Office of the Parliamentary Crime & Misconduct Commissioner

Telephone: 61 7 3234 0465
Facsimile: 61 7 3234 0268

email: pcm.commissioner@parliament.qld.gov.au
www.parliament.qld.gov.au/Committees/

28 July 2006

Mr Geoff Wilson MP
Chair
Parliamentary Crime and Misconduct Committee
Parliament House
BRISBANE QLD 4000

Dear Mr Wilson

RE: Submissions to three-yearly review.

Thank you for affording me the opportunity to consider the submissions to the three-yearly review provided under cover of your letter of 14 June 2006. It appears that most of the submissions are quite positive and express satisfaction generally with the performance of the Crime and Misconduct Commission (CMC). Many of the submissions from the Units of Public Administration (UPAs) mention the CMC's publication "Facing the Facts", the joint CMC/ICAC publication "Managing Conflicts of Interest in the Public Sector: Guidelines" and other misconduct prevention initiatives very favourably.

I have set out below some observations concerning the 15 individual submissions made by the CMC and the more significant issues referred to in other submissions. I trust this will be of assistance to the Committee.

1. Assistant Commissioners to preside at public hearings.

Submission number 1 – Hon C W Pincus: page 3.
Submission number 26 - Crime and Misconduct Commission: page 9.

"The CMC considers that its current powers to hold public and closed hearings are appropriate and effective, subject to a proposed amendment to the CM Act that will allow the Assistant Commissioner, Crime, or the Assistant Commissioner, Misconduct, to preside at public hearings, as well as the Chairperson."

Former CMC Commissioner Hon Pincus refers briefly to this issue in his submission. The submission is uncontentious and has my support. It is noted that, pursuant to the *Crime and Misconduct Legislation Amendment Bill 2005*, Assistant Commissioners may be appointed to preside at public hearings in addition to the Chairperson.

2. Investigative powers to be maintained.

Submission number 26 – Crime and Misconduct Commission: page 11.

"The CMC is of the view that the investigative powers currently given to it under the CM Act for its crime, misconduct and civil confiscation jurisdictions should be maintained."

This submission is uncontentious and has my support.

3. Extension of CMC's jurisdiction.

Submission number 23 – Dept of Primary Industries and Fisheries: page 1.
Submission number 25 – Auditor-General of Queensland: page 1.
Submission number 26 – Crime and Misconduct Commission: page 15.

"The CMC continues to be of the view that private entities that carry out public functions should be subject to scrutiny by the CMC, especially where public funding is involved."

This submission has been made by the CJC and the CMC in the two previous three-yearly reviews. The CMC's submission notes that the Government's response to the Committee's report on the last three-yearly review (Report No 64) stated:

> *The Government supports the sentiment that now is not the time for any broad extension to the jurisdiction of the CMC. In the future, when the operation of the new Act is further settled, the Government might reconsider the ambit of the operation of the Act, especially if the matter is the subject of a recommendation in the Committee's next three-year review report.*

The Auditor-General observes that the *Crime and Misconduct Act 2001* (*CM Act*) precludes the CMC from investigating misconduct in all public sector entities. The scope and extent of the Auditor-General's powers are clearly defined in legislation and extend to a broader range of public sector agencies than are covered by the CMC. He states that this may lead to some confusion as to the oversight undertaken by the respective organisations (that is the CMC and the Auditor-General).

As the Committee noted in its last review report of March 2004, it is clearly an anomaly that bodies exercising public functions and utilising public moneys are not subject to oversight by the CMC. This submission has my support in principle subject to the resourcing and legislative concerns raised by the Committee at page 35 of Report No 64.

4. Removal of claim of spousal privilege at CMC hearings.

Submission number 26 – Crime and Misconduct Commission: pages 16 – 17.

"The CMC seeks the committee's support for appropriate amendments to the CM Act to clarify that spousal privilege does not apply to CMC hearings."

I appeared as counsel for the CMC in the matter of *Callanan v Bush* ([2004] QCA 478) referred to in the CMC's submission. I endorse the comments in the CMC's submission. It is clearly anomalous that spousal privilege, which cannot now be claimed in a criminal trial, can still be relied upon to frustrate an investigative hearing. These investigative hearings clearly play an important part in allowing the CMC to properly exercise its crime fighting functions and it is important that such functions are not unnecessarily frustrated.

5. Telecommunication Interception powers.

Submission number 2 – Australian Parents for Drug-Free Youth: pages – all.
Submission number 18- Mr Stephen Coates: pages – all.
Submission number 31 – Commissioner, Queensland Police Service: page 4.
Submission number 26 – Crime and Misconduct Commission: pages 17 – 20.

"The CMC notes the support from previous committees in this regard, and seeks the committee's continued support in recommending that TI legislation be introduced in Queensland, and, if such legislation is passed, that funding be made available for the CMC to establish its own secure and effective interception facility."

The submission from the President of APFDF advocates the granting of TI powers to the CMC. Annexed to the submission are copies of two papers discussing the importance of TI powers and the statutory regulatory regimes utilised in other jurisdictions.

Mr Coates' submission discusses the dangers of TI evidence and suggests safeguards to provide protection against misuse of information obtained by TI.

The QPS Commissioner strongly supports the introduction of telephone interception powers for both the CMC and the QPS.

The CMC deals with this issue at some length in its submission and makes the point that access to telephone intercept product is not available for the vast majority of its investigations. (It is only available through joint investigations with agencies afforded telephone interception powers.) Consequently, the CMC makes greater use of covert operatives and technical officers (to install surveillance devices in subject premises) who are put at higher levels of risk. I support the CMC's submission. It would seem that any perceived constitutional difficulties which may arise through the mandated involvement of the PIM could be overcome by a redefining of that role.

6. Referral of matters to the DPP.

Submission number 26 – Crime and Misconduct Commission: pages 20 – 21.

"The CMC agrees that the issue of which matters should be referred to the DPP can be dealt with on an administrative basis and that legislative amendment is not required to allow police officers seconded to the CMC to charge in appropriate cases."

This has been an issue between the DPP and the CMC (or the CJC) since at least 1993 when an arrangement was made between the then DPP, Mr R.N. Miler QC and the then CJC Chairperson, Mr R.S. O'Regan QC. (The arrangement is detailed in a report by the Acting Parliamentary Criminal Justice Commissioner dated August 2001 in relation to a complaint by Ms Michelle Bromham.)

At the public hearings of the Three Year Review, Mr Needham indicated that a protocol had now been developed between the CMC and the DPP as to which matters will be referred to the DPP. Mr Needham stated that matters to be referred to the DPP will be those that are of considerable public interest, those which call for the exercise of prosecutorial discretion and any other matter in respect of which the CMC seeks the advice of the DPP for any reason. Mr Needham also pointed out that the recent amendment to section 255 of the *CM Act* made it "utterly clear" that police officers attached to the CMC retain their power to initiate charges against persons.

Whilst this submission has my support, I believe the Committee should be afforded the opportunity to comment on the protocol. It may also be worthwhile monitoring the matters referred to the DPP pursuant to the protocol and the matters in which the CMC institutes the charges without reference to the DPP.

7 – 15. Submissions relating to the *Criminal Proceeds Confiscation Act 2002*.

Submission number 26 – Crime and Misconduct Commission: pages 53 - 56.

7. ***"The CMC submits that the Criminal Proceeds Confiscation Act should contain express provisions concerning its application to property held outside Queensland, including property held offshore. Its current failure to do so represents a major inadequacy in the legislation and provides a simple means of avoiding its application."***

8. ***"The CMC submits that the current provisions be separated to distinguish between administrative orders and investigative orders, notice be required for administrative orders, but that investigative orders be available only to the state and be available ex parte".***

9. ***"The CMC submits that, subject to the decision of the Court of Appeal [Namely State of Queensland v Meredith (2006) QSC], the legislation make clear the scope of examination powers under the Criminal Proceeds Confiscation Act."***

10. *"The CMC submits that provisions be inserted into the Criminal Proceeds Confiscation Act clarifying derivative use of examination evidence and the admissibility of examination transcripts in confiscation proceedings."*

11. *"The CMC submits that the reversal of the onus of proof relating to proceeds assessment applications ought to be consistent with the onus in respect of forfeiture, in order to give full effect to the objects of the legislation."*

12. *"The CMC submits that the making of a pecuniary penalty order ought not to prevent the court from later making a proceeds assessment order based on the same serious crime-related activity, but that the amount of any pecuniary penalty should be taken into account in the making of a subsequent proceeds assessment order."*

13. *"The CMC submits that the ability of the court to make orders substituting other property, instead of the disposed property, in a forfeiture order would render ineffective attempts to dispose of forfeitable property and give full effect to the objects of the Criminal Proceeds Confiscation Act."*

14. *"The CMC submits that penalty provisions should attach to non-compliance or, alternatively, forfeiture of non-disclosed assets should be available under provisions similar to recent amendments to the New South Wales civil confiscation legislation (see ss. 31A 31B and 31C of the Criminal Assets Recovery Act 1990 (NSW))."*

15. *"The CMC submits that the legislation should be amended to make clear the conditions precedent to the Public Trustee recovering its fees, charges and outlays."*

These submissions appear to be worthwhile and directed at fine–tuning the Criminal Proceeds Confiscation legislation, which after all, is a major plank in the CMC's armoury to combat crime.

Frivolous or vexatious complaints, false or misleading statements/documents.

Submission number 5 – Department of Corrective Services: page 1.
Submission number 17 – Local Government Association Qld Inc: pages 4 – 5.
Submission number 20 – Cr Barry Lansdown, Cardwell Shire Council: page 2.

The Director-General of the Department of Corrective Services states that the CMC's failure to take immediate and decisive prosecution action against complainants whose complaints have been found to be either false or misleading undermines public confidence in the CMC and further disenfranchises staff who have been the subject of the false or misleading statements.

During the hearings Mr Needham agreed that if people knowingly provided false or misleading information to the CMC they should be prosecuted in appropriate cases. He said that if people thought they could lie to or mislead the CMC with impunity it could effect the investigations that the CMC carried out and it could certainly affect the officer the subject of the investigations. Mr Needham pointed out that two prosecutions had

been commenced under the relevant section arising out of the CMC's investigation of the Gold Coast City Council. Mr Needham confirmed that his policy and that of the Commission was that in appropriate cases the CMC will prosecute such matters.

The LGAQ submits that the *CM Act* should be amended to require that a sanction be imposed on persons making frivolous or vexatious complaints. The Association suggests that the frivolous or vexatious complainant should be required to reimburse to the investigating authority (the CMC or the UPA) the reasonable costs of conducting the investigation. It is suggested that this should discourage baseless, politically motivated complaints.

As it presently stands, the *CM Act* requires that a person making a frivolous or vexatious complaint may be given a notice that the complaint will not be investigated or further investigated because it appears to concern a frivolous matter or to have been made vexatiously. It is only if the person makes the same or substantially the same complaint again that the person may be prosecuted. This seems to me to be a sensible and workable system and I do not support the LGAQ's submission that the *CM Act* should be amended in this respect. If the CMC or UPA incurred anything more than nominal costs investigating a frivolous or vexatious complaint, it is difficult to imagine that the complaint would not also involve information that was false or misleading in a material particular. Therefore the costs could be recovered from the complainant pursuant to sections 217 or 218 of the *CM Act* anyway.

At the hearings Mr Needham indicated that people may be of the view that if a complaint is unsubstantiated, it must be frivolous or vexatious. He stated that the CMC received complaints that turned out to have no basis but that one can generally see why the complainant thought the matter warranted referral to the CMC. Mr Needham explained that as part of the procedure to close an investigation file, CMC officers must specifically consider whether the complaint comes within the frivolous or vexatious category. He stated that this issue is not something that the CMC ignores – it just hasn't arisen.

It seems to me that frivolous or vexatious complaints are much more likely to be identified amongst the vast majority of matters referred back for investigation by the councils or other UPAs. Mr Needham stated that to his knowledge, in the 18 months he has been Chairperson, no UPA has advised the CMC that they were of the view that a complaint was frivolous or vexatious, false or misleading. He later stated (at page29) that the CMC needed to ensure that in future UPAs will refer suspected frivolous or vexatious, false or misleading complaints back to the CMC for consideration of appropriate action. Mr Lambrides suggested that this issue be specifically mentioned in the "Facing the Facts" manual. That would appear to be the most sensible solution.

Mr Needham has invited the LGAQ to identify any complaints that its members regard as frivolous or vexatious so that the CMC can consider them specifically. The Committee might consider it worthwhile to follow up on this issue to see whether the LGAQ does identify any such complaints.

The Principle of Devolution

Submission number 7 – Youth Advocacy Centre: pages 4 and 6.
Submission number 8 – Cr Ron Owen: pages 1 – 3.
Submission number 15 – Mr Garry Storch, Caloundra City Council: pages – all.
Submission number 17 – Local Government Association Qld Inc: pages 5 -7.
Submission number 19 – Mr Terry Sullivan MP: pages 2 -3.
Submission number 21 – Ms Margaret Hoekstra, Department of Local Government, Planning, Sport and Recreation: pages – all.

A number of submissions expressed dissatisfaction with the principle of devolution for various reasons. The submissions from the Youth Advocacy Centre and Mr Terry Sullivan MP relate to the CMC's devolution of complaints against police back to the QPS for investigation.

Mr Sullivan's MP view is that devolution is not the appropriate principle for a state police service because the "police culture" dictates that members shield each other from outside criticism. He states that there is a substantial bias involved in internal police investigations and devolution does not permit adequate monitoring of the QPS investigations by the CMC.

The Youth Advocacy Centre submits that the perception amongst young people is that they will suffer reprisals from police if their complaint is devolved back to the QPS for investigation. Further, young people are concerned that devolution will result in police officers being cleared on the basis of legal technicalities (presumably due to the protection provided by police culture bias).

Both submissions also recommend that the CMC closely monitor QPS investigations of complaints against police and that the CMC monitor patterns or trends in complaints against the QPS or particular officers. The CMC already does this.

The other submissions expressing concerns with the principle of devolution all relate to local government issues. Cr Owen's submission adopts a similar theme to Mr Sullivan's. He suggests that the principle of devolution encourages bias by ensuring that the perpetrators of official misconduct are their own judge and jury. (Much of Cr Owen's submission is, with respect, somewhat misguided – especially his comments relating to a public official's responsibilities pursuant to section 44 of the *CM Act.*)

Mr Garry Storch submits that local governments are not funded to investigate matters referred to them by the CMC and devolution amounts to an exercise in cost shifting. The LGAQ submission makes the same point.

Mr Storch further submits that there are difficulties in having councils investigate complaints by or about councillors or mayors. He states that the political atmosphere is not conducive to the conduct of such investigations. The LGAQ submission raises the same issue and observes that it is difficult for CEOs to investigate allegations of corruption against councillors because, in most other respects, council CEOs are

answerable to councillors. The LGAQ makes the analogy that departmental Directors-General are not expected to investigate complaints against their respective Ministers.

As Mr Needham stated (at page 8 of the hearings), even if the resources of the CMC were enormously increased, it would still not be possible for the CMC to investigate every complaint it received, nor would it be appropriate. Mr Needham's view is that proper standards of integrity within the public sector cannot be achieved by the CMC conducting every investigation of alleged official misconduct – *"wielding the big stick all the time"*. He believes that *"the notion of integrity as being the normal way that you work"* must be instilled into the public sector from the highest level down to all the workers. The principle of devolution fosters this notion by making the UPAs accountable for their own integrity. Devolution is a fundamental principle of the *C&M Act* and *"when we accept the reality that we must have devolution, we then just have to look to make sure that we ensure that it works as best we can"*.

The submissions received from the local governments indicate that some local councils are having issues with their capacity to deal with cases of misconduct effectively and appropriately. There is clearly a need for closer cooperation between the CMC and the local governments, particularly in the area capacity building. I do note Mr Needham's belief that the newly created Conduct Review Tribunals created under amendments to the *Local Government Act* should resolve many of the concerns of the LGAQ. (page 60)

Mr Sullivan MP also makes the point that devolution has the effect of limiting the Committee's oversight of complaints against the police. The Committee is well aware of this fact. It is the inescapable result of applying the principle of devolution. The best means available to the Committee to maintain some degree of oversight of complaints against police is through the CMC's Monitoring and Support Unit. Basically, I could be asked to inspect the reviews and audits that the MSU has conducted of complaint investigations devolved back to the QPS.

The CMC monitors investigations of complaints referred back to police in four ways; close monitoring of the entire investigation during the course of the investigation, reviewing the completed investigation report prior to any final action taken by the police, reviewing the completed investigation report after final action has been taken by the police and auditing the way in which the police have dealt with a complaint or a class of complaints. Generally it would be necessary to have access to the source documents of the police investigation in order to conduct a meaningful assessment of the investigation. The CMC are more likely to have source documents for complaints in the first two categories – close monitoring and reviews prior to finalisation.

Confidentiality of Complaints

Submission number 14 – Director-General, Dept of Industrial Relations: page 1.
Submission number 17 – Local Government Association Qld Inc: pages 3 - 4.
Submission number 20 – Cr Barry Lansdown, Cardwell Shire Council: pages 1 - 2.
Submission number 22 – Mr Rob Noble, CEO Caboolture Shire Council: page 2.

A number of local government representatives submitted that complainants to the CMC should be required to keep the existence and the nature of their complaints confidential until they are notified that the investigation of the complaint is finalised. The LGAQ submits that this level of confidentiality is appropriate to protect the presumption of innocence.

I agree with Mr Needham that any such legislative change would be incredibly difficult to enforce and supposed breaches would be very difficult to prove. Furthermore, to require confidentiality of the existence and the nature of a complaint would tend to stifle debate about matters of possible public interest. I do not accept, as the LGAQ submits, that the publicity attached to the mere making of a complaint to the CMC would generally lead to a reduction of public confidence in the honesty and integrity of the system of State and local governments.

Other Issues

The figures quoted by the CMC in relation to the timeliness of its assessment process (at page 61 of its submission) are heartening; the figures relating to timeliness of investigations (at page 87) less so, although it is difficult to speak generally without knowing and appreciating the reasons for some of the delays.

Whilst a few submissions complain about delays in the assessment process (eg Director-General Queensland Transport and the CEO of Caboolture Shire Council) many others refer to improvements in the timeliness of assessments and the streamlined assessment process pursuant to directions under section 40 of the Act. With the CMC's initiative of extending section 40 directions to all departments, larger agencies and to some of the larger local government councils well advanced, it is expected that concerns about delays in the assessment process will be addressed. The timeliness of investigations is a matter the Committee may wish me to monitor in the future audits.

I trust that these comments will be of some assistance to the Committee in the conduct of its review. If there are other matters upon which the Committee seeks my input I would be pleased to assist further.

Yours faithfully

A J MacSporran SC
Commissioner