in support of its own work, it also shares relevant intelligence with other agencies and, where appropriate, the public. Although the resources for collecting and collating intelligence data are not shared, the criminal intelligence produced generally is.

In relation to sharing intelligence information, section 55 of the CMA provides that:

- (1) *The commissioner of police must give the chairperson access to intelligence information held by the police service as required by the chairperson as soon as possible after receiving the request.*
- (2) *The commission must, in the performance of all of its functions, give intelligence information to the entities it considers appropriate in the way it considers appropriate.*

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<sup>289</sup> Section 55(3) of the CMA.

- (3) *The commission must limit access to information in its database of intelligence information to those persons the chairperson considers have a legitimate need to access the information.*

The SIU works in close partnership with other organisations, such as the newly formed ACC, the AFP and the Australian Customs Service in respect of law enforcement. These partnerships are designed to eliminate duplication of effort between agencies and to ensure that resources are used in an effective manner. There is also a high level of cooperation between the CMC and the QPS which is fostered by a cooperative culture of both being part of the wider intelligence community, rather than adversaries. This makes the CMC a contributor to and a beneficiary of a wider intelligence network.

## 7. RESEARCH AND PREVENTION

### 7.1. Introduction

The CMC's Research and Prevention function supports the CMC's two key outputs of fighting major crime and addressing public sector integrity. It performs its role by conducting research designed to assist the CMC investigate and prevent occurrences of major crime and misconduct, improve public sector integrity and improve the standard of policing in Queensland.

The Research and Prevention function includes:

- considering matters influencing the administration of criminal justice and the enforcement of criminal law in Queensland;
- reviewing and monitoring the work of the QPS;
- conducting research into the trends and causes of crime and misconduct; and
- developing prevention-oriented advice to proactively address crime and misconduct risks for public-sector agencies and the public.

Activities for 2003-2004 are focussed on policing, capacity development, crime prevention, drugs, paedophilia and Indigenous liaison.<sup>290</sup>

### 7.2. The Fitzgerald Report

Before the Fitzgerald Report was released there had been little independent research into criminal justice and policing matters carried out in Queensland. Fitzgerald QC identified the need for research on criminal justice issues, commenting that:

*The administration of criminal justice involves dealing with deep and peculiar problems which are not addressed by ad hoc responses to issues by individual agencies.*

*There is a need for continual review of the suitability of criminal law, the exercise of investigative powers, and the effective use of resources. Research is required into the changing nature and incidence of crime, the roles and methods of various agencies and how their efforts are best co-ordinated.*<sup>291</sup>

The Fitzgerald Inquiry identified problems that might arise in the absence of independent research. The report stated:

*Public servants used to dealing with a particular Government tend to give advice which supports predetermined policies. The process of giving advice becomes incestuous. It is more about confirming opinions than challenging them. Research or new information, if it manages to penetrate at all, is rejected if it does not fit with the rigid but unwritten agenda.*<sup>292</sup>

Fitzgerald QC recommended that the CJC be given a research function. The CJC was to independently review, research, and report to Parliament and relevant agencies on the operation and performance of the police service and the broader criminal justice system.<sup>293</sup> He envisaged:

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<sup>290</sup> CMC submission, p.4.

<sup>291</sup> Fitzgerald report, p. 316.

<sup>292</sup> Ibid, p. 130.

<sup>293</sup> Ibid, pp. 316-317.

*Amongst its other activities the Division will prepare draft reports and directions for the CJC to the Commissioner of Police detailing the trends, opportunities or problems observed, and preferred courses of response or remedial action.*

*An important part of this process will be the prompt and accurate identification of the extent and nature of resources required within the Police Department to carry out policing programs considered essential in the community interest.*

*The Division will also provide reports to the CJC on implementation progress and impact of CJC directives within the Police Department...*

*The Division's role will be flexible, may be expanded and may embrace liaison with similar research and co-ordination specialist bodies. For example, it could investigate the use of sharing research with the Australian Institute of Criminology.*

*Its role will be to supplement and complement research and the activities of other efficient, productive agencies elsewhere and relate that to State needs, rather than to duplicate or replicate their functions in Queensland.<sup>294</sup>*

The CJC was duly given a research function when it was established. Its initial research agenda was largely determined by the recommendations contained in the Fitzgerald Report. As a result the CJC published reports on homosexuality, prostitution, gaming laws, cannabis law reform and police powers.

A Corruption Prevention Program was established by the CJC in August 1991. It was initially placed within the Official Misconduct Division, however in March 1993 it became a separate Division of the CJC. In 1998 the Corruption Prevention Division and the Research Division merged to form the Research and Prevention Division.

### **7.3. The CMC's research and prevention roles**

Under section 52 of the CMA, the CMC has the following research functions:

- (a) *to undertake research to support the proper performance of its functions;*
- (b) *to undertake research into the incidence and prevention of criminal activity;*
- (c) *to undertake research into any other matter relating to the administration of criminal justice or relating to misconduct referred to the commission by the Minister; and*
- (d) *to undertake research into any other matter relevant to any of its functions.*

Section 52(2) provides that the CMC may undertake research into:

- (a) *police service methods of operations;*
- (b) *police powers and the use of police powers;*
- (c) *law enforcement by police; and*
- (d) *the continuous improvement of the police service.*

In addition, under section 33 of the CMA, the CMC has a clear prevention role. This role is 'to raise standards of integrity and conduct in units of public administration'. Section 34 of the Act provides that the CMC:

*...has a lead role in building the capacity of units of public administration to prevent and deal with cases of misconduct effectively and appropriately.*

<sup>294</sup> Ibid, p. 317.

## 7.4. Current structure and operations

Research and Prevention employs a Director, Deputy Director, Executive Assistant, three Senior Research Officers, nine Research Officers, two Indigenous Liaison Officers and two support officers. It also employs a Manager, two Senior Prevention Officers, four Prevention Officers and an Assistant Prevention Officer.

Research and Prevention staff and projects are organised into six streams – policing, misconduct prevention, crime prevention, illicit drugs, paedophilia and Indigenous liaison.<sup>295</sup>

The following discussion looks at some of the significant projects in each area during the term of the current PCMC.

### 7.4.1. Policing

The CMC describes one of its key responsibilities as being to promote an effective and accountable police service that is responsive to community needs.<sup>296</sup>

Research and Prevention undertakes a significant role in researching, monitoring and overseeing the QPS. It looks at organisational performance and reform, promotes innovative policing strategies and engages in cooperative research partnerships with the QPS where appropriate.<sup>297</sup>

The role of Research and Prevention in policing is to:

- monitor and report on significant developments in policing and the QPS;
- promote improvements in police methods of operation by conducting pilot projects and disseminating research;
- conduct research on trends in, the causes of, and the prevention of misconduct by police; and
- monitor the implementation of significant recommendations made in CMC reports relating to the QPS.<sup>298</sup>

Some examples of significant projects conducted during the term of the current PCMC are described below.

#### Beat policing

In June 2003 the CMC released a detailed report which examined the effectiveness of beat policing. The CMC describes the report, *On the beat: An evaluation of beat policing in Queensland*, as demonstrating that beat policing is a worthwhile investment of police resources that has community support. Neighbourhood beats were found to reduce the overall rate of reported crime and the rate of chronic repeat calls for service over a longer period.<sup>299</sup>

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<sup>295</sup> CMC, *Annual Report 2002-2003*, p. 44.

<sup>296</sup> *Ibid*, p. 16.

<sup>297</sup> *Ibid*, pp. 13-14 and 16.

<sup>298</sup> *Ibid*, p. 45.

<sup>299</sup> *Ibid*, p. 17.

### Police handling of sexual offence complaints

Public concerns were expressed regarding the prosecution of swimming coach Scott Volkens. These concerns raised issues regarding how the QPS and the ODPP handled sexual offence matters, and issues regarding the laws relating to the naming of persons accused of sexual offences.

The CMC examined these issues, taking submissions and calling 21 witnesses at public hearings. In June 2003 the CMC published its findings in a report entitled *Seeking justice: An inquiry into how sexual offence matters are handled by the Queensland criminal justice system*.

The CMC made a number of recommendations for reform, aimed at:

- better training for all officers in the sexual offence squads;
- improved supervision and communication practices;
- a review of human resource practices within the specialist squads; and
- an assessment being made of the state-wide demands made on the service by sexual offences, with a view to enhancing the regional response.<sup>300</sup>

### Steroid use in the QPS

In 2001 a joint project of the QPS and the then CJC was established to examine the nature and extent of the possible use of illicit steroids by QPS officers. The project included a review of complaints and intelligence data held by the two agencies, a review of information from external agencies and academic literature in relation to steroid use, a survey of officers within the QPS, and interviews with QPS personnel and an external academic consultant. The project found that the use of illicit steroids in the QPS to be potentially serious, but to date isolated in nature.

### Drug and alcohol initiatives

The CMC continued its participation in the QPS Drug and Alcohol Policy Working Party. The CMC's view is:

*... that a random and targeted alcohol-testing system should be implemented and that compliance levels should be consistent with those in other high-risk occupations.*<sup>301</sup>

### Police pursuits

The CMC undertook an examination of high-speed pursuits by the QPS from 1997 to 2002. The resultant report examined the number of pursuits, their duration and speed, the causes, the characteristics of vehicles and drivers involved, and the consequences of pursuits. The report made a number of recommendations to improve QPS policy and practice.<sup>302</sup>

### Other Research and Prevention Projects in Policing

Other recent CMC Research and Prevention initiatives in the policing area include projects examining:

- whether capsicum spray is being used appropriately by police and whether amendments to QPS policy or procedures are warranted;
- the effectiveness of problem-oriented policing strategies by detectives on the Gold Coast;

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<sup>300</sup> Ibid.

<sup>301</sup> Ibid, p. 18.

<sup>302</sup> Ibid, p. x.



- the police response to domestic violence; and
- police interview tapes, to assess police compliance with legislation.<sup>303</sup>

#### 7.4.2. *Crime prevention, illicit drugs and paedophilia*

The CMC undertakes a wide range of research and prevention activities in support of its functions relating to crime and criminal paedophilia. Research examining illicit drug markets and the nexus between drug use and crime is another major focus of the current research program. Additionally, there is a key focus on research examining the handling of sexual offences by the criminal justice system, as well as examining the correlation between sexual abuse of children and criminogenic consequences of that abuse.

The CMC summarised the role of Research and Prevention in these three areas:<sup>304</sup>

##### Crime prevention:

- undertake research projects that provide policy makers and law enforcement authorities with relevant information;
- monitor the success and likely success of crime-prevention strategies; and
- collaborate with the CMC's crime function to integrate research data and prevention advice with operational activities.

##### Illicit drugs:

- undertake major research projects into illicit drugs, particularly into amphetamine abuse;
- establish benchmark data on state-wide levels of illicit drug use to help monitor trends in such use; and
- collaborate with key agencies, such as the Australian Institute of Criminology, in the monitoring of illicit drug use and its relationship with other crimes, such as property offences or offences of a violent nature.

##### Paedophilia:

- undertake research assessing the range of court outcomes for sexual offences against children;
- undertake research into the nature of sexual victimisation among prisoners; and
- provide an internet-based information service for those interested in paedophilia-related legislation, research, support services and publications.

Some of the most significant recent projects that Research and Prevention has carried out in relation to crime prevention, illicit drugs and paedophilia include:<sup>305</sup>

##### *Amphetamines research*

The CMC collaborated with Queensland Health to survey amphetamine users in Queensland, with a view to gaining an increased understanding of the nature and extent of amphetamine markets in Queensland. The project examined over 600 amphetamine users and provided detailed information on illicit drug use,

<sup>303</sup> CMC, *Annual Report 2002-2003*, p. 18.

<sup>304</sup> *Ibid*, p. 45.

<sup>305</sup> This information is taken from the CMC's 2002-2003 Annual Report and the CMC submission, pp. 32-33.

price structures, market distribution patterns, the nexus between drug use and crime and the existence of drug-related victimisation in Queensland.<sup>306</sup>

### *Illicit drug use in Queensland*

This research involves a state-wide survey of 3,000 respondents aged 18 years and over. The aim is to obtain baseline indicators of illicit drug-use patterns and attitudes in Queensland households to compare that data with patterns of drug use from high-risk samples of arrestees or individuals in drug-abuse treatment programs.

### *Alcohol and drug research in hospital emergency room attendees*

This is a collaborative project with the Queensland Alcohol and Drug Research Education Centre to identify the prevalence of illicit drug use among individuals entering hospital emergency rooms. The research is aimed at establishing baseline levels of illicit drug use and examining relationships between such drug use and negative consequences, such as car accidents and overdoses.

### *Drugs Use Monitoring, Australia (DUMA)*

The CMC maintains an ongoing research project drawing on the DUMA data administered by the Australian Institute of Criminology. The information is gathered from detainees in police watch-houses and provides data about market characteristics, drug-user profiles, and information on the nexus between drug use and crime.

### *Recidivism among young offenders*

Data from the Queensland Department of Families, the QPS and the Queensland Department of Corrective Services was used to determine the extent to which juveniles on supervised orders in 1994-1995 progressed to adult correction centres. The rate of progression was used as a measure of recidivism.

The results of the project, which were recently published in a report entitled, *Youth justice: Criminal trajectories*, confirmed that there are multiple factors that amplify the risk of recidivism and highlight the need for a whole-of-government response to offences committed by youths, rather than relying solely on the imposition of criminal sanctions.

### *Drug treatment and crime prevention*

This project critically examines the available empirical research on the effectiveness of the major drug-treatment programs currently in use in Queensland. The main focus of the research is producing directions for how drug-treatment resources should be invested in the future.

### *Child sexual abuse and prevention programs*

The aims of this project are to:

- review research on the effectiveness of child-sexual abuse prevention programs;
- identify the characteristics of effective programs; and
- provide useful advisory material relating to the application of child-sexual abuse prevention programs in Indigenous communities.

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<sup>306</sup> CMC, *Patterns of amphetamine use: Initial findings from the Amphetamines in Queensland research project*, January 2004.

Other crime prevention initiatives

In July 2003, the CMC launched an Internet portal called the *Sexual abuse prevention & information site*. It contains resources to help combat paedophilia, including:

- resources for victims and survivors of sexual abuse;
- service agencies for children and families;
- research, education and publications;
- definitions, legislation and policy; and
- information on the Internet and child protection.<sup>307</sup>

Additional crime prevention initiatives include educational presentations to community groups, schools and other bodies connected with the education of children. The CMC also provides training to school-based policing officers, their supervisors and officers of Education Queensland. These school-based officers have then been able to return to their schools and provide information sessions on the Internet and criminal paedophilia.<sup>308</sup>

Recent Projects

Recent projects by the CMC in this area have examined:

- common methods used by extra-familial and networked sexual offenders to groom and target victims;
- the success of child sex-abuse programs in helping prevent crimes against children by identifying the characteristics of effective programs and also assessing the applicability of such programs to Indigenous communities;
- evaluations of sex-offender treatment programs both in Australia and overseas;
- analyses of sentencing trends regarding sexual offences against children; and
- the effect of exposure to violence and sexual victimisation during childhood on offenders serving non-custodial sentences in Queensland.<sup>309</sup>

**7.4.3. Misconduct prevention**

Misconduct can thrive where an agency has inadequate systemic controls or management deficiencies. An important aspect of the CMC's role in prevention is to build the capacity of agencies to guard against misconduct.

The CMC describes the role of Research and Prevention in misconduct prevention as being to:

- report on significant developments in the capacity of external agencies to identify, deal with and prevent instances of misconduct;
- provide targeted advice and assistance to agencies aimed at enhancing their capacity to deal with misconduct;
- undertake detailed analyses of organisational exposure to the risks of misconduct; and

<sup>307</sup> CMC, *Annual Report 2002-2003*, p. 27-28.

<sup>308</sup> *Ibid*, p. 27.

<sup>309</sup> *Ibid*.

- provide advice about the rights and obligations of employers and employees in relation to potential instances of misconduct.<sup>310</sup>

A Capacity Development Coordination Unit has been established within the misconduct area of the CMC to work with Research and Prevention to coordinate the capacity-building activities of the CMC.

Research and Prevention works in conjunction with the misconduct investigations area to produce risk management system reviews for government agencies that have been the subject of a CMC investigation into allegations of official misconduct. This is done to reduce the possibility of future corruption and misconduct. These reviews aim to:

- identify activities and management practices that pose a risk of misconduct;
- formulate strategies to minimise the risks of misconduct;
- build capacity to prevent and deal with misconduct; and
- build an ethical workplace culture.<sup>311</sup>

The CMC reported that it has collaborated on misconduct prevention projects with the QPS, the Department of Corrective Services and the Queensland Ambulance Service, as well as universities and local government consultative groups. It has helped agencies in the preparation of corruption risk assessments and the integration of misconduct prevention strategies and ethics training packages.<sup>312</sup>

#### *Advice to candidates at State and local government elections*

The CMC prepared an advice for State government election candidates in the lead up to the February 2004 State elections.<sup>313</sup> The primary purpose of the publication was to bring to the attention of candidates the need for clean election campaigns without false election-related complaints being made to the CMC, thus avoiding the misuse of the CMC's complaints process for political purposes during the election campaign.

A similar publication was prepared and distributed in advance of the March 2004 local authority elections.<sup>314</sup>

#### *Prevention projects under way at 30 June 2003*

As at 30 June 2003, the CMC was:

- helping the Department of Corrective Services manage and minimise risks associated with inappropriate relations between prison staff and inmates; and
- commissioning a research officer from Griffith University's Key Centre for Law, Integrity, Ethics and Governance to prepare materials on creating favourable reporting climates within organisations.<sup>315</sup>

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<sup>310</sup> Ibid, p. 45.

<sup>311</sup> CMC, *Annual Report 2002-2003*, pp. 40-41.

<sup>312</sup> CMC submission, p. 47.

<sup>313</sup> CMC, *A message to all State government candidates*, December 2003.

<sup>314</sup> CMC, *A message to all local government candidates*, December 2003.

<sup>315</sup> CMC, *Annual Report 2002-2003*, p. 42.

#### 7.4.4. *Indigenous liaison*

As the CMC notes, Indigenous people experience a disproportionately high level of social problems and are over-represented in Queensland's prison system.<sup>316</sup> The CMC has established an Aboriginal and Torres Strait Islander Liaison and Education Program, to build good relationships between the CMC, police and Indigenous people. Liaison officers visit Indigenous communities with investigation teams and complaints officers to work towards resolving conflict between the police and the community.<sup>317</sup>

The CMC employs two Aboriginal and Torres Strait Islander Liaison and Education Officers, as well as an Indigenous Complaints Officer, who is available to help Indigenous people lodge complaints. The Liaison and Education Officers attend and give presentations at various conferences and community organisation meetings, facilitate cultural awareness training sessions for all CMC staff, and maintain regular contact between the CMC and officials from a number of Aboriginal councils.<sup>318</sup>

The CMC describes the role of Research and Prevention in Indigenous liaison as being to:

- provide advice and information about governance and misconduct prevention strategies to Indigenous organisations;
- help the CMC's Complaints Services deal with complaints made by Indigenous people; and
- address criminal justice issues affecting Indigenous people.<sup>319</sup>

To facilitate collaboration and cooperation with Indigenous communities, the CMC hosts meetings of the Aboriginal and Torres Strait Islander Consultative Committee, made up of representatives from various organisations. The Committee meets bi-monthly.

The CMC reports that it has responded to concerns coming from the Indigenous community that there is a scarcity of well-qualified, competent clerks and CEOs in Indigenous councils, by producing an information kit entitled *On the right track*. This kit was designed to raise awareness of ethical issues and help council staff fulfil their ethical obligations. The kit provided Aboriginal and Torres Strait Islander councillors and staff with practical advice on issues that they are likely to face every day. As part of the *On the right track* kit, the CMC has produced two information sheets that aim to increase community awareness of about the role of councils and council staff, Councillors and Council Chairpersons.<sup>320</sup>

### 7.5. **Interaction between the CMC and the QPS**

#### 7.5.1. *Concerns of micro-management of the QPS by the CMC*

In its submission to the Committee's review, the QPS stated:

*The Service wishes to reiterate its long held concern that any tendency to try to micro-manage the QPS without being accountable for the Service's budget management or the difficult day-to-day operational decisions that the senior executive has to make is fraught with difficulty.*

*The development of viable recommendations using a Reference Group, drawn from the senior executive of the agencies towards which recommendations were directed, is one method that should be used to monitor and react to recommendations in the development stage. This*

<sup>316</sup> Ibid, p. 47.

<sup>317</sup> Ibid.

<sup>318</sup> Ibid, p. 47.

<sup>319</sup> Ibid, p. 45.

<sup>320</sup> Ibid, pp. 48-49.

*model has been used successfully across government.*

...

*A concern of the QPS with respect to recommendations made by the CMC in general, whether the result of investigation, public hearing, research or otherwise, is the tendency for some recommendations to be about very specific operational issues, issues that have significant resourcing implications or issues that have been examined in isolation. Recommendations of this nature seem quite feasible prima facie, but are considerably less so when the QPS is faced with balancing priorities in a limited budget.<sup>321</sup>*

At the public hearings, Commissioner of Police, Mr Bob Atkinson, stated:

*To be blunt, it is all very well to make recommendations, but I think there is an increasing demand on the police department, understandably. ... It seems to me that every time there is a problem in society there is an expectation that a new law will be created and that the enforcement authorities will be there to deal with it. It is understandable, but I do not know that that is always the best approach.*

...

*I will give one example. The CMC supports police officers being issued with tape-recorders on an individual basis. I have two fundamental difficulties with that. Firstly, there is no evidence at the moment that members of the public or the community are subject to police verbals. ... We estimate that the cost of issuing personal issue tape-recorders to all police would be in the vicinity of \$30 million. To my mind, that money could be far better spent in other ways.*

*Theoretically, if every one of the 8,500 police were issued with a tape-recorder and they tape recorded only one conversation a day, after a week—my maths will not be really great here—there will be 60,000 tape-recordings. They have to be stored, retrieved and perhaps transcribed. I am trying to make the point that there are logical and practical implications sometimes of recommendations that need to be thought through.<sup>322</sup>*

The CMC's Director of Research and Prevention, Dr Mazerolle, responded to those concerns at the Committee's public hearing:

*Our legislation empowers us to look at the continuous improvement of the QPS. That certainly orients a lot of our research activities. In doing so, in undertaking research projects it is inevitable that we identify areas which require reform and enhancement. It is important to point out that recommendations which emanate from research and prevention reports arise out of a consultative process internally and, most times, externally as well with the QPS. There probably are examples such as the commissioner raised this morning where actually putting in place taping could involve certain resource challenges. That is a fair viewpoint.*

*On balance, if you look over time, over the last 10 years, if not more, of the commission's work and see where the gains have occurred—real gains—with respect to organisational performance, organisational enhancement, public attitudes about the performance as well as corruption in the QPS, they are really material changes and trends. I think they have come because of concerted efforts in research and policing about best practice.*

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<sup>321</sup> QPS submission, pp. 2-3.

<sup>322</sup> CMC, *Police pursuits: A law enforcement and public safety issue for Queensland*, November 2003, p. x.

*It is probably fair to say that there are some examples where recommendations have perhaps missed their mark or not necessarily fully taken consideration of some of the resource implications. But I think that, in the main, is the minority view. If you look at the body of work that that has involved our promoting innovative police strategies which are consistent with world's best practice, enhancing the integrity and the view of integrity of the Queensland Police Service—working with them in constructive ways—I think there is ample evidence, in particular in the Research and Prevention Unit of the commission, that we work very constructively with the QPS. I am certainly available to lots of officers and research officers and have good relationships with them. I am sure there are going to be some differences of opinions but I think that is more of a minority.*<sup>323</sup>

Mr Butler advised the Committee:

*... we make recommendations. We have no power to enforce those. We do not exercise the power to enforce them. From time to time the Police Service does not accept our recommendations. We have found that in the majority of cases they have implemented them and they have found them useful. One of the important things about the work of our research division is that it chooses not to be theoretical; it tries to have practical outcomes and to value add for the organisations we are talking about.*<sup>324</sup>

### **7.5.2. Analysis and comment**

The Committee agrees with the views of the 3<sup>rd</sup> PCJC and the 4<sup>th</sup> PCJC that independent monitoring and evaluation external to the police service is essential. As the 3<sup>rd</sup> PCJC stated:

*The Committee accepts that there is a natural reluctance by an organisation to be critical of its own operations. Further, the Committee acknowledges the practical reality that the potential exists for ministerial pressure to present the results of any research in the best light for the Government of the day. The Committee can envisage a myriad of areas in which there may be a reluctance on the part of the police service to change long established practices and that reluctance to change may be overcome by the results of independent research.*<sup>325</sup>

### **7.5.3. Conclusion**

The Committee considers that the CMC plays a vital role in providing independent research of issues affecting the QPS and there remains a critical need for ongoing and independent research to be undertaken in relation to reform of the QPS.

The Committee sees value in collaborative research being undertaken by the CMC and the QPS in appropriate areas in order to maximise the use of available resources and efficiency.

## **7.6. Appropriate scope of research function of the CMC**

Section 52 of the CMA grants the CMC the power to undertake research to support the proper performance of its functions. This includes research into the incidence and prevention of criminal activity.

Section 52(1)(c) provides that the CMC can undertake:

<sup>323</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 49-50.

<sup>324</sup> Ibid, p. 50.

<sup>325</sup> PCJC, *A report of a review of the activities of the CJC pursuant to s.118 (1)(f) of the Criminal Justice Act 1989*, Report No. 45, 1998, p. 91.

*... research into any other matter relating to the administration of criminal justice or relating to misconduct referred to the commission by the Minister.*

Mr Terry O’Gorman, President of the Australian Council for Civil Liberties, criticises this provision. He told the Committee:

*Fitzgerald made the quite apt observation that if research into law and order issues is embedded in the relevant departments—Police and Justice—then the government of the day has control of the data and control of the research and is therefore able to politicise issues at its will.*

*If you remember the very sound work done by the research division when it had an opportunity to do research on any issue of criminal justice without reference to the minister, it stood on the toes of the government of the day—and a good thing that was. My recollection is that it did some research into cannabis that attracted some ire of the government. It did some research into prostitution which was controversial. But I think it is critical, particularly if you look at the success of the similar office that Dr Weatherburn operates in New South Wales, that research into criminal justice issues be separate from the government of the day. Otherwise, it just means that debate and issues about what, in fact, is going on in the criminal justice area are able to be controlled by the minister through the department.<sup>326</sup>*

No other submissions were made on this issue.

The Queensland Opposition submitted:

*... that it is a waste for the CMC to devote resources to conduct research in areas already well serviced by other research bodies, such as universities, and the Australian Institute of Criminology, and where culturally the research conducted by the CMC is going to find difficulty obtaining acceptance.<sup>327</sup>*

### **7.6.1. Conclusion**

The Committee considers that the research powers the CMC has been given under the CMA are appropriate. If the need to pursue research outside the scope of its current powers arises, the CMC may invite the Minister to give a reference to the CMC that will enable it to do so. The Committee regards the current scope of research opportunities available to the CMC to be suitably extensive and relevant to the functions it performs.

From what is discussed above, the Committee considers that the CMC conducts necessary research that is relevant to its functions and the administration of law and justice in Queensland. The CMC consistently produces impressive research that significantly aids a better understanding of law and justice issues in Queensland. The Committee considers that it is crucial that the CMC be able to produce the type of research that it does and continue to exercise its current research powers.

The Committee supports the present research and prevention role of the CMC and recommends that it continue to operate and evolve as necessary to service the needs of the CMC and Queensland’s criminal justice and administrative systems.

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<sup>326</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 79.

<sup>327</sup> Queensland Opposition submission, p. 2.



## 8. THE WITNESS PROTECTION UNIT

### 8.1. Introduction

Witness protection is available to a person who is assisting or has assisted a law enforcement agency investigate or prosecute offences, where that person's safety is at risk as a result. The role of witness protection is to ensure that individuals who give information to law-enforcement authorities are protected from possible consequential harm.

Witness protection also recognises the responsibility of government to provide protection to those who put themselves at risk in assisting the prosecution of offences. Witness protection is not a reward for giving assistance to a law-enforcement agency. It is given only in circumstances where there is a real threat to personal safety as a result of a person providing information or testimony.

The Witness Protection Program commenced in August 1987 during the Fitzgerald Commission of Inquiry into police corruption, when it became necessary to protect several important witnesses who were able to give direct evidence of crime and corruption at the Inquiry. At the end of the Fitzgerald Inquiry, a Witness Protection Division was established within the CJC. When the CJC and the QCC merged to form the CMC, the CMC retained responsibility for witness protection. Today, the Witness Protection Program is contained within the CMC's Witness Protection Unit (WPU). Since the time of the Fitzgerald Inquiry, the WPU has protected 1129 people.<sup>328</sup>

### 8.2. *The Witness Protection Act 2000*

The *Witness Protection Act 2000* (WPA) commenced on 9 March 2001. In summary, the WPA:

- sets criteria for the Chairperson of the CMC to consider before accepting a person onto the program;<sup>329</sup>
- sets conditions pursuant to which protection is offered and maintained, including a requirement that a witness accepted onto the program sign a protection agreement;<sup>330</sup>
- provides for interim protection to be offered while consideration of an application for full protection takes place;<sup>331</sup>
- sets the circumstances in which variation, termination or suspension of a protection agreement may occur;<sup>332</sup>
- provides for the identity of the witness to be changed, by allowing for the creation of a new birth certificate;<sup>333</sup>
- provides a statutory basis for arrangements with witness protection authorities in other jurisdictions;<sup>334</sup>
- provides for witness anonymity in a proceeding where a protected witness or former protected witness who has been given a new identity is or may be required to give evidence.<sup>335</sup>

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<sup>328</sup> CMC, *Annual Report 2002-2003*, p. 51.

<sup>329</sup> Section 6 of the WPA.

<sup>330</sup> Sections 7 and 8 of the WPA.

<sup>331</sup> Section 9 of the WPA.

<sup>332</sup> Sections 10 to 14 of the WPA.

<sup>333</sup> Part 3, Division 1 of the WPA.

<sup>334</sup> Sections 40-43 of the WPA.

<sup>335</sup> Part 3, Division 2 of the WPA.

- creates various offences including an offence for a person to disclose information about the program or a witness;<sup>336</sup> and
- makes provision for dealing with the rights and obligations of protected witnesses.<sup>337</sup>

Decisions made by the Chairperson under the WPA are exempt from the operation of the *Judicial Review Act 1991*.<sup>338</sup>

### **8.3. National Witness Protection Program**

The Federal Government's *Witness Protection Act 1994* implemented the National Witness Protection Program and a scheme of complementary witness protection legislation. State legislation complementary to the Federal scheme is required before Federal Government agencies can provide important Commonwealth identity documents, such as passports and tax file numbers, to Queensland protected witnesses. Without this, the ability to protect Queensland witnesses with effective re-identification will be hampered.<sup>339</sup> Complementary legislation is also required to make arrangements with witness protection agencies based in other States and Territories.<sup>340</sup>

Queensland's witness protection legislation has been declared as complementary by all States and Territories, other than the Australian Capital Territory and the Northern Territory. The CMC has been declared as an approved authority to carry out the witness protection functions under the national scheme by all States and Territories other than the Australian Capital Territory, the Northern Territory, Victoria and Western Australia. The CMC has said that it will continue to liaise with the relevant State and Territory agencies to have the legislation and the CMC recognised as being complementary with the national scheme, and to ensure ongoing cooperation in witness protection matters and with reciprocal arrangements.<sup>341</sup>

### **8.4. Structure of the Witness Protection Unit**

The Witness Protection Advisory Committee was established assist the CMC Chairperson and the Director, Witness Protection and Operations Support. The Witness Protection Advisory Committee is chaired by the Director of the WPU, who is an Assistant Commissioner of the QPS.<sup>342</sup>

The Witness Protection Advisory Committee advises the Chairperson of the CMC as to who should receive protection. The decision whether or not to admit a person to the Witness Protection Program is made by the Chairperson. The Witness Protection Advisory Committee advises the CMC Chairperson in relation to:

- all applications for witness protection;
- any fresh matters which may have a bearing on the protection assigned to a protectee; and
- the termination of protection assigned to a protectee.<sup>343</sup>

WPU positions are primarily filled by QPS officers. The day-to-day operations of the WPU are supervised by the Officer-in-Charge, who is a Detective Inspector of the QPS.

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<sup>336</sup> Sections 36-38 of the WPA.

<sup>337</sup> Sections 29-31 of the WPA.

<sup>338</sup> Schedule 2 of the *Judicial Review Act 1991*.

<sup>339</sup> Explanatory notes to the Witness Protection Bill 2000, p. 1.

<sup>340</sup> Sections 40 and 41 of the WPA.

<sup>341</sup> CMC submission, pp. 78-79.

<sup>342</sup> CMC, *Annual Report 2001-2002*, p. 64.

<sup>343</sup> CMC submission, pp. 77-78.

## **8.5. Admission to the Witness Protection Program**

Prior to a person being admitted to the Witness Protection Program, a threat assessment is conducted to determine whether the person fulfils certain eligibility criteria. A person is eligible for inclusion in the Witness Protection Program if the Chairperson considers that the person needs protection from danger that arises because:

- the person has either helped a law-enforcement agency, such as the CMC or the QPS, in the performance of its duties, or has a relationship or association with a person who has helped a law-enforcement agency in the performance of its duties; and
- it is appropriate to include the person in the program.<sup>344</sup>

The availability of witness protection under the program is not restricted to witnesses assisting the CMC. Witnesses assisting other law enforcement agencies, including interstate agencies, are referred to the WPU. The majority of protected witnesses are referred to the CMC by the QPS.

The CMC has the power to give interim protection and to enter into protection agreements granting full protection. Interim protection can usually be offered within 36 hours of an application being received or immediately if necessary. Formal admission usually takes eight weeks, during which a threat assessment is conducted to determine if the person fulfils the eligibility criteria under the WPA.<sup>345</sup>

## **8.6. Short-term protection agreements**

### **8.6.1. Issue**

The CMC submitted that there is a need to make provision in the WPA for short-term protection arrangements for the duration of court appearances. The CMC considers that such a provision would be useful to support witnesses who seek protection only while they are at court.<sup>346</sup>

The CMC submitted that the capacity to offer such protection should be capable of delegation by the Chairperson in the same way the power to enter into interim agreements can be delegated. It accordingly recommended that sections 6 and 7 of the WPA be amended to allow the CMC to provide short-term protection arrangements.<sup>347</sup>

### **8.6.2. Analysis and comment**

Section 9 of the WPA, which provides the circumstances in which an interim protection arrangement may be entered into, does not allow an interim protection agreement to be made in circumstances where only court-security protection is required.<sup>348</sup> Thus, where witness protection is required for the duration of a court appearance, the Chairperson is required to approve a full-protection agreement. The authority to offer a full-protection agreement cannot be delegated.

The CMC, as it noted in its submission, has experienced significant administrative difficulties and unnecessary pressures in preparing documentation and agreements for signing by the Chairperson and the witness in a timely manner, particularly as applications for court-only security are received at short

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<sup>344</sup> Section 6 of the WPA.

<sup>345</sup> CMC, *Annual Report 2001-2001*, p. 64.

<sup>346</sup> CMC submission, pp. 79.

<sup>347</sup> *Ibid*, p. 80.

<sup>348</sup> CMC submission, pp. 79-80.

notice.<sup>349</sup> A provision permitting the CMC to grant short term protection agreements for court purposes would eliminate these difficulties currently experienced by the CMC.

### 8.6.3. Conclusion

The Committee considers that the proposal for short-term protection agreements has merit. However, it may be that limiting the power to enter into short-term protection agreements to circumstances in which protection is required only for the duration of a court appearance is an unnecessary restriction on the use of those agreements.

The Committee is of the opinion that the CMC should be given the power to enter into short-term protection agreements to provide court-only security and that the approval process should be streamlined in accordance with the CMC's recommendation.

The Committee also believes that consideration should be given to whether the power to enter into short-term protection agreements should be available in circumstances beyond that of court-only situations.

#### **Recommendation 36**

**The Committee recommends that sections 6 and 7 of the *Witness Protection Act 2000* be amended to allow the CMC to make short-term protection agreements for the purpose of providing court-only protection and that the Chairperson be allowed to delegate the power to enter into such agreements.**

#### **Recommendation 37**

**The Committee recommends that consideration be given to whether the power to enter into short-term protection agreements should also be available in circumstances other than solely 'court-security only' situations.**

## 8.7. Suspension from the Witness Protection Program

In its submission, the CMC sought the Committee's support for an amendment to the WPA, giving the Chairperson of the CMC the power, in appropriate circumstances, to suspend a person from the Witness Protection Program while a decision to terminate that person's protection agreement is being considered.<sup>350</sup>

The Chairperson currently has the power to end a protection agreement with a witness under section 14(1) of the WPA where:

*the chairperson considers it is no longer appropriate for the protected witness to be included in the program, including, for example, because the protected witness's conduct is a threat to the integrity of the program.*

The witness must be advised of the intention to end protection, before it is terminated, and be given a reasonable opportunity to state why the protection should not end.<sup>351</sup>

According to the CMC's submission, it may be necessary to suspend a witness from the program pending a decision whether to end that person's protection under the program, in order to protect the program

<sup>349</sup> Ibid.

<sup>350</sup> Ibid, p. 80.

<sup>351</sup> Section 14(2) of the WPA.

itself and other protected witnesses while the decision is being made.<sup>352</sup> However, this is not possible under section 12 of the WPA which restricts suspension of a protection agreement to circumstances where:

*the chairperson is satisfied a protected witness cannot be protected under the program because of something the protected witness has done or intends to do that stops the person from being appropriately protected.*

The Committee accepts that the CMC's proposal has merit as it may be necessary to suspend a witness on short notice to protect the integrity of the program, without risk to the program being occasioned by any delay necessary for the Chairperson to remove the person under section 14. However, the Committee considers that a person suspended from the program should be properly protected by alternative means during the period of suspension.

### **Recommendation 38**

**The Committee recommends that the *Witness Protection Act 2000* be amended to give the Chairperson power to suspend a protection agreement where, in the opinion of the Chairperson, the protected witness's conduct is a threat to the integrity of the program, subject to the witness being afforded adequate alternative protection during the period of suspension to ensure the safety of the witness.**

## **8.8. Assumed identities for Witness Protection officers**

According to the CMC, there are times when circumstances require that witness protection officers obtain false identity documents to perform their witness protection duties. The CMC currently relies on section 15 of the WPA to obtain assumed identities for its witness protection officers. Section 15 provides that the Chairperson may require a person responsible for issuing an identity document to do so to allow a protected witness to establish a new identity, to otherwise protect a protected witness, or to restore a former protected witness's former identity.<sup>353</sup>

As both the CMC and the Parliamentary Commissioner note, the use of section 15 provides a dubious legal basis for obtaining false identity documents for witness protection officers.<sup>354</sup> The CMC points to the possibility that the current use of section 15 may lead to later challenges to the legality of the CMC's actions.<sup>355</sup>

Accordingly, the CMC has sought the Committee's support for a new section to be included in the WPA to clarify that the acquisition and use of assumed identities by witness protection officers may be authorised by the Chairperson. The Commission's submission is that it is vital to the security of witness protection operations that officers as well as witnesses are able to conceal their true identities when necessary.<sup>356</sup>

In light of these considerations the Committee considers that it is appropriate that the WPA be amended to provide a statutory basis for witness protection officers using assumed identities and in doing so facilitate a scheme that is already being used by the CMC.

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<sup>352</sup> CMC submission, p. 80.

<sup>353</sup> Ibid, pp. 80-81.

<sup>354</sup> Ibid; Parliamentary Commissioner submission, p. 7.

<sup>355</sup> CMC submission, p. 81.

<sup>356</sup> Ibid.

**Recommendation 39**

**The Committee recommends that a new section be included in the *Witness Protection Act 2000* to expressly state that the acquisition and use of assumed identities by witness protection officers may be authorised by the Chairperson.**

**8.9. Disclosures about protected witnesses and the Witness Protection Program**

Section 36 of the WPA provides that it is an offence to disclose or record information about a person who is, or has been, included as a witness in the Witness Protection Program if the information compromises the security of the person or the integrity of the program. However, it is not an offence to disclose information, which compromises the integrity of the program, if that disclosure is not about a protected witness.

The anomaly is that a person could make a disclosure that compromises the security of the Witness Protection Program itself, without making reference to a protected witness, and not have committed an offence in doing so.

The CMC has recommended that this oversight be corrected. It therefore calls for a similar deterrent and penalty for disclosures about the Witness Protection Program itself, which could conceivably be quite damaging to the program and endanger the safety of the protected witnesses.<sup>357</sup> The Parliamentary Commissioner agrees that this amendment is necessary.<sup>358</sup>

At the Committee's public hearing, Mr Terry O'Gorman raised concerns that the proposed amendment may allow the CMC to prevent any public comment being made about the Witness Protection Program itself.<sup>359</sup> The CMC argued in response that the purpose of the proposed amendment is to protect the program and its protected witnesses, not to stifle or prevent public scrutiny of the Witness Protection Program or to prevent discussion in relation to it.<sup>360</sup>

The Committee agrees with the CMC's view. The amendment would still allow public comment to be made in circumstances that do not contravene section 36 of the WPA. Further as the CMC notes sections 36 and 37 permit the Chairperson of the CMC to authorise appropriate disclosures.

The Committee supports the proposed amendment, as it appears to correct an oversight in the drafting of the provision.

**Recommendation 40**

**The Committee recommends that section 36 of the *Witness Protection Act 2000* be amended to provide that it is an offence to disclose or record information about the Witness Protection Program that may compromise its integrity, even in cases where such information does not relate to a protected witness.**

<sup>357</sup> CMC submission, pp. 81-82.

<sup>358</sup> Parliamentary Commissioner submission, p. 7.

<sup>359</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 79.

<sup>360</sup> CMC supplementary submission, p. 6.

## **8.10. Notices to Produce and Notices to Discover Information for witness protection**

### **8.10.1. Issue**

Under sections 74, 74A and 75 of the CMA, the Chairperson may give a notice which requires a person to produce documents, things and evidence. Currently, such notices can be issued only for crime or misconduct investigations or for a confiscation related investigation.

The CMC seeks to use similar powers to support its witness protection function. According to the CMC, information obtained under these notices, particularly information from financial institutions could be used to locate witnesses or identify persons who may be compromising protection arrangements.<sup>361</sup>

The Parliamentary Commissioner after seeking further information from the CMC in relation this issue informed the Committee that witnesses under protection are often not under close twenty-four hour guard, but live in the community and are able to make contact with witness protection officers should the need arise. He advised that witness protection officers must be able to contact a witness to monitor that person's safety. If a witness is unable to be contacted by a witness protection officer, it could be that the witness has merely travelled elsewhere. Alternatively, the safety of the witness may have been compromised.<sup>362</sup>

### **8.10.2. Analysis and comment**

Access to the powers requested would enable the WPU to locate a witness, for example by ascertaining whether, where and when a witness's bank accounts had been accessed. This or similar methods could be used to discover the whereabouts of the witness or a recent known location of the witness. It is acknowledged that this power could also be used to access information regarding an associate of a witness, but should only be used as a means of determining the witness's probable location and activities.

The second possible application of these powers is more intrusive. The powers could be used to monitor the location and activities of a person, who is not a protected witness, and is considered to be a potential threat to a witness under protection or to be compromising protection arrangements.

The power could also be used to monitor the movements and activities of a witness to determine whether that person is acting in a manner that makes them a threat to the integrity of the Witness Protection Program. The Committee is of the opinion that the use of such a power in these circumstances is justified.

### **8.10.3. Conclusion**

The Committee considers it reasonable that the CMC have this power to assist it perform its witness protection duties, when it can be used in crime and misconduct investigations. As such, the Committee supports the proposed changes.

However, the Committee is concerned that the power should only be available strictly for the purposes of protecting a person who has been admitted to the Witness Protection Program or of protecting the integrity of the Witness Protection Program. It is not to be available for any other purpose, such as locating a witness for the purpose of coercing that person to attend a trial.

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<sup>361</sup> CMC submission, p. 82.

<sup>362</sup> Information provided by the Parliamentary Commissioner by letter to the Committee dated 18 June 2004.

**Recommendation 41**

**The Committee recommends that the CMC be given the power to issue notices in terms similar to those in sections 74, 74A and 75 of the *Crime and Misconduct Act 2001* for the purposes of protecting a person who has been admitted to the Witness Protection Program or of protecting the integrity of the Witness Protection Program.**

**8.11. Activities of the Witness Protection Unit since the last Three Year Review**

Given the confidential nature of most of the work carried out by the WPU, a detailed review of the activities of the unit is problematic. However, some assessment of its efficiency and effectiveness can be ascertained from published statistics relating to the activities of the WPU since the last three year review.

The following table summarises statistics sourced from the Annual Reports of the CJC and CMC relating to the years 2000-2001, 2001-2002 and 2002-2003.<sup>363</sup>

<b>Activities</b>	<b>2000-2001 Annual Report (CJC)</b>	<b>2001-2002 Annual Report (CMC)</b>	<b>2002-2003 Annual Report (CMC)</b>
Referrals	197	198	190
Offers of witness protection accepted	94	84	94
Provided support and protection	137 persons in 74 operations	131 persons in 63 operations	141 persons in 68 operations
Concluded protection arrangements	109 persons in 56 operations	86 persons in 46 operations	74 persons in 37 operations
Threat assessments conducted	83	125	126
Court security provided	49 persons	51 persons	61 persons

The CMC claims that since its establishment, the WPU has maintained a 100 per cent success rate in protecting witnesses.<sup>364</sup>

In November 2002, the WPU and its staff received a QPS award for Excellence in Operational Policing. This award was received for the WPU having successfully conducted what the CMC describes as the most complex and largest court security witness protection operation in Australia. The operation, as the CMC notes involved providing concurrent protection to 11 witnesses who gave evidence against members and associates of an outlaw motorcycle gang in committal proceedings over a two-week period and subsequent concurrent protection of 14 witnesses who were summoned to give evidence at three separate trials in the Cairns Supreme Court.<sup>365</sup>

<sup>363</sup> CJC, *Annual Report 2000-2001*, p. 61; CMC, *Annual Report 2001-2002*, p. 64; CMC, *Annual Report 2002-2003*, pp. 51-52.

<sup>364</sup> CMC, *Annual Report 2002-2003*, p. 51.

<sup>365</sup> CMC, *Annual Report 2002-2003*, pp. 51-52; CMC submission, p. 77.



## **8.12. Training for witness protection officers**

The Committee notes the high priority placed on training witness protection officers. These officers are subject to major psychological demands in dealing with people who are fearful for their safety, and who often have previously been involved with criminal activity.

### **8.12.1. Implementation of a QPS-approved witness protection course**

The CMC recently implemented a QPS-approved witness protection course in line with the National Competency Standards for Witness Protection. The first course was successfully conducted from 10 June to 5 July 2002. This was the first course of its type to be conducted in Australia and involved representatives from the CMC, QPS, New South Wales Police, New Zealand Police and the United States Marshals Service.<sup>366</sup> The Witness Protection Course is being considered by the Australasian Police Professional Standards Council as the course to provide the benchmark in witness protection training.<sup>367</sup>

## **8.13. Marketing the Witness Protection Unit**

As noted in its 2002-2003 Annual Report, the CMC continues to deliver education and awareness-raising sessions to client agencies throughout Queensland to promote the existence of the WPU and the services it provides.<sup>368</sup>

## **8.14. Location and staffing of the Witness Protection Unit**

### **8.14.1. Whether the Witness Protection Unit should remain located within the CMC**

The Witness Protection Program is located within the CMC and is external to the QPS. The current location and staffing of the WPU is in accord with the vision of the Fitzgerald Report that witness protection would be undertaken by a body separate from the rest of the police service, although staffed at least in part by police officers.<sup>369</sup>

In its Three Year Review of the CJC the 3<sup>rd</sup> PCJC recommended that the then Witness Protection Division be retained as a division within the CJC. The 3<sup>rd</sup> PCJC concluded that it was essential to have a witness protection function separate from the police service and that the best available option was for the function to be carried out by a separate unit within the CJC. It also recommended that the Witness Protection Division continue to be staffed by police officers to the extent considered necessary.<sup>370</sup>

The 4<sup>th</sup> PCJC concluded in its Three Year Review that although the position in every other comparable jurisdiction is different from that in Queensland, there seemed to be no suggestion that the witness protection function would be better located in an organisation other than the CJC or as a stand alone body.<sup>371</sup>

The Committee received no submissions commenting on the location of the WPU. The Committee is of the opinion that it is appropriately located.

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<sup>366</sup> CMC, *Annual Report 2001-2002*, p. 64; CMC, *Annual Report 2002-2003*, p. 52; CMC submission, p. 82.

<sup>367</sup> CMC, *Annual Report 2002-2003*, p. 52; CMC submission, p. 82.

<sup>368</sup> CMC, *Annual Report 2002-2003*, p. 53.

<sup>369</sup> Fitzgerald Report, p. 319.

<sup>370</sup> 3<sup>rd</sup> PCJC, *Three Year Review*, pp. 150-153.

<sup>371</sup> 4<sup>th</sup> PCJC, *Three Year Review*, p. 157.

### 8.14.2. *Staffing of the Witness Protection Unit*

Consistent with the model favoured in the Fitzgerald Report, the WPU is staffed primarily by police officers. This recognises the fact that the skills and training essential for witness protection officers in order to deal with the physical and psychological demands of witness protection are those usually held by police officers.

Like the 4<sup>th</sup> PCJC, the Committee considers that it is appropriate that police officers staff the WPU as they have the necessary skills and training required for effective witness protection and it is virtually impossible to suggest an alternative source of personnel with the necessary skills.<sup>372</sup>

The Committee is aware of the difficulties inherent in operating a Witness Protection Program. It notes that persons who are protected witnesses may be under enormous emotional strain, that in some circumstances close contact between officers and protected witnesses is required and there is a power imbalance between witness protection officers and protected witnesses. Officers in the WPU are subject to major psychological demands in dealing with people who are fearful for their safety, and who often have previously been involved with criminal activity.

The Committee considers that witness protection officers must be effectively managed, supervised and trained to ensure the expectation that officers maintain the highest professional standards when dealing with protected witnesses is appropriately emphasised.

#### **Recommendation 42**

**The Committee recommends that witness protection officers be effectively managed, supervised and trained to ensure that officers maintain the highest professional standards in their dealings with protected witnesses.**

### 8.15. **Judicial review of a decision to terminate a protection agreement**

Mr Terry O’Gorman suggested at the Committee’s public hearing that some form of judicial review should apply to the discretion to suspend a person while a determination is being made to terminate the protection agreement of a witness.<sup>373</sup> The *Judicial Review Act 1991* specifically excludes recourse to judicial review of decisions relating to witness protection.<sup>374</sup> The reason for this is the importance of maintaining the integrity of the Witness Protection Program.

The Committee does not consider an amendment to the *Judicial Review Act 1991* is warranted. The appropriate means of review remains a complaint to the PCMC regarding the conduct of the CMC, which is the check against misuse of this power.

### 8.16. **Memorandum of understanding with the Registrar-General of Births, Deaths and Marriages**

The Committee notes that that recent negotiations have resulted in a memorandum of understanding between the CMC and the Registrar-General of Births, Deaths and Marriages to facilitate the production of new identities for protected witnesses.<sup>375</sup>

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<sup>372</sup> Ibid, p. 158.

<sup>373</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 79.

<sup>374</sup> Section 18(2)(b) of the *Judicial Review Act 1991*.

<sup>375</sup> CMC, *Annual Report 2002-2003*, p. 53.

## 9. WHISTLEBLOWER SUPPORT

### 9.1. Introduction

A necessary element in the drive to raise the integrity of the public sector is the fostering of an environment in which individuals are willing to come forward and disclose information about maladministration and misconduct. Fitzgerald QC, recognising the need for adequate protections to encourage honest public officials to come forward without fear of retribution, urged that legislation be introduced prohibiting any person from penalising any other person for making public statements about misconduct, inefficiency and other problems within public instrumentalities.<sup>376</sup> The *Whistleblowers Protection Act 1994* was subsequently enacted to promote the public interest by protecting persons who disclose:

- unlawful, negligent or improper conduct affecting the public sector;
- danger to public health or safety; and
- danger to the environment.<sup>377</sup>

The *Whistleblowers Protection Act 1994* is administered by the OPSME. The OPSME is responsible for providing advice and guidance to public sector agencies and officers, and private citizens about their rights and obligations under the *Whistleblowers Protection Act 1994*. The CMC, along with a number of other agencies such as the Ombudsman's office also provides advice and assistance to whistleblowers and may receive public interest disclosures about official misconduct.

This chapter examines the CMC's role in respect of whistleblower protection and the adequacy of the current whistleblower protection scheme in Queensland.

### 9.2. *The Whistleblowers Protection Act 1994*

The *Whistleblowers Protection Act 1994* gives protection to people who make a 'public interest disclosure'. A public interest disclosure by a public officer may be about conduct that is:

- official misconduct;
- maladministration that substantially and adversely affects someone's interests;
- negligent or improper management involving a substantial waste of public funds; or
- a substantial and specific danger to public health or safety or the environment.<sup>378</sup>

Further anyone, irrespective of whether or not they are a public officer, may make a public interest disclosure about:

- a substantial and specific danger to the health or safety of a person with a disability;<sup>379</sup>
- an offence or contravention of certain conditions imposed under legislation, that is or would be a substantial and specific danger to the environment;<sup>380</sup> and
- a reprisal taken against anybody for making a public interest disclosure.<sup>381</sup>

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<sup>376</sup> Fitzgerald Report, p. 134.

<sup>377</sup> Section 3 of the *Whistleblowers Protection Act 1994*.

<sup>378</sup> Sections 15, 16, 17 and 18 of the *Whistleblowers Protection Act 1994*.

<sup>379</sup> Section 19(1)(a) of the *Whistleblowers Protection Act 1994*.

<sup>380</sup> Sections 19(1)(b) and 19(1)(c) of the *Whistleblowers Protection Act 1994*.

<sup>381</sup> Section 20 of the *Whistleblowers Protection Act 1994*.

Part 4 of the *Whistleblowers Protection Act 1994* provides that disclosures must be made to ‘appropriate entities’. A public sector entity is an ‘appropriate entity’ to receive a public interest disclosure if:

- the disclosure is about the conduct of the entity or its officers;
- the entity may investigate the matter; or
- the disclosure is appropriately referred by another public sector entity.<sup>382</sup>

The CMC is an appropriate entity to receive public interest disclosures about official misconduct.

The *Whistleblowers Protection Act 1994* provides that a person is not liable civilly, criminally or under an administrative process for making a public interest disclosure.<sup>383</sup> Furthermore, it prohibits reprisals (i.e. detrimental action) against a person because they have made, or may make, a public interest disclosure.<sup>384</sup>

Public sector entities are required to establish reasonable procedures to protect their officers from reprisals that may be taken against them by the entity or officers of the entity.<sup>385</sup> A person who is suffering, or may suffer a reprisal, may apply to the Industrial Commission or Supreme Court for an injunction.<sup>386</sup> In circumstances where an alleged or suspected reprisal amounts to official misconduct by the holder of an appointment in a unit of public administration or involves a QPS officer, the CMC may investigate the alleged or suspected reprisal and where necessary, apply for an injunction on the public officer’s behalf.<sup>387</sup>

As can be seen from the foregoing provisions, the *Whistleblowers Protection Act 1994* does not establish a centralised system by which one agency or authority is responsible for protecting whistleblowers in Queensland. Essentially each public sector entity has responsibility for receiving public interest disclosures about the conduct of their officers, managing the disclosure process and taking steps to protect its officers from reprisals.

### 9.3. The CMC’s role

The CMC is one of a number of agencies that provides advice and support to whistleblowers. As the CMC Chairperson, Mr Butler, explained at the Committee’s public hearing:

*The Whistleblowers Protection Act places an onus on each particular government organisation to assess whether a complainant is making a public interest disclosure and to protect complainants in accordance with the act. ...*

*We are not the lead agency in respect of it; the OPSME is. If our complaints officers believe that a complainant might fall under the protections of the act, they will generally try to draw that to their attention. They will consider that when we are making decisions about how the matter might be dealt with.*<sup>388</sup>

At the time of the 4<sup>th</sup> PCJC’s Three Year Review, the CJC had an established position of Complaints Liaison and Whistleblower Support Officer. That officer undertook the role of:

<sup>382</sup> Section 27(1) of the *Whistleblowers Protection Act 1994*.

<sup>383</sup> Section 39 of the *Whistleblowers Protection Act 1994*.

<sup>384</sup> Section 41 of the *Whistleblowers Protection Act 1994*.

<sup>385</sup> Section 44 of the *Whistleblowers Protection Act 1994*.

<sup>386</sup> Sections 47 and 48 of the *Whistleblowers Protection Act 1994*.

<sup>387</sup> Sections 47, 48 and 57 of the *Whistleblowers Protection Act 1994*.

<sup>388</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 89.

- advising people who are considering disclosing suspected official misconduct within the Queensland public sector and misconduct within the QPS;
- explaining the forms of protection offered to whistleblowers by the CJA and the *Whistleblowers Protection Act 1994*;
- explaining the CJC's complaints process; and
- where appropriate, referring people to complaints officers in the CJC's Complaints Section.<sup>389</sup>

While the CMC's role in respect of whistleblowers has not undergone any significant change as a result of the commencement of the CMA, the role of the Complaint Liaison and Whistleblower Support Officer is now performed by the CMC's Senior Complaints Officer. In the event that a person who provides information to the CMC raises the issue of being a whistleblower with a complaints officer, the matter is assessed to determine whether the person is a whistleblower to which the protections in the *Whistleblowers Protection Act 1994* may apply.

The CMC's website also contains a number of resources, including the CJC publication *Exposing Corruption – A CJC guide to whistleblowing in Queensland* to assist whistleblowers and those public sector officers responsible for managing whistleblower disclosures.

In addition to the provisions in the *Whistleblowers Protection Act 1994* regarding the CMC's power to investigate alleged or suspected reprisals and apply for injunctions on behalf of public sector officers, the CMA, like its predecessor the CJA, contains a number of provisions relevant to the protection of 'whistleblowers'. Section 212 of the CMA makes it an offence to victimise a person because they or someone else gave evidence to, or helped the CMC in the performance of its functions. Further the CMC is empowered to:

- provide witness protection where a person's safety is at risk or they may be subject to intimidation or harassment because of assisting the CMC;<sup>390</sup> and
- apply to the Supreme Court for an injunction to restrain conduct or proposed conduct that would constitute victimisation.<sup>391</sup>

Where a person believes he or she has been disadvantaged because of blowing the whistle to the CMC, the CMC undertakes to, as a matter of priority:

- assess the circumstances of the case;
- take whatever action is practicable to stop and correct the disadvantage that has occurred and prevent further disadvantage from taking place; and
- offer support to those affected.<sup>392</sup>

The following tables record public interest disclosures received by the CMC in 2001-02 and 2002-03.<sup>393</sup>

<sup>389</sup> CJC, *Blowing the Whistle on Corruption*, November 1999.

<sup>390</sup> Section 338 of the CMA.

<sup>391</sup> Section 344 of the CMA.

<sup>392</sup> CMC, *Message to whistleblowers*, viewed 15 January 2004, <<http://www.cmc.qld.gov.au/WHISTLEMESSAGE.html>>.

<sup>393</sup> CMC, *Annual Report 2001-2003*, p. 46 and *Annual Report 2002-2003*, p. 70.

**Analysis of public interest disclosures received by the CMC 2001-02**

Section of Whistleblowers Protection Act	Verified (by CJC)	Not verified (by CJC)	Referred to other agency	Under consideration (by CMC)	Total referred and not verified	Total referred and verified	Totals
15: Public officer complaining of official misconduct		47	72*	22	17	19	177
16: Public officer complaining of maladministration			1*				1
17: Public officer complaining of improper management							Nil
18: Public officer complaining re health/environment matter							Nil
19: Any person complaining re public health or safety matter							Nil
20: Any person complaining re reprisal			1*				1
<b>TOTALS</b>		<b>47</b>	<b>74</b>	<b>22</b>	<b>17</b>	<b>19</b>	<b>179</b>

Note: There were 62 complaints received, comprising 179 allegations. This table details the status of the allegations.  
 \* The outcomes of the allegations in this category may not be known at this stage, or alternatively may never be known because they were referred to another agency with no need for review by the CMC.

**Analysis of public interest disclosures received by the CMC 2002-03**

Section of Whistleblowers Protection Act	Verified (by CMC)	Not verified (by CMC)	Referred to other agency	Under consideration (by CMC)	Total referred and not verified	Total referred and verified	Totals
15: Public officer complaining of official misconduct		70	152*	6	113	40	381
16: Public officer complaining of maladministration		2	7*		10		19
17: Public officer complaining of improper management		2					2
18: Public officer complaining re health/environment matter							
19: Any person complaining re public health or safety matter			1*		1		2
20: Any person complaining re reprisal		21	5*	2	8		36
<b>TOTALS</b>		<b>95</b>	<b>165</b>	<b>8</b>	<b>132</b>	<b>40</b>	<b>440</b>

Note: There were 147 complaints received, comprising 440 allegations. This table details the status of the allegations  
 \*The outcomes of the allegations in this category may not be known at this stage, or may never be known, because they were referred to another agency with no need for review by the CMC.

### 9.3.1. Capacity building and research

CMC prevention officers provide advice on an ongoing basis to public sector agencies regarding whistleblower protection systems.<sup>394</sup> More recently the CMC has commenced a number of capacity building and research initiatives in the area of whistleblower protection. In conjunction with the Key Centre for Ethics, Law, Justice and Governance at Griffith University, it has undertaken a project looking at building favourable reporting climates within the public sector. As the CMC's Director, Research and Prevention, Dr Mazerolle explained to the Committee, the CMC intends to publish advisory documents which identify some key challenges facing the public sector to enhance reporting climates in relation to whistleblowing behaviour.<sup>395</sup>

The CMC has recently undertaken, with the assistance of the Office of Economic and Scientific Research, a comprehensive survey to obtain data about the capacity of units of public administration to prevent and deal with misconduct. The survey contains a number of questions designed to inform the CMC about an agency's knowledge of and involvement with, whistleblower protection.<sup>396</sup> The findings of the survey and the CMC's research are intended to lay the foundations of further work in promoting whistleblower protection systems within the public sector.<sup>397</sup> As the CMC Chairperson, Mr Butler explained further:

*I think one of the issues we have identified is that at the moment protection for whistleblowers is delivered within individual departments. There is no coordinated standard across the public sector. We would like to work it by providing perhaps a best practice model that departments could refer to that would help them judge the way in which they are carrying out this function at the moment against a model that has been validated in some way.*<sup>398</sup>

### 9.4. Adequacy of the Queensland whistleblower protection system

The 4<sup>th</sup> PCJC in its Three Year Review, while not purporting to address all issues associated with the protection of whistleblowers in Queensland, identified a number of concerns with the existing scheme. In particular, the 4<sup>th</sup> PCJC noted that while the scheme imposes legislative obligations on public sector agencies to deal effectively with public interest disclosures and to protect whistleblowers from reprisals, a lack of commitment to the fundamental object of the *Whistleblowers Protection Act 1994* within an organisation would render the legislation ineffective.<sup>399</sup>

The 4<sup>th</sup> PCJC concluded that there was a gap in the oversight and coordination of whistleblower support across the public sector. In particular, no single body was charged with responsibility for supervising whistleblower support programs in public sector agencies.<sup>400</sup> The 4<sup>th</sup> PCJC, while noting that the OPSME was in the process of addressing these apparent deficiencies, recommended that the Government give consideration to a full review of whistleblower protection in Queensland and the *Whistleblowers Protection Act 1994* including a review of:

- the roles of the CJC and the OPSME;
- the need for an oversight body and an inter-agency committee;
- training and support of public sector managers and other public sector employees;
- research needs in the area of whistleblower protection; and

<sup>394</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, pp. 46-47.

<sup>395</sup> Ibid, p. 48.

<sup>396</sup> Ibid, p. 89.

<sup>397</sup> A report entitled 'Profiling the Queensland Public Sector' detailing the findings of the survey is due to be published by the CMC in April 2004.

<sup>398</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 48.

<sup>399</sup> 4<sup>th</sup> PCJC, Three Year Review, pp. 141-142.

<sup>400</sup> Ibid, pp. 150 and 142.

- reporting to Parliament on whistleblower protection.<sup>401</sup>

While this recommendation was adopted by the Government in the sense that the matters raised would be given consideration, the extent and nature of a review was to be given further consideration.<sup>402</sup> The Committee understands that such a review has not been undertaken.

Like the 4<sup>th</sup> PCJC, the Committee considers that whistleblower protection in Queensland remains in need of examination and review by the Government. While the Committee supports the CMC's research and capacity building initiatives noted above, and ongoing cooperation with other agencies such as the OPSME in relation to these matters, the Committee considers that broader concerns such as those identified by the 4<sup>th</sup> PCJC in relation to oversight and coordination of whistleblower support across the public sector remain. Similar concerns were raised by the Whistleblowers Action Group in their submission to the Committee.<sup>403</sup>

## 9.5. Conclusion

While cognisant of the scope of its three year review and the present limited jurisdiction of the CMC in respect of whistleblowers, the Committee considers that there are a number of issues that need to be examined concerning the apparent inadequacies of whistleblower protection in Queensland and the *Whistleblowers Protection Act 1994*. The Committee, like its predecessor committee, accordingly recommends that the Government give consideration to a full review of whistleblower protection in Queensland and the *Whistleblowers Protection Act 1994*.

### Recommendation 43

**The Committee recommends that the Government give consideration to a full review of whistleblower protection in Queensland and the *Whistleblowers Protection Act 1994* in accordance with the recommendations of the 4<sup>th</sup> PCJC in Report No. 55.**

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<sup>401</sup> Ibid, p. 151.

<sup>402</sup> Government Response to Parliamentary Criminal Justice Committee's report No. 55, 30 October 2001.

<sup>403</sup> Whistleblowers Action Group submission, p. 8.



## 10. OFFICE OF GENERAL COUNSEL

### 10.1. Introduction

The Office of General Counsel was established in the then CJC in December 1992. Whilst the CMC employs legal officers in a number of its functional areas, the function of the Office of General Counsel is to provide independent legal advice to the CMC as a whole and to its various functional areas.<sup>404</sup>

The composition of the staff of the Office has varied over the years. It currently comprises General Counsel, the Official Solicitor, the Freedom of Information coordinator, and a legal officer.<sup>405</sup>

The Office of General Counsel is established as an independent unit of the CMC. The role of the Office can be summarised as follows:

- representing the CMC before courts, tribunals and other bodies;
- providing independent legal advice and analysis on matters the subject of consideration by the CMC Commissioners;
- engaging external advice and representation;
- responding to subpoenas and other compulsory processes served on the CMC seeking production of documents;
- preparing and coordinating the CMC's submissions to other external bodies on diverse legal issues, such as the content of proposed legislation;
- overseeing the CMC's responses to the PCMC;
- coordinating the CMC's liaison with the Parliamentary Crime and Misconduct Commissioner; and
- undertaking some internal FOI reviews.

The CMC briefs external counsel on occasions when considered appropriate.

### 10.2. Retention of the Office of General Counsel

#### 10.2.1. Introduction

In the course of the Three Year Reviews conducted by a number of our predecessor Committees, the issue has arisen as to whether the Office of General Counsel ought to be retained. The matter was again raised in the current review.

In its submission, the QPUE urges that the role of General Counsel be abolished.<sup>406</sup> The Union argues that the CMC would be 'better served' by seeking independent advice from the private Bar on matters of importance to it. The Union sees the position of General Counsel as:

*... really no more than that of an employee of the Commission with a vested interest in protecting the Commission rather than providing it with independent and objective legal advice.*<sup>407</sup>

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<sup>404</sup> CMC Annual Report 2002-2003 p 61, CMC submission, p. 88

<sup>405</sup> Ibid.

<sup>406</sup> QPUE submission, p. 3.

<sup>407</sup> Ibid.

In oral evidence before the Committee, the Union's General President made it clear that the concerns were with the position, not any personnel:

*I am not criticising the integrity of the individuals. I believe they are too close to the organisation. We have had the same one for a long time. But they are probably too close to the organisation, been involved in it for too long that they live and breathe it and think the way the organisation thinks instead of using an independent mind. I think an independent mind probably would suit the purpose of the whole structure of the organisation better.*<sup>408</sup>

### **10.2.2. Analysis and comment**

The Committee does not propose to set out at any length the arguments for and against the retention of the Office of General Counsel.<sup>409</sup> In brief, on the one hand, it is argued that having in-house counsel allows for a cost effective and timely response to be provided to the myriad of legal issues that arise on a daily basis for consideration by the CMC. On the other hand, it is argued that in-house counsel cannot have the necessary degree of independence from the CMC.

The Committee is satisfied that independent advice can be provided by an in-house counsel arrangement. Such an arrangement, if properly structured and operated, can allow for the delivery of legal advice in a more responsive, timely, consistent, and cost effective manner than is likely to be the case with an external provider. The Committee believes the effectiveness of the Office of General Counsel is enhanced by its independence within the CMC, and by having it report directly to the Commissioners.

An internal legal unit, if used properly, can be a useful internal accountability mechanism, engaging in the provision of constructive, independent, and balanced advice, involving criticism where necessary. Where necessary, such advice ought to include cogent arguments that challenge the perceived presumption that the CMC is acting or has acted properly. From its experience over a range of matters which have come before it during its term, the Committee is not satisfied that the full potential of the Office of General Counsel in this regard has been realised. On significant matters from time to time, the advice given to the Commissioners has fallen short of the ideal, in the following respects:

- there has been a lack of rigorous analysis of opposing argument on an issue;
- the quality of the advice has suffered by too often seeing the strengths of the CMC's position, and not the weaknesses; and
- there has not been adequate presentation of the range of arguments on an issue to aid the Chairperson and the part-time Commissioners in making decisions.

The Committee does not believe that the answer to these shortcomings lies in a greater use of external counsel by the CMC. It is appropriate that at times external counsel be briefed by the CMC, particularly when considerable experience in a specific area of law is required.

The Committee believes that the CMC should thoroughly re-evaluate the extent to which the Office of General Counsel is able to provide truly independent and objective advice to the CMC and take appropriate steps to ensure that it is available in the future. This is vital to support the effective participation of the part-time Commissioners in deliberations and decisions. A considered analysis of opposing arguments and opinions leads to stronger decisions. With the proper approach, the Office of General Counsel could, along the model of the office of Crown Solicitor, be a true internal accountability mechanism, adding to the checks and balances.

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<sup>408</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 87.

<sup>409</sup> The history of the consideration of this issue by previous committees, and more detail of the considerations involved, can be found at pp. 172 and following of the report on the Three Year Review by the 4<sup>th</sup> PCJC.

**Recommendation 44**

**The Committee recommends the continued retention of the Office of General Counsel as an independent unit within the CMC, answerable directly to the Commissioners.**

**Recommendation 45**

**The Committee recommends that the Office of General Counsel be reviewed by the CMC or the Premier, with a view to increasing the capacity of the Office to provide independent, balanced and objective legal advice.**

## 11. EXTERNAL ACCOUNTABILITY OF THE CRIME AND MISCONDUCT COMMISSION

### 11.1. Parliamentary Crime and Misconduct Committee

#### 11.1.1. Introduction

The Parliamentary Crime and Misconduct Committee (PCMC) is the Parliamentary Committee having the role of oversight of the CMC. The Committee is for practical purposes a continuation of the previous Parliamentary Criminal Justice Committee (PCJC) which had a similar role of oversight of the CJC.

The PCJC was established pursuant to the CJA, implementing a recommendation of the Fitzgerald Report. The Fitzgerald Report envisaged the CJC as being independent, yet accountable. The primary accountability mechanism was to be a bi-partisan Parliamentary Committee. The role of the PCJC was to monitor and review the activities of the CJC, in effect serving as the conduit through which the CJC was accountable to the Parliament and ultimately to the people of Queensland.<sup>410</sup>

With the commencement of the CMA, the PCJC underwent what was in effect a name change, and the CMC is now overseen by the PCMC.<sup>411</sup> The CMA made no major changes to the composition, functions or powers of the Committee.

The Committee consists of seven members, drawn from all sides of politics represented in the Legislative Assembly, with four members nominated by the Leader of the House, and three by the Leader of the Opposition.<sup>412</sup> The chair is to be nominated by the Leader of the House and thus in effect will be a government member.<sup>413</sup>

#### 11.1.2. The role and functions of the Committee

The functions of the Committee are set out in the CMA as follows:<sup>414</sup>

- (a) *to monitor and review the performance of the commission's functions;*
- (b) *to report to the Legislative Assembly, commenting as it considers appropriate, on either of the following matters the committee considers should be brought to the Assembly's attention -*
  - (i) *matters relevant to the commission;*
  - (ii) *matters relevant to the performance of the commission's functions or the exercise of the commission's powers;*
- (c) *to examine the commission's annual report and its other reports and report to the Legislative Assembly on any matter appearing in or arising out of the reports;*
- (d) *to report on any matter relevant to the commission's functions that is referred to it by the Legislative Assembly;*
- (e) *to participate in the selection of commissioners and the removal from office of a commissioner as provided under this Act;*
- (f) *to review the activities of the commission at a time near to the end of 3 years from the*

<sup>410</sup> For more detail regarding the reasoning behind the establishment of the PCJC and its history see, 4<sup>th</sup> PCJC, Three Year Review, pp. 211 and 213.

<sup>411</sup> Section 291 of the CMA establishes the PCMC.

<sup>412</sup> Section 300(1) of the CMA.

<sup>413</sup> Section 300(2) of the CMA.

<sup>414</sup> Section 292 of the CMA.

*appointment of the committee's members and to table in the Legislative Assembly a report about any further action that should be taken in relation to this Act or the functions, powers and operations of the commission;*

*(g) to issue guidelines and give directions to the commission as provided under this Act.*

### **11.1.3. Monitoring and reviewing the performance of the functions of the CMC**

A number of procedures have been developed by the PCMC to facilitate its effective monitoring of the CMC's activities. The Committee:

- receives and considers complaints against the CMC;
- reviews CMC guidelines and makes suggestions for improvement of CMC practices;
- reviews CMC reports including its annual report and research reports;
- requests reports from the CMC on matters which have come to the committee's attention, through the media or by other means; and
- deals with various issues concerning the CMC as they arise.

In addition, the Committee holds regular meetings with the Chairperson and other Commissioners and senior officers of the CMC.

### **11.1.4. Reporting to the Parliament**

The second main function of the Committee is to report to Parliament on the operations and activities of the CMC so that it is accountable to the Parliament and people of Queensland. The Committee's general function is to comment and report on the full range of the Commission's operations at the Committee's discretion. In addition, it has the responsibility to report on any matter referred to it by the Parliament.<sup>415</sup>

Also, the Committee reports near to the expiry of its three year term on the activities of the Commission during such three years (the Three Year Review).<sup>416</sup>

### **11.1.5. Participating in the appointment of the Chairperson and part-time commissioners of the CMC**

The Commission consists of a full-time Chairperson, and four other Commissioners, who serve part-time. The Committee plays a role in the selection of the Commissioners in the following manner:

- before nominating any person for appointment as Chairperson or part-time Commissioner of the CMC, the Minister (the Premier) is required to consult with the Committee; and
- a person shall not be nominated by the Minister for appointment as Chairperson or part-time Commissioner of the CMC unless the nomination has the bipartisan support of the Committee.<sup>417</sup>

The Committee is concerned that there is no requirement for such consultation and bipartisan support in the case of an appointment as acting chairperson of the CMC. The CMA provides for an acting Chairperson to be appointed by the Governor in Council during a vacancy in the office, or during any period, or all periods, when the Chairperson is absent from duty or the State or, for another reason, cannot perform the duties of the office.<sup>418</sup>

<sup>415</sup> See section 292(b) (c) and (d) of the CMA.

<sup>416</sup> Section 292(f) of the CMA.

<sup>417</sup> Section 228 of the CMA. The dictionary in schedule 2 to the CMA defines 'bipartisan support' as either unanimous support, or the support of a majority of members other than a majority consisting wholly of members of the parties in government.

<sup>418</sup> Section 237(1) of the CMA.

The Act expressly provides that the requirement for consulting with, and obtaining the bipartisan support of, the Committee does not apply in the case of an appointment as acting chairperson.<sup>419</sup> There was no similar excluding provision in the *Criminal Justice Act 1989* (which did make provision for an appointment as acting Chairperson of the CJC).

There is no time limit on the period of an appointment as acting chairperson of the CMC.

Whilst the Committee appreciates that it might become necessary for an appointment as acting Chairperson to be made quickly in some circumstances, it is unsatisfactory that such an appointment can be made without time limitation and without the usual requirements for consultation with the Committee, and the bipartisan support of the Committee. It is possible that the provision could be used to circumvent the usual requirement for such consultation and support.

#### **Recommendation 46**

**The Committee recommends that the *Crime and Misconduct Act 2001* be amended so that the usual requirements for consultation with, and the bipartisan support of, the Parliamentary Committee apply to any appointment as acting chairperson of the CMC for a period or periods totalling in excess of six months.**

#### **11.1.6. *Considering complaints against the CMC and its officers***

Previous Parliamentary Criminal Justice Committees have adopted the practice of receiving and considering complaints against the former CJC and its officers. This practice was continued by the present Committee, in its capacity as the 5<sup>th</sup> Parliamentary Criminal Justice Committee. The CMA gave reinforced statutory recognition to this complaints handling role. Section 329 provides:

- (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—*
  - “commission officer” includes former commission officer.*
  - “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.*

Thus, in certain circumstances, the CMC Chairperson is obliged to notify the Committee of conduct on the part of a ‘commission officer’. Once such a notification has been made, the Committee has a number of options available to it.<sup>420</sup>

Section 329(2) provides that in that section, ‘commission officer’ includes a former commission officer. Section 295 sets out the options available to the Committee where it receives a notification under section 329 (or where it otherwise has a concern or receives a complaint). That section makes reference to the conduct of a Commission officer or a former Commission officer.

<sup>419</sup> Section 237(2) of the CMA.

<sup>420</sup> Section 295 of the CMA.

The dictionary in the Act defines ‘commission’ as meaning the Crime and Misconduct Commission and ‘commission officer’ as meaning:

- (a) a commissioner; or
- (b) an assistant commissioner; or
- (c) a senior officer; or
- (d) a person employed under section 254 or seconded under section 255; or
- (e) a person engaged under section 256; or
- (f) a police officer authorised by the chairperson under section 272(2).

There is clear intent in sections 329 and 295 that their provisions would extend to former officers of the CMC. However, the Committee is concerned that the provisions of the sections do not clearly extend to former officers of the former Criminal Justice Commission or former officers of the former Queensland Crime Commission. It is desirable that the CMA be amended to make it clear that this is so.

#### **Recommendation 47**

**The Committee recommends that the *Crime and Misconduct Act 2001* be amended to make it clear that sections 329 and 295 extend to former officers of the former Criminal Justice Commission and former officers of the former Queensland Crime Commission.**

#### **11.1.7. Roles of the Committee under the *Misconduct Tribunals Act 1997***

The Committee plays a role in the appointment of Misconduct Tribunal panel members under the *Misconduct Tribunals Act 1997*. The Minister (currently the Premier) may not nominate a person for appointment to the panel unless that nomination is supported by a multi-party majority of the Committee.<sup>421</sup>

The senior member of the panel of members of the Misconduct Tribunal is required to provide an annual report, not only to the relevant Minister, but also to the Committee.<sup>422</sup> The practice has been for the Minister to table the report in the Legislative Assembly. However there is no statutory requirement for the report to be tabled. In the interest of accountability, it is desirable that there be a legislative requirement for the annual report to be tabled. Such a provision would avoid any uncertainty as to whether the Minister or the Parliamentary Committee ought to table the report.

#### **Recommendation 48**

**The Committee recommends legislative amendment so that there is a statutory requirement for the annual report of the Misconduct Tribunals to be tabled by the responsible Minister within four months and fourteen days of the end of the financial year.**

#### **11.1.8. Powers of the Committee**

The Committee has a number of powers to enable it to fulfil the statutory functions and responsibilities imposed upon it, including the power to:

- call for persons, documents and other things;
- administer oaths to witnesses; and

<sup>421</sup> Section 7(1)(c) of the *Misconduct Tribunals Act 1997*. Section 7(2) provides that a ‘multi-party majority’ does not include a majority consisting only of members of the political party or parties recognised in the Legislative Assembly as being in government.

<sup>422</sup> See section 39 of the *Misconduct Tribunals Act 1997*.

- examine witnesses on oath.

In addition, the Committee has the power to issue guidelines to the CMC about the conduct and activities of the CMC,<sup>423</sup> or to direct the CMC to investigate specified matters involving misconduct.<sup>424</sup>

### **11.1.9. Analysis and comment**

The Committee is satisfied from its experience that a Parliamentary Committee, with adequate resources and powers, engaged in ongoing monitoring of the performance of the activities of the CMC, is an appropriate mechanism for oversight of the CMC, and to inform the Parliament and the public on issues of significant public interest. It is also appropriate that a Parliamentary Committee be the primary oversight mechanism. The question of oversight of bodies such as the CMC has recently been considered by the Legislation Committee of the Western Australian Legislative Council. That Committee has reported on its consideration of the then proposed legislation aimed at establishing a Crime and Corruption Commission in Western Australia.<sup>425</sup> In its report, that Committee recommended the adoption of many features of the Queensland accountability scheme, including:

- the establishment of a Public Interest Monitor;
- the establishment of an office of a Parliamentary Inspector; and
- the appointment of the Parliamentary Inspector only with the bi-partisan support of a Parliamentary Committee.

It was submitted to this review that the positions of the Chairperson and Deputy Chair of the Parliamentary Committee should, as far as possible, remain filled by the same persons for at least two Parliamentary terms.<sup>426</sup> It was argued that it takes time and continuity of membership to build expertise within the Committee itself. There is some merit in this observation. However, there are so many variables affecting the continuity of the make-up of the available 'pool' from which the Committee draws its membership, that it would be difficult if not impossible to be at all prescriptive in this regard.

Other than the relatively minor changes recommended in this chapter, the Committee does not see the need for any change to its present functions or powers.

## **11.2. Office of the Parliamentary Crime and Misconduct Commissioner**

### **11.2.1. Introduction**

The Committee is ably assisted in its task by the Parliamentary Crime and Misconduct Commissioner. The office of Parliamentary Criminal Justice Commissioner was created in 1989,<sup>427</sup> adopting a recommendation of the 3<sup>rd</sup> PCJC.<sup>428</sup> The 3<sup>rd</sup> PCJC was of the view that the Committee's role of ensuring the accountability of the CJC would be enhanced by having the assistance of a Parliamentary Commissioner. This arose from a number of deficiencies in the then ability of the Parliamentary Committee to ensure the accountability of the CJC. The deficiencies related to:

- the ability to access confidential and sensitive information held by the CJC;

<sup>423</sup> Section 296 of the CMA.

<sup>424</sup> Section 294 of the CMA.

<sup>425</sup> *Report of the Standing Commission on Legislation in relation to the Corruption and Crime Commission Act 2003 and the Corruption and Crime Commission Amendment Bill 2003*, report 21, tabled 9 December 2003. Chapter 7 deals with accountability and oversight issues. (The *Corruption and Crime Commission Act 2003* received Royal Assent on 22 December 2003.)

<sup>426</sup> Submission by Dr Noel Preston, p. 2.

<sup>427</sup> Section 118G of the *Criminal Justice Act 1989*.

<sup>428</sup> PCJC, Report No 38, *A report on the accountability of the CJC to the PCJC*, p.119.



- the need to effectively investigate complaints regarding the CJC; and
- the need to be able to effectively audit the CJC's use of its coercive powers.<sup>429</sup>

The office of Parliamentary Criminal Justice Commissioner ceased upon introduction of the CMA. Section 303 of the CMA instead provides for the appointment of a similar officer, the Parliamentary Crime and Misconduct Commissioner.

The Parliamentary Crime and Misconduct Commissioner is a part-time appointment<sup>430</sup> (currently at the equivalent of an average of two days per week). An appointment must be for a minimum of two years, and a person cannot hold office as the Parliamentary Commissioner for a period or periods exceeding five years in total.<sup>431</sup> The Act provides that to qualify for appointment as the Parliamentary Crime and Misconduct Commissioner, a person must have served as or be qualified for appointment as a judge of the Supreme Court of Queensland or another state, or of the High Court or Federal Court.<sup>432</sup> As well as secretarial and administrative assistance, the Parliamentary Commissioner is assisted by an experienced legal officer.

The CMA provides that a report by the Parliamentary Commissioner prepared at the request of the Parliamentary Committee is subject to parliamentary privilege.<sup>433</sup>

The Parliamentary Commissioner is appointed as an officer of the Parliament by the Speaker, and can only be appointed with the bipartisan support of the PCMC.<sup>434</sup>

### **11.2.2. Role and functions of the Parliamentary Crime and Misconduct Commissioner**

In essence, the Parliamentary Crime and Misconduct Commissioner assists the Committee in ensuring the accountability of the CMC.

The Parliamentary Commissioner undertakes a number of functions on the Committee's behalf. These include, as required by the Committee, to:<sup>435</sup>

- (a) *audit records kept by the commission and operational files and accompanying documentary material held by the commission, including current sensitive operations, including for the purpose of deciding the following—*
  - (i) *whether the commission has exercised power in an appropriate way;*
  - (ii) *whether matters under investigation are appropriate for investigation by the entity investigating or are more appropriately the responsibility of another entity;*
  - (iii) *whether registers are up to date and complete and all required documentation is on the file and correctly noted on the registers;*
  - (iv) *whether required authorisations for the exercise of power have been obtained;*
  - (v) *whether any policy or procedural guidelines set by the commission have been strictly complied with;*
- (b) *investigate, including by accessing operational files of the commission to which the parliamentary committee is denied*

<sup>429</sup> Ibid, at pp. 39 to 64.

<sup>430</sup> Section 310(1) of the CMA.

<sup>431</sup> Section 309 of the CMA.

<sup>432</sup> Section 304 of the CMA.

<sup>433</sup> Section 323 of the CMA.

<sup>434</sup> Section 306(3) of the CMA.

<sup>435</sup> Section 314(2) of the CMA.

Any request to the Parliamentary Commissioner to carry out these functions must be made with the bipartisan support of the Parliamentary Committee.<sup>436</sup>

The Parliamentary Commissioner also has the role of conducting, and preparing a report on, an annual review of the intelligence holdings of both the CMC and the QPS. This function is provided for by the CMA and, unlike the functions set out above, is not dependent upon a requirement of the Committee. The Parliamentary Commissioner must however provide a copy of the report on the intelligence review to the Committee, as well as to the head of each of the CMC and the QPS.

Section 320(2) of the CMA provides that the purposes of the review are:

- (a) *to consider whether intelligence data held by each agency is appropriately held by the agency having regard to the agency's functions; and*
- (b) *to consider whether there is unnecessary duplication of intelligence data held by the agencies; and*
- (c) *to consider whether the agencies are working cooperatively as partners to achieve optimal use of—*
  - (i) *available intelligence data; and*
  - (ii) *the resources used to collect, collate or record the data; and*
- (d) *to consider whether an agency is placing inappropriate restrictions on access to intelligence data by the other agency.*<sup>437</sup>

The Parliamentary Commissioner also has possession of the records of what is commonly known as the Connolly/Ryan Inquiry, and is to grant access to those records to persons who the Parliamentary Commissioner is satisfied has a legitimate need of access to those records.<sup>438</sup>

### **11.2.3. Powers of the Parliamentary Commissioner**

The Parliamentary Commissioner has extensive powers, set out in the CMA. Section 317 provides:

- (1) *The parliamentary commissioner has power to do all things necessary or convenient for the performance of the parliamentary commissioner's functions.*
- (2) *For the performance of the parliamentary commissioner's functions, the parliamentary commissioner may, by giving written notice to the chairperson, require a commission officer to do 1 or more of the following—*
  - (a) *produce to the parliamentary commissioner, or allow the parliamentary commissioner access to, all records, files and other documents in the commission's possession;*
  - (b) *give the parliamentary commissioner all reasonable help in connection with the parliamentary commissioner performing his or her functions.*
- (3) *Also, for the performance of the parliamentary commissioner's functions, the parliamentary commissioner may, by giving written notice to a public official, require the public official to do 1 or more of the following—*
  - (a) *produce to the parliamentary commissioner, or allow the parliamentary commissioner access to, all records, files and other documents in the possession of the unit of public administration in which the public official holds an*

<sup>436</sup> Section 314(3) of the CMA and see also section 295(3).

<sup>437</sup> Details of intelligence reviews conducted by the Parliamentary Commissioner are set out in Section 6.6 of this report.

<sup>438</sup> Section 374 of the CMA.

*appointment;*

- (b) *give the parliamentary commissioner all reasonable help in connection with the parliamentary commissioner performing his or her functions.*
- (4) *If documents are produced to the parliamentary commissioner under this part, the parliamentary commissioner may—*
  - (a) *keep the documents for the period the parliamentary commissioner considers necessary for the proper performance of the parliamentary commissioner’s functions; or*
  - (b) *make copies or extracts of the documents for use in connection with the parliamentary commissioner’s functions to which the document is relevant.*
- (5) *While the parliamentary commissioner has possession of a document under subsection (4), the parliamentary commissioner must permit a person who would be entitled to inspect the document if it were in the possession of the commission or unit of public administration to inspect it at all reasonable times.*
- (6) *A person required by a notice under subsection (2) or (3) to do something must comply with the requirement.*
- (7) *Maximum penalty for subsection (6)—85 penalty units or 1 year’s imprisonment.*

#### **11.2.4. Power to hold hearings**

##### Introduction

Under the CMA, the Parliamentary Commissioner may conduct hearings in certain circumstances:<sup>439</sup>

- (1) *This section applies if—*
  - (a) *the parliamentary commissioner has used all reasonable means to obtain information about a matter without success; and*
  - (b) *the parliamentary committee authorises the parliamentary commissioner to hold a hearing to obtain the information.*
- (2) *The parliamentary committee may give the authorisation only if it receives the bipartisan support of the parliamentary committee.*
- (3) *The parliamentary commissioner may hold a hearing to obtain the information.*
- (4) *The parliamentary commissioner may, by notice, require any named commission officer or person who holds or held an appointment in a unit of public administration (the “person”) to appear at the hearing to be examined on oath or to produce a document or thing.*

Thus, the Parliamentary Commissioner can conduct a hearing if these pre-conditions are met:

- all reasonable steps have been taken to obtain the information, without success; and
- a bipartisan majority of the Parliamentary Committee authorises a hearing.

Once a hearing is held, there is a further limitation. The Parliamentary Commissioner can only compel evidence from a commission officer or a person who holds or has held an appointment in a unit of public administration.<sup>440</sup> For this purpose, ‘commission officer’ includes a former officer of the CMC, and a former officer of the CJC.<sup>441</sup>

<sup>439</sup> Section 318 of the CMA.

<sup>440</sup> ‘unit of public administration’ is defined in section 20 of the CMA.

<sup>441</sup> Section 318(11) of the CMA.

*Analysis and comment*

Under the CJA, the Parliamentary Criminal Justice Commissioner had, for the purposes of an investigation, all the powers of a royal commission.<sup>442</sup> The Parliamentary Criminal Justice Commissioner could therefore hold a hearing whenever the Commissioner deemed it appropriate, without any pre-conditions. The Parliamentary Criminal Justice Commissioner could compel any witness, not only those prescribed in the CMA.

The pre-conditions imposed on the holding of a hearing by the Parliamentary Commissioner present no great difficulty. However, the Committee has a concern that the limitation regarding compellable witnesses can prove unsatisfactory. It would, for example, mean that the Parliamentary Commissioner would not be able to require a person whose complaint against the CMC has led to an investigation by the Parliamentary Commissioner to give evidence (where that person is not a Commission officer or the holder or previously the holder of an appointment in a unit of public administration). On the other hand, a commission officer, for example, an officer who is the subject of the complaint, would be compellable. In any event, it seems clear that a situation might arise where a person who is not otherwise compellable might have evidence crucial to an investigation, but not be willing to volunteer that evidence.

The restrictions could potentially result in unfairness, and in some circumstances unduly limit the ability of the Parliamentary Commissioner to fully investigate a matter. It is appropriate that the restriction be removed.

The Parliamentary Commissioner has jurisdiction over the CMC, which was formed from a merger of the CJC and the QCC. The Parliamentary Commissioner can require evidence from a person who was an officer of the former, but not a person who was an officer of the latter. This is an incongruous and unsatisfactory position.

**Recommendation 49**

**The Committee recommends that there be no restriction on the persons that can be required by the Parliamentary Crime and Misconduct Commissioner to give evidence at a hearing.**

**Recommendation 50**

**The Committee recommends in the event that the last recommendation is not adopted, that the *Crime and Misconduct Act 2001* be amended to make it clear that former officers of the former Queensland Crime Commission can be required by the Parliamentary Commissioner to give evidence at a hearing.**

**11.2.5. The need for the Office of Parliamentary Crime and Misconduct Commissioner**

This Committee, like its immediate predecessors, supports the role of the Parliamentary Commissioner. It is noteworthy that the CMC has consistently supported the Office, recently describing the current role of the Parliamentary Commissioner (and the Public Interest Monitor) as ‘effective and appropriate’.<sup>443</sup> There were no submissions made to this review calling for the abolition of the position. Further, a number of submissions expressly supported the role.<sup>444</sup>

<sup>442</sup> Section 118W of the *Criminal Justice Act 1989*.

<sup>443</sup> CMC supplementary submission, p. 7.

<sup>444</sup> Submission from Dr Noel Preston, p. 2; QPUE submission, p. 2; CMC supplementary submission, p. 7.

The position of Parliamentary Commissioner has rectified the deficiencies in the oversight regime identified by the 3<sup>rd</sup> PCJC and referred to above.<sup>445</sup> As mentioned, those deficiencies arose in relation to:

- effective investigation of complaints;
- access to confidential operational information; and
- ability to audit exercises of coercive powers.

The Committee has found the Parliamentary Commissioner to be of invaluable assistance, carrying out the more ‘hands-on’ aspects of ensuring the accountability of the CMC. The Committee does not have the resources, powers, or time necessary to effectively and fully investigate the more complex complaints or concerns which arise regarding the actions of the CMC.

The Parliamentary Commissioner also provides a useful ‘firewall’ between the CMC and the Committee when it comes to sensitive operational documents of the CMC. This allows such material to be examined, where this is necessary to ensure accountability, while limiting the number of people who have access to the material, thereby ensuring the confidentiality of that material is not compromised.<sup>446</sup>

The Parliamentary Commissioner, at the request of the Committee, has also conducted an audit of records kept by the CMC. Audit references given by the Committee to the Parliamentary Commissioner have been in the terms contemplated by the CMA.<sup>447</sup> Thus, the Parliamentary Commissioner has been asked to audit the records of the CMC for the purpose of deciding the following:

- whether the CMC has exercised [its statutory] power in an appropriate way;
- whether matters under investigation are appropriate for investigation by the entity investigating or are more appropriately the responsibility of another entity;
- whether registers are up to date and complete and all required documentation is on the file and correctly noted on the registers;
- whether required authorisations for the exercise of power have been obtained; and
- whether any policy or procedural guidelines set by the CMC have been strictly complied with.

The Parliamentary Commissioner reported in two stages, firstly, in relation to records of the former CJC for the year 2001 (that is, prior to the merger with the QCC on 1 January 2002), and secondly, in relation to records for the activities of the CMC for the year to 30 June 2003.

Both reports were in favourable terms.

In his report on stage one, the Parliamentary Commissioner, whilst finding some non-compliance with statutory requirements in minor respects and making some recommendations for improvement of CMC processes, reported in positive terms.

The Parliamentary Commissioner also reported cooperation from CMC officers in the audit process. It is pleasing that the CMC has provided the Parliamentary Commissioner with full access to all its policy and procedures manuals. The Parliamentary Commissioner described these manuals as very detailed and as constituting ‘*a good set of systems and procedures for ensuring that the Commission’s role is carried out in an appropriate way*’.

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<sup>445</sup> See section 11.2.1 above.

<sup>446</sup> Under section 316 of the CMA, the Parliamentary Commissioner cannot be required by the Parliamentary Committee to disclose to it information which the CMC can lawfully withhold from the Committee. See also section 66 of the CMA.

<sup>447</sup> Section 314(2)(a) of the CMA.

The Parliamentary Commissioner observed that there is in the CMC a ‘good culture’ of acting appropriately and in compliance with the systems in place. The Parliamentary Commissioner also commented favourably on *COMPASS*, an electronic case management system developed in-house by the Commission.

The Committee provided a copy of the Parliamentary Commissioner’s report to the CMC for its response and discussed the report with the Commissioners at a joint meeting.

The CMC responded positively to the recommendations made by the Parliamentary Commissioner in his report and agreed to implement changes to give full effect to those recommendations. The Committee is confident that these changes will improve the CMC’s already very good performance in this area.

The report on the second stage of the Parliamentary Commissioner’s audit also was in favourable terms, with the Parliamentary Commissioner finding no instances where the CMC had exercised its statutory power in an inappropriate way. It was also pleasing to see that the Parliamentary Commissioner reported that generally the time taken by the CMC to complete its investigations had ‘improved considerably’.

The Parliamentary Commissioner expressed some reservations regarding relatively minor matters, and made some recommendations for improvement. The CMC has responded positively to those recommendations.

The previous Committee recommended that its successor – this current Committee - issue a standing reference to the Parliamentary Commissioner to conduct an ongoing operational audit of the current operations of what was then the CJC.<sup>448</sup> The Committee has had regard to this recommendation and the reasoning behind it.

The Committee has adopted a slightly different approach, by issuing a series of ‘rolling’ audit references. This has for all practical purposes had the same result by allowing, if need be, an audit of current operations of the CMC.

#### ***11.2.6. Relationship between the CMC and the Parliamentary Commissioner***

As mentioned in the preceding section, the CMC has been clear in its support of the role of the Parliamentary Commissioner. The Committee is satisfied that the relationship is working well. In his oral submissions to the Parliamentary Committee, the Parliamentary Commissioner, Mr Robert Needham, observed in relation to his monitoring role:<sup>449</sup>

*...[O]ne of the things that is heartening to see is that in my experience there appears to be an appropriate culture existing within the CMC amongst all its staff that I come in contact with with respect to the importance of the need for their duties to be carried out in a fair, impartial, independent way and in accordance with law. This is evidenced, amongst other things, by the response that I get to my particular role when I am carrying that out. The staff at the commission could see me at best as a nuisance and at worst they could see me perhaps as a threat because I am investigating things that they have done and I am reporting to yourselves. However, I am happy to be able to report that I almost invariably receive nothing but full cooperation from all of the staff at the commission. In particular, I have received that without any qualification from all the senior staff at the commission.*

*That culture of the commission is reinforced by an appropriate set of manuals and guidelines which are in place and which are being updated, guiding the commission officers in the*

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<sup>448</sup> 4<sup>th</sup> PCJC, Three Year Review, at p. 274, and see the preceding discussion at pp. 271 to 273.

<sup>449</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 57.

*appropriate performance of their duties. I was pleased to see that it was supported by the submission from the Queensland Police Union, on the attitude of the present commission, and in particular by the chairman, Mr Butler, towards any comments or criticism that can be made of the commission. There are two ways, of course, that criticism can be taken. It can be taken as a threat or it can be taken and received in a constructive way to take on board if it is worthwhile criticism, to adopt it and to use it to improve the commission. I have only ever seen Mr Butler approach it in the latter way.*

### **11.2.7. An own motion power for the Parliamentary Commissioner?**

As noted,<sup>450</sup> the bulk of the functions of the Parliamentary Commissioner can be performed only upon the request of the Parliamentary Committee.<sup>451</sup> It has been argued that the Parliamentary Commissioner ought to also have an ‘own motion’ power – that is, that the Parliamentary Commissioner should be able to act of his or her own volition in considering complaints or concerns regarding the CMC. This is an issue that was put forward in a number of submissions to the Three Year Review of the 4<sup>th</sup> PCJC.<sup>452</sup> It was argued in only one submission to the current review. In that submission, the QPUE stated:

*... [T]he commissioner’s jurisdiction should not be limited only to references made to it by the Parliamentary Committee. The Parliamentary Commissioner should have an independent discretion to investigate matters that he/she considers necessary to investigate within the public interest, within jurisdiction of course.<sup>453</sup>*

The Union’s General President, Mr Gary Wilkinson, elaborated on the reasons for the Union’s stance in oral submissions before the Committee:

*...matters may not be referred to the Parliamentary Commissioner for whatever reason. It may not come to the notice of this committee, for example, but if the Parliamentary Commissioner is aware of it, then we just believe that the individual should have the power to make the investigations quickly and proceed along those lines. It is not something that we will die in the gutter over; it is just a matter that we think is appropriate, and it would probably expedite a lot of issues if that were the case.<sup>454</sup>*

In his evidence before the Committee, the current Parliamentary Commissioner, Mr Robert Needham, observed, in relation to an own motion power:

*That is not a power I have ever sought. This committee is the committee charged with overseeing the CMC. I think it is better for members of the public or any organisation that has a complaint to make about the CMC to make it to this committee as the parliamentary representatives. Then if it is a matter that this committee feels is worth while, you feel you need the assistance of investigation by me, it can be referred on. If a matter came to my attention that I thought should be investigated, then there is no difficulty in me bringing it to the attention of this committee. If it were a matter that I thought should be investigated, there is a way I could have that done. I do not feel that my role is constrained in any way because I do not have an own motion or own initiative power.*

*...if at any time a matter did arise or I became aware of a matter that I thought should be looked at, then I would refer it to this committee. Bear in mind that I have an audit power*

<sup>450</sup> See above at section 11.2.2.

<sup>451</sup> Section 314(2) of the CMA.

<sup>452</sup> See 4<sup>th</sup> PCJC, Three Year Review, pp. 265 - 267.

<sup>453</sup> QPUE submission, p. 2.

<sup>454</sup> PCMC, Transcript of Public Hearing, 19-20 June 2003, p. 86.

*referred to me by the committee which is not referred to me with any time limit. So generally if it were a small matter it would probably come within my audit power. I would be able to look at it in that way. If it were something that came up immediately after I had put in an audit report, then I would refer it to the committee if I felt that I otherwise could not deal with it appropriately.*<sup>455</sup>

The Inspector of the Police Integrity Commission in New South Wales has an own motion power, as does the newly created office of Parliamentary Inspector of the Corruption and Crime Commission.<sup>456</sup>

### **11.2.8. Analysis and comment**

The accountability scheme under the CMA is that the Parliamentary Commissioner is the agent of the Parliamentary Committee.<sup>457</sup> The Parliamentary Commissioner reports to the Parliamentary Committee which will in appropriate cases report to the Parliament.

The Parliamentary Committee is the primary accountability mechanism, and can call for assistance from the Parliamentary Commissioner. This reflects the intent that the CMC be accountable to the Parliament through a Parliamentary Committee.<sup>458</sup> If any matter came to the attention of the Parliamentary Commissioner who believed it ought to be pursued, the Parliamentary Commissioner is able to seek a reference from the Committee. The Committee supports the present scheme.

### **11.3. The Public Interest Monitor**

The Public Interest Monitor (PIM) also has a role in oversight of the functions of the CMC. The appointment of the PIM is provided for by section 324(1) of the CMA.<sup>459</sup> The functions of the PIM principally involve:

- appearing at applications by the CMC (and by the QPS) for surveillance warrants and covert search warrants; and
- monitoring compliance by the CMC (and by the QPS) with the CMA (or the PPRA) in matters regarding such warrants.<sup>460</sup>

It can be seen that the functions of the PIM are in some respects more ‘front end’ than those of the Parliamentary Commissioner and the Parliamentary Committee. In relation to the exercise of powers by the CMC pursuant to warrants, scrutiny by the Parliamentary Committee is after the event. The PIM is involved at the application stage, and can make considered submissions to the court as to the merit of the CMC’s application for the warrant. The Committee believes the PIM provides a very useful role here, and supports the continuation of the present role of the PIM.

### **11.4. Other review mechanisms**

The CMA introduced two provisions for review of the CMC’s performance. The first is a requirement that the responsible Minister (the Premier) must review the CMA and the CMC’s *operational and*

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<sup>455</sup> Ibid, p. 60.

<sup>456</sup> See section 89(2) of the *Police Integrity Commission Act 1996* (NSW) and section 195(2) of the *Corruption and Crime Commission Act 2003* (WA).

<sup>457</sup> Section 10 of the CMA provides that the Parliamentary Commissioner is an officer of the Parliament who helps the Committee in the performance of its functions. See also the second reading speech on the Crime and Misconduct Bill, Queensland Hansard, 16 October 2001, p. 2822.

<sup>458</sup> See the discussion on this topic in the 4<sup>th</sup> PCJC’s report on its Three Year Review, pp. 265 - 269.

<sup>459</sup> And also Section 157 of the PPRA.

<sup>460</sup> The functions of the PIM are set out at section 326 of the CMA. See also section 159 of the PPRA.



*financial performance*' commencing no sooner than two years after the commencement of the provision.<sup>461</sup>

The second provision requires performance reporting by the CMC to the Minister. The CMA provides:<sup>462</sup>

- (1) *The Minister has a responsibility to ensure that the commission operates to best practice standards.*
- (2) *To help the Minister discharge that responsibility, the commission must report to the Minister, when and in the way required by the Minister, on the efficiency, effectiveness, economy and timeliness of the commission and its systems and processes, including operational processes.*
- (3) *The report must be accompanied by any financial or other reports the Minister requires to enable the Minister to assess the efficiency, effectiveness, economy or timeliness of the commission, including, in particular, the timeliness with which the commission deals with complaints.*

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<sup>461</sup> Section 347 of the CMA. That section commenced on 1 January 2002.

<sup>462</sup> Section 260 of the CMA.

**APPENDIX ONE*****Three Year Review Reports by predecessor Committees*****The first PCJC of the 46<sup>th</sup> Parliament**

- Report No. 9, tabled in July 1991, entitled *Review of the Committee's operations and the operations of the Criminal Justice Commission Part A, Submissions, Volume 1 – Public submissions, Volume 2 - CJC Submissions and Minutes of Evidence taken on 6 and 13 June 1991.*
- Report No. 13, tabled in December 1991, entitled *Review of the operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission.*
- Report No. 18, tabled in November 1992, entitled *Review of the operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission. Part C - A report pursuant to section 4.8(I)(f) of the Criminal Justice Act 1989-1992.*

**The second PCJC of the 47<sup>th</sup> Parliament**

- Report No. 26, tabled in February 1995, entitled *A report of a review on the activities of the Criminal Justice Commission pursuant to s.118(1)(f) of the Criminal Justice Act 1989.*

**The third PCJC of the 48<sup>th</sup> Parliament**

- Report No. 38, tabled in May 1997, entitled *Report on the accountability of the CJC to the PCJC;* and
- Report No. 45, tabled in June 1998, entitled *A report of a review of the activities of the Criminal Justice Commission pursuant to s.118(1)(f) of the Criminal Justice Act 1989.*

**The fourth PCJC of the 49<sup>th</sup> Parliament**

- Report No. 55, tabled in March 2001, entitled *A report of a review of the activities of the Criminal Justice Commission pursuant to s.118(1)(f) of the Criminal Justice Act 1989.*

**APPENDIX TWO***Submissions Tabled*

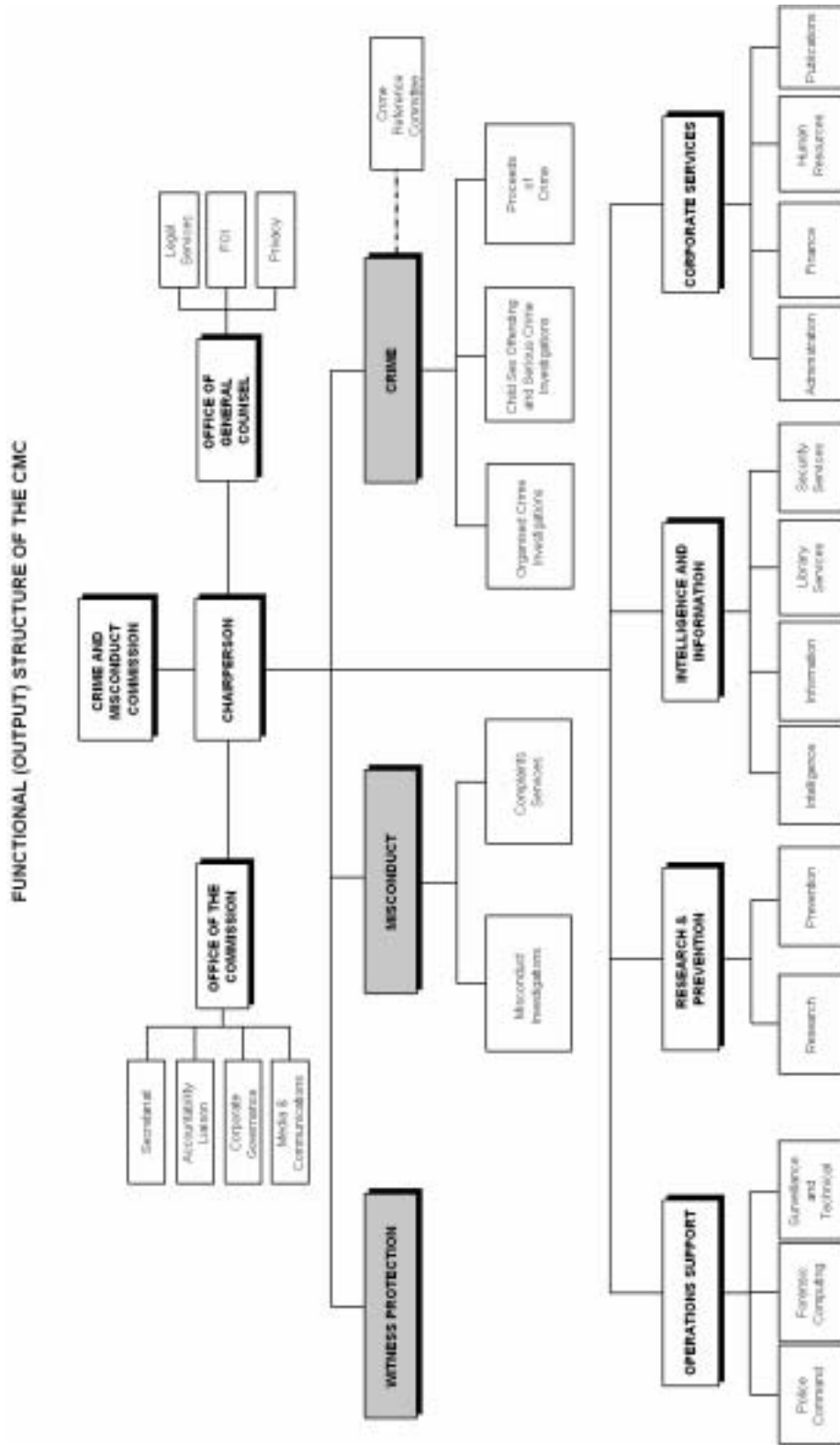
1.	State Development, 14 February 2003.
2.	Local Government and Planning, 10 March 2003.
3.	Treasury, 17 March 2003.
4.	Queensland Health, 31 March 2003.
5.	Department of Employment and Training, 26 March 2003.
6.	Department of Main Roads, 31 March 2003.
7.	Environmental Protection Agency, 26 March 2003.
8.	Department of Tourism, Racing and Fair Trading, 4 April 2003.
9.	Bar Association of Queensland, 1 April 2003.
10.	Misconduct Tribunal, 3 April 2003.
11.	Queensland Ombudsman, 3 April 2003.
12.	Paul Askern, 3 April 2003.
13.	Queensland Opposition, 3 April 2003.
14.	Queensland Teachers' Union of Employees, 4 April 2003.
15.	Department of Justice and Attorney-General, 4 April 2003.
16.	Queensland Police Union of Employees, 7 April 2003.
17.	Department of Emergency Services, 4 April 2003.
18.	Whistleblowers Action Group Qld, 26 March 2003.
19.	Office of Public Service Merit and Equity, 4 April 2003.
20.	Queensland Police Service, 8 April 2003.
21.	Department of Natural Resources and Mines, 11 April 2003.
22.	Dr Noel Preston, 14 April 2003.
23.	Crime and Misconduct Commission, 16 April 2003.
24.	Department of Education, 8 May 2003.
25.	Aboriginal Co-ordinating Council, 9 May 2003.
26.	Queensland Police Service, (further submission) 5 August 2003.
27.	Crime and Misconduct Commission, (further submission) 18 August 2003.
28.	Mr Robert Sibley, Public Interest Monitor, 19 June 2003.
29.	Mr Robert Needham, Parliamentary Commissioner, 17 June 2003.
30.	Mr Robert Needham, Parliamentary Commissioner, (further submission) 18 June 2003.

**APPENDIX THREE***Witnesses at the Public Hearing*

<b>Thursday 19 June 2003</b>	
CMC	Mr Brendan Butler SC (Chairperson) and Commissioners Mr John Callanan – Assistant Commissioner, Crime Mr Stephen Lambrides – Assistant Commissioner, Misconduct Mr Paul Roger – Director, Intelligence and Information
Queensland Police Service	Commissioner Bob Atkinson APM
Queensland Teachers Union	Mr Jeff Backen – Secretary, Services and Welfare
CMC	Assistant Commissioner of Police Kathy Rynders – Director, Witness Protection & Operations Support Dr Paul Mazerolle – Director, Research and Prevention
Public Interest Monitor	Mr Robert Sibley
Parliamentary Crime and Misconduct Commissioner	Mr Robert Needham
<b>Friday 20 June 2003</b>	
Youth Advocacy Centre	Ms Robyn Munro - Director
Education Queensland	Mr Peter Anderson, Director, Ethical Standards Unit
Dr Noel Preston	
Qld Council for Civil Liberties	Mr Terry O’Gorman (Vice-President, QCCL and President, Australian Council for Civil Liberties)
Queensland Police Union of Employees	Mr Gary Wilkinson – General President
CMC	Mr Brendan Butler SC

**APPENDIX FOUR**

*Structure of the CMC*



Source: Outputs

February 2003

**APPENDIX FIVE***5th Parliamentary Crime and Misconduct Committee Reports*

<b>Report No.</b>	<b>Report Name</b>	<b>Date Tabled</b>
56	Annual Report 2000/2001	16 October 2001
57	Annual Report 2001/2002	30 October 2002
58	A report on an investigation by the Parliamentary Crime and Misconduct Commissioner into the performance of the Crime and Misconduct Commission in dealing with four matters	25 March 2003
59	A report on an investigation by the Parliamentary Crime and Misconduct Commissioner into the actions of the Crime and Misconduct Commission in its handling of allegations against Ms C M Greer	19 August 2003
60	A report on an investigation by the Parliamentary Crime and Misconduct Commissioner, into the actions of the Crime and Misconduct Commission in its handling of allegations against Magistrate Brian Murray	19 August 2003
61	Annual Report 2002/2003	14 October 2003
62	Report on Activities	25 November 2003
63	A report on an investigation by the Parliamentary Crime and Misconduct Commissioner into the Crime and Misconduct Commission's handling of allegations against Mr Chris Murphy	25 November 2003