

Our Ref: 11.1.Advisory Panel

16 November 2012

Hon. Ian Callinan AC and Professor Nicholas Aroney  
Advisory Panel  
Review of the Crime and Misconduct Act  
GPO Box 149  
BRISBANE QLD 4001

Dear Hon. Callinan and Professor Aroney

### **Submission to the Review of the Crime and Misconduct Act**

This submission is made on behalf of the Parliamentary Crime and Misconduct Committee (the Committee). The Committee is an all-party committee of the Queensland Legislative Assembly established by section 291 of the *Crime and Misconduct Act 2001* (CM Act).

The principal function of the Committee is to monitor and review the performance of the CMC and report to Parliament.<sup>1</sup> It is through the Committee that the CMC is accountable to Parliament and the people of Queensland.

Briefly, the Committee performs its functions under the Act by receiving and considering complaints about the conduct of the CMC or its officers, considering notifications from the Chairperson of the CMC involving suspected improper conduct, holding bi-monthly meetings with the Chairperson, Commissioners and senior staff of the CMC, holding bi-monthly meetings with the Parliamentary Commissioner, considering reports of the CMC and reports of the Parliamentary Commissioner on the audits of the CMC records. [Further information on the role and functions of the Committee is attached.]

Rather than duplicate the work of the former Committees, this submission outlines the current Committee's views on some issues. Where this submission is silent on an issue, the Committee refers the Advisory Panel to the latest three yearly review of the CMC, Parliamentary Crime and Misconduct Committee, report no 86, *Three Yearly Review of the Crime and Misconduct Commission*.<sup>2</sup>

### **The current review**

The Attorney-General announced this review of the *Crime and Misconduct Act 2001* (the CM Act) less than six months after the Committee reported on its own, legislated, review of the Crime and

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<sup>1</sup> C&M Act, section 292.

<sup>2</sup> Parliamentary Crime and Misconduct Committee, *Report No 86, Three Yearly Review of the Crime and Misconduct Commission*, May 2012, available at: <http://www.parliament.qld.gov.au/documents/committees/PCMC/2011/three-year-review-11/rpt86-3YrReview.pdf>

Misconduct Commission (CMC), tabled on 10 May 2012.<sup>3</sup> The Attorney-General announced the review and established the Advisory Panel prior to the Government's response to the Committee's 38 recommendations in that report.<sup>4</sup>

The Committee was unsuccessful in its attempts to meet with the Attorney-General on several occasions to discuss the Government's concerns about the CMC, first raised in the Parliament on 19 June 2012.<sup>5</sup> However, the Committee was not consulted on this review prior to the announcement or establishment of the Advisory Panel, and prior to the terms of reference being tabled, received a copy of the terms of reference from a representative of the media.

The Committee is concerned about the wide terms of reference of the Advisory Panel in conjunction with the relatively short timeframe to conduct the review. Any review of the CMC should be undertaken by a properly resourced body with sufficient time to gain a thorough understanding of the issues and to develop practical, workable recommendations.

Whilst acknowledging the right of the Government to review the CMC, and the skills and experience of the members of the Advisory Panel, the Committee is concerned that the Advisory Panel has not been afforded sufficient time for any thorough review of the CMC, particularly given that any recommendations of the Advisory Panel could result in significant changes to the structure and operations of the CMC.

### **The Committee's three yearly reviews of the CMC**

Section 292(f) of the CM Act requires the Committee to undertake a review of the CMC before the end of each committee's three year term. The reviews undertaken by the Committee are not clause by clause reviews of the CM Act, rather a review of the CMC's activities and its performance of its functions.

The Committee's review of the CMC and subsequent Committee report is an effective and important tool for the Committee to highlight to the Parliament and to the people of Queensland how the CMC performs its functions under the CM Act, and to make any necessary recommendations for changes.

The requirement for a review every three years aligns with the Parliamentary cycle and allows each Committee the opportunity to gain a good knowledge of the CMC, its practices and systems and, critically, to identify areas of the CMC which require improvement, prior to the review.

As noted above, the latest Committee report on the review of the CMC was tabled in May 2012. The former Committee recommended that Committee reviews of the CMC be undertaken every five years, rather than the current three years (see recommendation 35).<sup>6</sup> During that review, a number of recommendations from a former Committee's review of the CMC, which had been

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<sup>3</sup> Ibid.

<sup>4</sup> Queensland Government response to the Parliamentary Crime and Misconduct Committee Report No. 86, Three Yearly Review of the Crime and Misconduct Commission, tabled 8 November 2012, available at: <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2012/5412T1529.pdf>

<sup>5</sup> Queensland Parliament, Record of Proceedings, 19 June 2012, at 723-724.

<sup>6</sup> Op. Cit, n2 at 167.

accepted by the Government, were not implemented or had been implemented but not fully monitored at the time of the Committee's review.

Reviews of other bodies, such as the legislated strategic review of the Ombudsman and review of the Office of the Information Commissioner are undertaken every five years which allows sufficient time for any changes recommended during the former strategic review to be both implemented, monitored and evaluated prior to a further review.<sup>7</sup>

The Committee recommends that the Committee's legislated review of the CMC be retained, but, as recommended in report no 86, that review be undertaken on a five yearly basis rather than the current three year cycle. The Committee considers that this recommendation is particularly prudent at this time, given the time required for the Government to consider, implement and monitor any recommendations flowing from this review which result in significant changes to the CMC, its structure, its functions or its operations.

### **Structure of the CMC**

The Committee notes the structural changes that the CMC has undergone over the years since its establishment following the Fitzgerald Inquiry.<sup>8</sup> The initial body to be established following the Fitzgerald Review was the Criminal Justice Commission, which had similar powers and functions as the current CMC. The *Crime Commission Act 1997* split the functions of the CJC between the Criminal Justice Commission, which focussed on Misconduct, and the Queensland Crime Commission, which focussed on Crime. Hon. Russell Cooper MLA, then Minister for Police and Corrective Services, provided a range of reasons for the split during the second Reading of the bill, including:

- *that the multiple functions and responsibilities of the CJC mean that resources and energies are divided in such a way that do not permit a suitable concentration on combating organised crime;*
- *a Crime Commission will provide a singularity of purpose with regards to organised and major crime and paedophilia, and will free the CJC to concentrate more fully on its very important charter of corruption detection and prevention...; and*
- *the very palpable conflict between the CJC's role as a watchdog over police corruption and its close working relationship with police through the Joint Organised Crime Task Force.*<sup>9</sup>

On 1 January 2002, the CM Act established the CMC with reunited crime and misconduct functions. The reasons provided in the Explanatory Notes to the Crime and Misconduct Bill 2001 include *greater efficiency in the fight against serious crime and misconduct and to recognise long standing arrangements for resolution of misconduct complaints to make the process more*

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<sup>7</sup> *Right to Information Act 2009*, section 186; *Ombudsman Act 2001*, section 83.

<sup>8</sup> Commission of Inquiry into Possible Illegal activities and Associated Police Misconduct, *Report of a Commission of Inquiry pursuant to Orders in Council*, June 1989

<sup>9</sup> Queensland Parliament, *Hansard*, Thursday 30 October 1997, at 4109, available at: <http://www.parliament.qld.gov.au/documents/hansard/1997/971030ha.pdf>

*transparent whilst ensuring the commission has an oversight role including powers to take over and complete investigations, if required.*<sup>10</sup>

The former Committee (the 8th PCMC of the 53<sup>rd</sup> Parliament) considered this issue during its three yearly review of the CMC and noted that former PCMC's had considered and examined the proposals to split the CMC. The 6th PCMC, in its Three Yearly Review Report in October 2006, found no substance in concerns that there were conflicts of interest in having CMC police officers investigate serious crime or misconduct which could show police involvement in that crime or misconduct.<sup>11</sup> That Committee referred to the safeguard provided in the operation of section 329 of the Act which requires the CMC Chairperson to notify the Committee of suspected improper conduct by CMC officers. Section 329 improper conduct notifications continue and, experience of this and former committees shows a low threshold of behaviour will arouse the suspicion of the Chairperson of the CMC that suspected improper conduct by a CMC officer has occurred. The Chairperson of the CMC then notifies the Committee. The Committee will then consider the notification and may undertake one of the actions set out in section 295(2) of the CM Act, usually requesting that a subsequent investigation and report to the Committee on that conduct, and advice as to the proposed disciplinary action proposed where appropriate.<sup>12</sup>

The former Committee found no compelling reasons why a split of the functions of the CMC between two distinct and separate bodies should occur. That Committee also noted that there is often a close interaction between criminal matters and official misconduct that are best served by being investigated by the same body.

In coming to this conclusion the former Committee had the benefit of its review of the CMC which found no major concerns with the CMC's crime function or its misconduct function. Whilst the Committee found room for improvement in some areas, this was more of a general or minor nature, which does not constitute a basis for splitting the CMC.

The sheer cost of splitting the functions of the CMC between two organisations, including the potential duplication of administration, is not justified by any potential benefits of a split. The inclusion of the crime and misconduct functions within the CMC avoids duplication of administration, staffing, resources and workload, and effective communication between the Commissioners and senior staff of the CMC ensures that potential links between misconduct and crime are investigated appropriately. Splitting the functions could result in significant extra costs and a reduction in the effective and efficient identification of connections and associations of persons involved in misconduct and crime, particularly serious organised crime. The Committee endorses the findings of the former Committee and recommends that the CMC structure remain as it is.

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<sup>10</sup> Crime and Misconduct Bill 2001, Explanatory Notes, at 1, available at:

<http://www.legislation.qld.gov.au/Bills/50PDF/2001/CrimeMiscB01Exp.pdf>

<sup>11</sup> Parliamentary Crime and Misconduct Committee, Report no 71, *Three Yearly review of the Crime and Misconduct Commission*, October 2006, at 13.

<sup>12</sup> Section 295(4) provides that the CMC, the police service, the parliamentary commissioner, or another investigative agency must investigate and report on matters as asked by the Committee.

### **The CMC's Crime functions**

The Committee considers that the CMC performs its crime functions well. The CMC's performance of its crime functions assisting or in partnership with the QPS was endorsed during the former Committee's review of the CMC by the then Deputy Commissioner of Police, Mr Ian Stewart.<sup>13</sup> Despite calls from the Queensland Police Union of Employees for some functions of the CMC to rest with Police (including witness protection and the CMC Cerberus unit's focus on paedophilia) the Committee considers that those functions should remain with the CMC and movement of those functions from the CMC to police is unnecessary and would not necessarily result in cost savings.

The Committee notes that the former Committee:

- had no concerns regarding the parameters of the CMC's serious crime role and is of the view that its current investigative powers should be maintained;
- was of the view that there are no concerns which would warrant a revision of the CMC's major crime role; and
- considered that the investigative powers currently given to the Commission for its crime jurisdiction are appropriate and should be maintained.<sup>14</sup>

### ***Proceeds of Crime***

The objects of the *Criminal Proceeds Confiscation Act 2002* (the CPCA) is to remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity. The CPCA provides for two schemes of restraint and forfeiture of assets linked to criminal activity. The CMC is tasked with administering the scheme which does not require a criminal conviction prior to the restraint and forfeiture assets.<sup>15</sup> The Director of Public Prosecutions is tasked with the criminal conviction restraint and forfeiture of assets.

The CMC's Proceeds of Crime Unit provides a dual benefit to Queenslanders in that it disrupts illegal activity by removing associated financial benefits, and in the restraint and subsequent forfeiture of assets to the State.<sup>16</sup> In 2011-12 the CMC restrained \$20.858m and forfeited \$7.007m in assets.<sup>17</sup> Given that the unit both disrupts criminal activity and increases state revenue, the Committee considers that this area of the CMC is of particular importance.

This unit is under-resourced at present and its significant workload means that focus is taken away from new matters and directed towards finalising matters already on foot. The queuing of new matters, as outlined in the CMC's Annual Report for 2011-12, provides time and opportunities for

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<sup>13</sup> Parliamentary Crime and Misconduct Committee, *Public Hearing - Three Yearly Review of the Crime and Misconduct Commission, Transcript of Proceedings*, 3 November 2011, at 28-29.

<sup>14</sup> Op. Cit, n2.

<sup>15</sup> *Criminal Proceeds Confiscation Act 2002*, section 4(5).

<sup>16</sup> Ibid, sections 59 and 153.

<sup>17</sup> Crime and Misconduct Commission, Annual Report 2011-12, September 2012, tabled 17 September 2012, available at: <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2012/5412T1089.pdf>

a suspected criminal to dispose of money and other assets obtained through criminal activities.<sup>18</sup> Current pressures on this unit are not sustainable and without significant financial and human resource investment in this unit, this situation will be further exasperated upon the proposed introduction of further unexplained wealth legislation.

Given the demonstrated difficulty in attracting and retaining staff to this important area of the CMC, the Committee considers it imperative that the CMC and the Government work together to ensure the future of this important CMC resource.

### **The CMC's Misconduct functions**

The CMC receives a significant number of complaints regarding misconduct; in 2011-12 the CMC assessed 5192 complaints. Given its resources, it is not possible for the CMC to investigate all complaints. To this end the Devolution Principle, set out in section 34 of the CM Act, provides:

*...subject to the cooperation and public interest principles and the capacity of the unit of public administration, action to prevent and deal with misconduct in a unit of public administration should generally happen within the unit.*

The Committee has found, consistent with the findings of former Committees, that some work is required to improve understanding amongst complainants to the CMC, the general public and departmental staff, of the role of the CMC in investigating complaints and, particularly, in relation to the devolution principle. Many of the complaints about the CMC received by the Committee relate to the referral of that matter to the agency being complained about. It seems to be of particular concern to some complaints where a complaint about the QPS or a police officer is referred back to the QPS. The Committee often receives complaints that this leads to police investigating their own.

Whilst the Committee agrees with the devolution principle, it is concerned that in some cases the CMC does not intervene at the earliest point to ensure that the complaint is considered and investigated appropriately. The Committee has received a small number of reports from the CMC which detail situations where the CMC has decided against retrieving carriage of the complaint where a disagreement arises between the Unit of Public Administration and the CMC regarding the findings and the proposed course of action in relation to the complaint.

This Committee endorses recommendation 12 of the former Committee in Report no 86, namely that the CMC focus on closely monitoring the performance of devolved agencies when dealing with and preventing misconduct, including more active involvement, if required, in matters that have been referred to agencies.<sup>19</sup>

Further, the retrieval of complaints, e.g. when the CMC considers that agencies have not investigated the complaint appropriately, or where the agency has reached a finding that the CMC considers could not be substantiated on the facts and/or the evidence, will model best practice

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<sup>18</sup> Ibid.

<sup>19</sup> Op. cit, n2, at 55.

and enhance the capacity of units of public administration to deal with misconduct effectively and appropriately.

### **CMC budget and staffing**

The Committee is concerned that there are increasing demands on the CMC to detect and investigate new and emerging trends, and new technologies in crime. As referred to earlier, this is compounded with the difficulty in attracting and retaining skilled and experienced staff, particularly in the proceeds of crime area, referenced above. The CMC is now required to manage these increasing demands with a reduced budget and reduced staffing.

The CMC budget for 2012/2013 was reduced from that provided in 2011/2012 from \$50,553,000 to \$50,037,000; a reduction of approximately \$516,000.<sup>20</sup> The Committee's jurisdiction does not include the CMC budget. However, given the obvious correlation between the resourcing of the CMC and the performance of its functions, the Committee does receive advice on budgetary concerns of the CMC in respect of its abilities to perform its functions.

The Committee has particular concern regarding the current staffing issues within the CMC. This follows advice from the Chairperson of the CMC during the Committee's bi-monthly meetings with the CMC, and comments made by the Chairperson of the CMC at the Estimates Committee hearing on 11 October 2012 that the 1% cut in the CMC's 2012-13 budget disproportionately affected the CMC and resulted in a loss of 30 positions, and 44 staff, at the CMC. Further, the Committee notes the recent CMC media statement that a further 13 staff were made redundant, effective 23 November 2012.<sup>21</sup> The total number of staff to leave the CMC between 1 July 2012 and 23 November 2012 will be 57. The Committee is concerned that such a reduction in staffing will inevitably affect the CMC's ability to perform its functions effectively.

The Committee notes a 1% budget reduction has contributed to the loss of a significant number of CMC staff. The Advisory Panel should consider the current funding of positions within the CMC carefully to ensure that the CMC has sufficient resources to fulfil its functions effectively.

As an independent body, it is important that the CMC Chairperson retain control over how the budget is allocated across the CMC. There is no requirement for the Treasurer to consult with the Committee on the proposed budget of the CMC. Legislation provides that the Legal Affairs and Community Safety Committee (and its predecessors the Legal, Constitutional and Administrative Review Committee, the Law, Justice and Safety Committee and the Legal Affairs, Police, Corrective Services and Emergency Services Committee) is to be consulted by the Treasurer on the proposed budget for the Ombudsman.<sup>22</sup>

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<sup>20</sup> Queensland Government, *State Budget 2012-13, Service Delivery Statements – Department of Justice and Attorney General*, at 50, available at: <http://www.budget.qld.gov.au/>

<sup>21</sup> Crime and Misconduct Commission, *Statement – 07.11.2012*, available at: <http://www.cmc.qld.gov.au/news-and-media/media-releases/cmc-statement-2014-7.11.2012>

<sup>22</sup> *Ombudsman Act 2001*, section 88(3).

To that end, the Committee considers an amendment to the Crime and Misconduct Act may be required to provide for the Committee to be properly consulted on the proposed budget of the CMC.

### **Use and possible abuse of functions conferred by the Act**

It would seem that this aspect of the Advisory Panel's terms of reference stems from the media reports of a CMC assessment, and subsequent investigation, of matters during the 2012 State election, as canvassed in the former Committee's report on its three yearly review of the CMC. The Committee notes that this issue is not new and has been considered by former Committees since at least 1991.

The Committee acknowledges that public disclosure of the existence of a CMC investigation may have negative impacts upon a person's reputation, particularly if that person is running for office, regardless of whether an actual CMC assessment or investigation is underway and regardless of any outcome of a CMC assessment or investigation. However, the Committee endorses the views of the former Committee that restricting the CMC from publicising details of its operations during an election or otherwise would fly in the face of its independence and openness. The transparency of the CMC's operations outweighs the need for any legislative gagging of the CMC or a complainant to the CMC. Further, the CMC must continue to assess each complaint received, regardless of who made that complaint, whether the complaint is of a political nature, or whether it was made during an election campaign.

In considering a complaint about the CMC, in relation to its media policy and statements made by the CMC during the 2012 election campaign, the Committee determined that the CMC acted appropriately in providing a factually correct media statement regarding its assessment of certain matters. The Committee accepted the advice of the Chairperson of the CMC that the CMC released a media statement to media outlets to pre-empt a misleading media report which would, incorrectly, detail an investigation by the CMC into, and purported action by the CMC regarding, the then candidate for Ashgrove. Additionally the CMC attached a fact sheet to its media statement to explain the distinction between an assessment and an investigation by the CMC.

The Committee considers that whilst the CMC complaints process may be misused by candidates in elections, the CMC cannot control how media representatives, complainants, political candidates or parties place or use information in the public domain. The Committee considers that it is not feasible nor desirable for the CMC to attempt to correct all incorrect media articles.

The CMC provides advice to all candidates prior to an election that the CMC complaints process is not to be misused for political gain. The Committee considers that attempts to require the confidentiality of complaints and matters referred to the CMC will be difficult to enforce and, should the CMC be tasked with identifying and enforcing breaches, could take resources away from the core functions of the CMC. A complainant could circumvent a requirement for the confidentiality of a complaint referred to the CMC, by disclosing their intention to refer the matter to the CMC. Further, the Committee considers that placing onerous restrictions on complainants



could result in legitimate complainants refraining from making complaints about serious crime or misconduct for fear of possible adverse consequences should that complaint be disclosed.

The Committee considers that the CMC, as an independent body, should retain the discretion to make public statements in relation to the performance of its functions, including statements relating to complaints or investigations of the CMC where it is in the public interest to do so.

The Committee considers that no amendment of the Act is required in this regard.

### **Conclusion**

In closing, the Committee reiterates that a recent review of the CMC by the former Parliamentary Crime and Misconduct Committee found no major concerns regarding the CMC. The Committee considers the CMC a professional, independent organisation which fulfils its functions appropriately. The Committee acknowledges that much of the work of the CMC is confidential and notes, in this regard that the CMC is subject to thorough, ongoing oversight by this Committee, the Parliamentary Commissioner and through its public reports, reports to the Attorney-General and those reports tabled in the Parliament. The Committee acknowledges that there is room for some improvement within the CMC, though the recent review of the CMC found no major concerns. The Committee has found that the CMC is open to change where necessary; a positive sign of an agency which must continually grow and improve in order to meet and respond to changing demands and new technologies in the detection and prevention of crime and misconduct.

The PCMC stands ready to work with the Government in relation to this review for the purpose of enhancing and expanding the important functions of the CMC – functions that Queenslanders have come to depend upon.

The Committee has provided a copy of this submission to the Attorney-General for his information. The Committee also resolved to place its submission on its website and expects that the Advisory Panel will, likewise, publicly release the submission.

Please contact the Committee's Acting Research Director, Ms Amanda Honeyman, on 3406 7207 if you require further information.

Yours sincerely

**Mrs Liz Cunningham MP**

Chair

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## **Functions of the Parliamentary Crime and Misconduct Committee**

Section 292 of the CM Act sets out the functions of the Committee as:

- 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 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; and*
- g) *to issue guidelines and give directions to the commission as provided under this Act.*

### **Monitoring and reviewing the performance of the functions of the CMC**

As there is no definition of 'monitor and review' in the CM Act, successive Committee's developed procedures under which the Committee performs this function. The Committee actively monitors and reviews the performance of the CMC's functions by:

- holding regular Committee meetings;
- carefully examining confidential bi-monthly reports of the CMC which contain detailed information about the activities of the CMC during the relevant period;
- considering the confidential minutes of meetings of the CMC and its executive;
- holding bi-monthly *in camera* meetings with the Chairperson, part-time Commissioners, and Assistant Commissioners of the CMC on the activities of the CMC;
- receiving and considering complaints against the CMC and its officers;
- reviewing CMC reports;
- requesting reports from the CMC on matters which arise via complaints, the media or other means;
- conducting inquiries into specific or general matters relating to the CMC;
- conducting (either itself or through the Parliamentary Crime and Misconduct Commissioner) audits of various registers and files kept by the CMC concerning the use of its powers;
- meeting regularly with the Parliamentary Crime and Misconduct Commissioner to discuss the Commissioner's activities;
- seeking independent legal advice to assist the Committee where a particular skill or expertise is required; and
- examining the appropriateness of the CMC's performance measures.