Parliamentary Committees

Crime and Misconduct and Other Legislation Amendment Bill 2014

Report No. 62

Legal Affairs and Community Safety Committee

April 2014

Legal Affairs and Community Safety Committee

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Abbreviations

Attorney-General	Hon. Jarrod Bleijie MP, Attorney-General and Minister for Justice
Bill	Crime and Misconduct and Other Legislation Bill 2014
Callinan/Aroney Review	Review of the Crime and Misconduct Act and related matters, Report of the Independent Advisory Panel – Hon. Ian Callinan AC and Professor Nicholas Aroney, 18 March 2013.
CaPE	Conduct and Performance Excellence
CCE	Commission Chief Executive
Committee	Legal Affairs and Community Safety Committee
CM Act	*Crime and Misconduct Act 2001*
CCC	Crime and Corruption Commission
CMC	Crime and Misconduct Commission
CJC	Criminal Justice Commission
Fitzgerald Report	Report of the Commission of inquiry into Possible Illegal Activities and Associated Police Misconduct {1989), Hon. Tony Fitzgerald AC, QC
IBAC	Independent Broad-based Anti-Corruption Commission
ICAC	Independent Commission Against Corruption
Keelty Review	Review by Mr Michael Keelty of the Crime and Misconduct Commission issued 19 November 2013.
PCMC	Parliamentary Crime and Misconduct Committee
Parliamentary Commissioner	Parliamentary Crime and Misconduct Commissioner or Parliamentary Crime and Corruption Commissioner
PID Act	*Public Interest Disclosure Act 2010*
PS Act	*Public Service Act 2008*
PSC	Public Service Commission
QLS	Queensland Law Society
QNU	Queensland Nurses' Union
QPS	Queensland Police Service
QPU	Queensland Police Union of Employees

Chair's foreword

This report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Crime and Misconduct and Other Legislation Amendment Bill 2014.

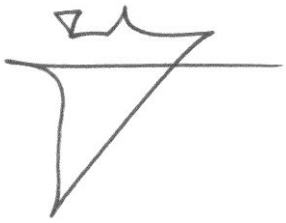
The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

While the Bill was not the largest Bill considered by the Committee, nor did it receive the most number of submissions, the Committee has been required to consider an array of very important and complex matters that will have a real impact on the way the Queensland's integrity organisations operate.

On behalf of the Committee, I thank those individuals and organisations who lodged written submissions on this Bill and those who provided further evidence at the public hearing. The Committee received volumes of information to consider and while the Committee has considered, in detail, all evidence it has received, it has simply not been possible to refer to each and every matter raised by submitters in this Report.

I take this opportunity to thank the Committee's Secretariat for its assistance throughout the inquiry. The Secretariat's assistance was invaluable in supporting the Committee prepare its report in the time provided by the House. I also thank the staff of the Department of Justice and Attorney-General, the Public Service Commission and the Crime and Misconduct Commission who similarly provided valuable assistance to the Committee, as required, throughout the conduct of the inquiry.

I commend this report to the House.



Ian Berry MP

Chair

Recommendations

Recommendation 1 **3**

The majority of the Committee recommends the Crime and Misconduct and Other Legislation Amendment Bill 2014 be passed.

Recommendation 2 **20**

The majority of the Committee recommends the Bill be amended to provide the new Parliamentary Crime and Corruption Committee with a power of veto over the appointment of Commissioners. The Committee considers a process similar to that used in New South Wales for the appointment of Independent Commission Against Corruption Commissioners is appropriate.

Recommendation 3 **27**

The majority of the Committee recommends the Bill be amended to ensure that the term 'police misconduct' is completely detached from the definition of 'corruption' or 'corrupt conduct' in all possible aspects. This should be done by including separate parts to deal with corruption and police misconduct.

Recommendation 4 **28**

The majority of the Committee recommends the Government give consideration to adding Queensland to the title of the new Crime and Corruption Commission to ensure that there is no confusion with the Western Australian integrity agency.

Recommendation 5 **37**

The majority of the Committee recommends the Bill be amended to ensure there is consistency in the application of existing section 216 and new section 216A.

Recommendation 6 **43**

The majority of the Committee recommends the Bill be amended to include further examples of exceptional circumstances to the list under section 36(3) such as the person making the complaint is a child; or is suffering from some other personal or physical disadvantage which might result in the making of a statutory declaration difficult or impossible.

Point of clarification **43**

The majority of the Committee requests the Attorney-General and Minister for Justice clarify whether the Commission will be able to demand a statutory declaration be submitted in the instance where a complaint is made without an accompanying declaration and the commission requires a declaration to test the veracity of the complaint.

Point of clarification **43**

The majority of the Committee requests the Attorney-General and Minister for Justice clarify, for the benefit of the House the various meanings of the terms 'complaint', 'information' and 'matter' and confirm in what instances a statutory declaration is required under the Bill and in what circumstances a statutory declaration is not required.

1 Introduction

1.1 Role of the Committee

The Legal Affairs and Community Safety Committee (Committee) is a portfolio committee of the Legislative Assembly which commenced on 18 May 2012 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The Committee's primary areas of responsibility include:

- Justice and Attorney-General;
- Police Service; and
- Fire and Emergency Services.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation;
- the application of fundamental legislative principles; and
- for subordinate legislation – its lawfulness.

The Crime and Misconduct and Other Legislation Amendment Bill 2013 (Bill) was introduced into the House and referred to the Committee on 19 March 2014. By motion of the House on the same day, the Committee was required to report to the Legislative Assembly by 30 April 2014.

1.2 Inquiry process

On 20 March 2014, the Committee wrote to the Department of Justice and Attorney-General (Department) seeking advice on the Bill, and invited stakeholders and subscribers to lodge written submissions.

The Committee received written advice from the Department, including a comparative analysis of Australian jurisdictions' integrity commissions and received 38 submissions (see **Appendix A**).

The Committee held a public hearing on 16 April 2014 to receive further evidence from invited stakeholders (see **Appendix B**) and ask questions to the Department on matters contained in the Bill.

1.3 Policy objectives of the Crime and Misconduct and Other Legislation Amendment Bill 2014

There are twelve policy objectives in the Bill which contribute to the reform of Queensland's most important crime fighting body, and transform the Crime and Misconduct Commission (CMC) into a new Crime and Corruption Commission (CCC).

The objectives are to:

1. reform the upper governance structure of the CMC*;*
2. change the definition of 'official misconduct' in the *Crime and Misconduct Act 2001* to raise the threshold for what matters are captured within that definition and rename the defined conduct as 'corrupt conduct';

[1] *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

3. rename the 'misconduct function' in the CM Act to 'corruption function'; which will result in the following new titles: '*Crime and Corruption Act 2001*'; 'Crime and Corruption Commission'; 'Parliamentary Crime and Corruption Committee' and 'Parliamentary Crime and Corruption Commissioner';
4. improve the complaints management system of the commission to refocus it on more serious cases of corruption and reduce the number of complaints the commission is to deal with and investigate;
5. remove the commission's responsibilities for the 'prevention' of corruption in units of public administration;
6. ensure the commission's research function is more focussed and relevant to its functions;
7. strengthen the transparency and accountability of the commission by expanding the role of the Parliamentary Crime and Corruption Commissioner (Parliamentary Commissioner) in his oversight of the commission, and requiring meetings between the commission and the Parliamentary Crime and Corruption Committee (the parliamentary committee) to be held in public as much as possible;
8. clarify the grounds for discipline and what disciplinary action may be taken by the commission in relation to conduct of commission officers;
9. make transitional arrangements to continue the current Acting Chairperson's appointment and certain other appointments; and provide transitional arrangements for the ending of other appointments;
10. implement recent recommendations of public reports about the commission's investigation of alleged official misconduct at the University of Queensland and to make other unrelated minor amendments to the CM Act;
11. improve the management of personal conduct and work performance of Queensland public service employees; and
12. make consequential amendments to the CM Act, the *Public Service Act 2008* (PS Act) and other Queensland legislation and regulations to support the above policy objectives.

1.4 Consultation on the Bill

As set out in the Explanatory Notes, consultation on the Bill has occurred over an extended period of time, over different levels.

Public submissions were sought by the Expert Advisory Panel which initially considered reforms to the CMC.

The Acting Chairperson of the CMC was a member of the implementation panel established to oversee and direct the implementation of the recommendations accepted by the Government from a number of reports which lead to the development of the Bill.

A number of judicial officers were consulted in relation to amendments which have possible impacts on members of the judiciary.

The Queensland Ombudsman was consulted about the definition of corrupt conduct and the complaints management systems which are contained in the Bill.

No general consultation with the community and stakeholders was conducted by the Government on the terms of the Bill.

1.5 Should the Bill be passed?

Standing Order 132(1) requires the Committee to determine whether or not to recommend the Bill be passed.

The Committee has examined the Bill and its policy objectives and has given thorough consideration to the information provided by the Department, the CMC and other stakeholders, including the written submissions and the evidence taken at the public hearing.

While the Committee accepts there are a number of areas in the Bill which require amendment, the Committee is satisfied the Bill achieves its intended policy objectives and will significantly improve the functions and processes of the existing Crime and Misconduct Commission.

The majority of the Committee therefore has no hesitation in making the following recommendation.

Recommendation 1

The majority of the Committee recommends the Crime and Misconduct and Other Legislation Amendment Bill 2014 be passed.

2 Examination of the Crime and Misconduct and Other Legislation Amendment Bill 2014

2.1 Background to the Bill

The Crime and Misconduct and Other Legislation Amendment Bill 2014 (Bill) is the product of a number of different reviews of the CMC over the past few years. As highlighted in part 1 of this report, the Bill has a number of policy objectives which are designed to streamline and improve the operations of one of Queensland's most important organisations, the CMC.

Expert Advisory Panel – Callinan/Aroney Review

The Attorney-General and Minister for Justice, the Honourable Jarrod Bleijie MP (Attorney-General) announced a review of the *Crime and Misconduct Act 2001* (CM Act) on 11 October 2012. The review was established to consider whether any changes to the CM Act were required to improve the operations of organisations such as the CMC.[2]

The review was undertaken by an expert advisory panel headed by former High Court Justice, the Honourable Ian Callinan AC and University of Queensland Professor Nicholas Aroney with the following terms of reference:

1. *An Advisory Panel is established comprising Ian David Francis Callinan AC and Nicholas Aroney to advise the Attorney-General and Minister for Justice in relation to the matters set out below.*
2. *The Advisory Panel shall make such recommendations as it thinks fit:*
    a. *as to whether the* Crime and Misconduct Act 2001 *(Qld) ('the Act') and any other associated statutes and regulations should be amended;*
    b. *to improve the operation of agencies charged with, or concerned in the operation of the Act with respect to:*
        i. *the use or any abuse of the powers and functions conferred by the Act;*
        ii. *ensuring the maintenance of public confidence in the Act and the relevant agencies;*
    c. *to ensure the prioritisation of focus by the relevant agencies on:*
        i. *criminal organisations;*
        ii. *major crime;*
        iii. *the elimination and prevention of corruption in public affairs;*
        iv. *timeliness and appropriateness of action by the relevant agencies;*
    d. *with respect to such other matters as the Panel think relevant to any of the above matters.*
3. *The Advisory Panel's recommendations are to be made by way of a report, to be provided to the Attorney-General by 14 March 2013.*[3]

[2] http://www.justice.qld.gov.au/cmareview/about
[3] http://www.justice.qld.gov.au/cmareview/about/terms-of-reference

The Attorney-General announced, on 11 March 2013, the Advisory Panel would report by 28 March 2013.

An executive summary of the report was released on 3 April 2013 with the full report (Callinan/Aroney Review) tabled in Parliament, by the Attorney-General, on 18 April 2013. Submissions received by the Advisory Panel and which were relied upon to inform the panel's deliberations, have not been publicly released.

Parliamentary Crime and Misconduct Committee inquiry into release of documents

Unrelated to the Callinan/Aroney Review, on 6 March 2013, the Parliamentary Crime and Misconduct Committee (PCMC) commenced its own inquiry into the release of documents by the CMC, in response to the then Chair of the PCMC being advised by the CMC of the dissemination of former *Fitzgerald Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (Fitzgerald Inquiry) material through the CMC's holdings at the Queensland State Archives.[4]

While the PCMC's inquiry was on foot, the Legislative Assembly resolved for the PCMC to conduct further inquiry on behalf of the Parliament, requiring the PCMC to:

(a) report upon the incorrect classification of documents transferred from the CMC between 2007 and 2009;

(b) report upon the CMC's failure to remedy the incorrect classification of the above documents in a timely and effective manner;

(c) report upon the destruction of records;

(d) report upon the failure by the CMC to account to the PCMC in a timely and effective manner regarding (a) to (c);

(e) report on how the issues arising from the incorrect classification of documents can be remedied in the longer term, including whether some or all of those documents have to remain confidential; and

(f) report on any other matters and make any other recommendations the PCMC believes necessary to address issues raised in its inquiry.[5]

The Committee tabled its report on the above matters on 5 April 2013.

Government Response

On 3 July 2013, the Government tabled its response to the recommendations in both reports.[6]

The Government response indicated it would establish an implementation panel—comprising the Director-General, Department of Justice and Attorney-General as panel chair; the Director-General, Department of the Premier and Cabinet; the Commission Chief Executive (CCE) of the Public Service Commission (PSC); and the Acting Chairperson of the CMC – to oversee and direct the consideration and implementation of the accepted recommendations in the Government response.

The Bill contains much of the implementation panel's work and seeks to implement the Government accepted recommendations to the Callinan/Aroney Review and the PCMC inquiry into the release of documents.

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4 Parliamentary Crime and Misconduct Committee, Report No. 90, *Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Inquiry documents,* April 2013, page 1.

5 Parliamentary Crime and Misconduct Committee, Report No. 90, *Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Inquiry documents,* April 2013, page 1.

6 http://www.parliament.qld.gov.au/documents/committees/PCMC/2013/FitzgeraldDocuments/gr-Jul2013.pdf

Other matters

The Bill also includes selected matters from the PCMC's last two three yearly reviews of the CMC conducted in accordance with the terms of the CM Act and which have remained largely unaddressed to date and other unrelated amendments arising out of the CMC's investigation into allegations of official misconduct at the University of Queensland.[7]

2.2 History of the Crime and Misconduct Commission

An extensive overview of the history and evolution of the CMC appears at pages 27-35 of the Callinan/Aroney Review.[8] Readers are directed to that report for a detailed background on the CMC and its predecessor, the Criminal Justice Commission (CJC).

In short, the CMC was established by the CM Act and can be traced directly to the CJC which was established pursuant to recommendations made as a result of the Fitzgerald Inquiry. The CJC merged with the Queensland Crime Commission to become the CMC and has remained largely unchanged since 2001.

The Bill before the Committee includes the most significant changes to the CMC in its relatively short history.

This report now turns to the Committee's consideration of the policy proposals contained in the Bill.

2.3 Reforming the upper governance structure of the CMC

It could be considered the most significant reforms contained in the Bill are those which reshape the upper governance structure of the CMC. In addition to the renaming of the CMC to the CCC and refocussing its functions on crime and serious corruption (which are dealt with in more detail later in this report), the Bill proposes to make significant changes to the upper governance structure of the CMC.

The Attorney-General stated in his Introductory Speech:

> *We have also examined the various governance structures for similar bodies around Australia, each with their own particular nuances and variations. The government welcomes suggestions and comments about the upper governance structure as reflected in the bill—by the Legal Affairs and Community Safety Committee when it considers the bill, by individuals and organisations who no doubt will make submissions to the parliamentary committee, and by commentators generally.*[9]

Current structure of the CMC, qualifications of, and appointment process for Commissioners

Current Structure

The CMC is a statutory body[10] established under the CM Act[11] and consists of five Commissioners –

- one full-time Commissioner who is the Chairperson and also Chief Executive Officer of the commission; and
- four part-time Commissioners who are community representatives; and who one of which has a demonstrated interest in civil liberties.[12]

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7 *Record of Proceedings (Hansard)*, 19 March 2014, page 704.
8 http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2447.pdf
9 *Record of Proceedings (Hansard)*, 19 March 2014, page 703.
10 *Crime and Misconduct Act 2001*, section 221A.
11 *Crime and Misconduct Act 2001*, section 220.

Together, the five Commissioners form the commission (akin to a board) and act as the primary decision making authority within the CMC.

Current Qualifications

The qualifications for appointment as a Commissioner are set out in the CM Act.[13]

The single qualification for appointment as the Chairperson (and CEO) is that the person must have served as, or is qualified for appointment as, a judge of either the Supreme Court of any State or the High Court of Federal Court.[14]

There are two categories for qualification for appointment as a part-time Commissioner:

- the civil liberties Commissioner – must be an Australian lawyer with at least five years' experience and has a demonstrated interest in civil liberties;[15] and
- the remaining three part-time Commissioners – must have qualifications or expertise in one or more of the areas of: public sector management and review; criminology; sociology; crime research or crime prevention; or community service experience or experience relating to public sector officials and public sector administration.[16]

There is also a requirement in the CM Act that at least one of the part-time Commissioners must be a woman.[17]

Current Appointment process

All Commissioners are currently appointed by the Governor in Council under the CM Act (as opposed to the PS Act).[18] The appointment process includes a bipartisan consultation process whereby before nominating a person for appointment as a Commissioner, the Attorney-General must first consult with—

- the PCMC; or
- if there is no PCMC at the relevant time, the Leader of the Opposition and the Leader in the Legislative Assembly of any other political party represented in the Assembly by at least 5 members.[19]

If consultation occurs with the PCMC, the Attorney-General may only nominate a person for appointment as a Commissioner to the Governor in Council – if the nomination is made with the bipartisan support of the PCMC.[20] Bipartisan support is defined in the CM Act to mean either the unanimous support of the PCMC or the support of a majority of the committee members, other than a majority consisting wholly of members of the political party or parties in government.[21]

12 *Crime and Misconduct Act 2001*, section 223.
13 *Crime and Misconduct Act 2001*, sections 224 and 225.
14 *Crime and Misconduct Act 2001*, section 224.
15 *Crime and Misconduct Act 2001*, section 225(1)(a).
16 *Crime and Misconduct Act 2001*, section 225(1)(b).
17 *Crime and Misconduct Act 2001*, section 230(4).
18 *Crime and Misconduct Act 2001*, sections 229 and 230.
19 *Crime and Misconduct Act 2001*, sections 228(1).
20 *Crime and Misconduct Act 2001*, sections 228(3).
21 *Crime and Misconduct Act 2001*, Schedule 2 Dictionary.

If the appointment is as a part-time Commissioner, the Attorney-General must also consult with the Chairperson of the CMC, however the Chairperson has no right of veto.[22] Also, as part of the appointment process for the 'civil liberties' Commissioner, the Attorney-General must ask the Bar Association Queensland and the Queensland Law Society (QLS) to each nominate two candidates for the position, prior to consulting with the PCMC and the Chairperson.

Currently, commissioners must not hold office as a Commissioner for more than five years in total.[23]

There are also a number of categories listed in Schedule 2 of the CM Act which make a person ineligible to be appointed as a Commissioner (see definition of *ineligible person*).

Proposed new structure of the Commission under the Bill

Both the Callinan/Aroney Review[24] and the PCMC Inquiry into release of documents[25] made a number of recommendations for changes to the governance structure of the CMC, with the PCMC specifically stating there should be '*structural separation of the role of Chairperson and CEO*.'[26]

The PCMC made the following comments in its report:

> *The* [PCMC] *does not believe that an organisation such as the CMC can continue to be managed by a CEO who is a skilled lawyer, but has little experience in managing a larger organisation.*
>
> *The* [PCMC] *finds that the current model of a Chairperson/CEO is flawed because the Chairperson's role as "Chairperson of the board" and "CEO" is at odds. This dual personality of the Chairperson diminishes the role of the other part-time Commissioners and embeds the culture that the approval of the Chairperson alone is important.*[27]

In reaching the proposed structure in the Bill, the Government examined various governance structures for similar bodies around Australia, each with their own particular nuances and variations.[28] A comparison of upper governance structures of integrity agencies around Australia was prepared by the Department and provided to the Committee on 26 March 2014.

In response to the need for structural change, the Attorney-General stated:

> *The structure of the commission has been the subject of much consideration and debate. That consideration and debate has obviously had significant regard to the Parliamentary Crime and Misconduct Committee's recommendation No. 19 that the Crime and Misconduct Act be amended to cause structural separation of the chairperson and chief executive officer and the circumstances leading up to the Parliamentary Crime and Misconduct Committee inquiry and report last year.*[29]

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22 *Crime and Misconduct Act 2001*, sections 228(2).

23 *Crime and Misconduct Act 2001*, sections 231(2).

24 The Honourable Ian Callinan AC and Professor Nicholas Aroney, *Review of the Crime and Misconduct Act 2001 and related matters*, March 2013, Recommendations 1, 4, 12 and 15.

25 Parliamentary Crime and Misconduct Committee, Report No. 90, *Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Inquiry documents,* April 2013, recommendations 2, 4, 18, and 19.

26 Parliamentary Crime and Misconduct Committee, Report No. 90, *Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Inquiry documents,* April 2013, Recommendation 19, page 80.

27 Parliamentary Crime and Misconduct Committee, Report No. 90, *Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Inquiry documents,* April 2013, page 80.

28 *Record of Proceedings (Hansard)*, 19 March 2014, page 703.

29 *Record of Proceedings (Hansard)*, 19 March 2014, page 703.

Clause 34 of the Bill sets out the proposal for membership of the commission which was settled on by the Government. The new structure proposed consists of:

- a full-time Commissioner who is the Chairman[30] of the commission;
- a part-time Commissioner who is the Deputy Chairman;
- a full-time Commissioner who is the Chief Executive Officer; and
- two part-time Commissioners who are 'ordinary Commissioners'.

The Attorney-General explained:

> *The commissioners, as the commission, will provide strategic direction and leadership for the performance of the commission's functions and the exercise of the commission's powers by the chairman, chief executive officer and commission staff.*[31]

Separation of the roles and responsibilities of the Chairperson and CEO

As set out above, the Bill separates the two roles of Chairperson and CEO, which are currently performed by a single person. New sections 251-253 set out the roles of the Commission (the board), the role of the Chairman, and the role of the CEO.

The Bill sets out who is responsible for the performance of the new CCC as follows.

Commission

The Commission is responsible for:

- *providing strategic leadership and direction for the performance of the commission's functions, and the exercise of the commission's powers, by the chairman, chief executive officer and commission staff; and*
- *the preparation of the commission's strategic and business plans; and*
- *the establishment of internal management committees and their charters; and*
- *the preparation of the internal audit charter prepared for the* Financial Accountability Act 2009*.*[32]

The Bill also provides that '*If asked by the chairman*', the commission may help the Chairman in the performance of the commission's functions or exercise of the commission's powers delegated to the Chairman under section 269.

Delegations

Section 269 sets out a range of Commission functions which are delegated to the Chairman and the CEO. All the commission's functions and powers under the CM Act or another Act, apart from those under sections 234, 251(1) and (2) (as amended by the Bill) and 259 are delegated to either the Chairman or Chief Executive Officer (CEO). The Chairman is delegated all the powers and functions of the commission apart from those which are delegated to the CEO.

The powers and functions delegated to the CEO include: sections 40, 245, 254, 256, 258, 260, and 346B of the CM Act; and the commission's financial accountability functions and public record powers.

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[30] The Bill contains a number of amendments which replace 'Chairperson' with 'Chairman'. This is discussed further at part 2.12.

[31] *Record of Proceedings (Hansard)*, 19 March 2014, page 703.

[32] New section 251.

The commission's financial accountability functions are those functions under the *Financial Accountability Act 2009* and the commission's public record powers are those powers under the *Public Records Act 2002*. New section 269(3) and 269(5) provide that the Chairman or CEO may sub-delegate a specific function or power to a senior executive officer for certain sections of the Act. Pursuant to new section 269(3) the CEO may sub-delegate a function or power of the commission delegated to the CEO to an 'appropriately qualified person'.

However, under new sections 269(4)(a),(b) and (c) there are limitations on the sub-delegation of a function or power pursuant to sections 254 and 346B of the CM Act and the commission's financial accountability functions. Further, section 269(6) provides that the sub-delegation of a power in relation to sections 50, 60 and 62 of the CM Act can be made to the CEO and/or a senior executive officer only.

Chairman

In short, under the Bill the Chairman is responsible for the proper performance of the commission's functions delegated to the Chairman under section 269 (described above).[33]

The Chairman is to report to the commission on the performance of the commission's functions, but is not subject to the direction of the commission in the performance of a function or exercise of a power in an investigation, hearing, operation or other proceeding under this Bill or another Act. Further, anything done in the commission's name by the Chairman or the Chairman's delegate is taken to have been done by the commission.[34]

Chief Executive Officer

Under the Bill, the CEO is responsible for the administration of the commission.

The CEO is to report to the commission on all matters relating to the administration of the commission; and the performance of the functions of the CEO under the Act. Anything done in the commission's name by the Chief Executive Officer or Chief Executive Officer's delegate is taken to have been done by the commission.[35]

Issues raised in submissions

While there has been general support from stakeholders about the structural separation of the two roles of the Chairperson and CEO, the allocation of responsibilities and the makeup of the new commission has received some criticism. For example, the QLS proposed a number of additional amendments to the Bill, however welcomed the introduction of a position of CEO to the Commission and stated that it saw the change as '*a significant positive advancement in the structural reform of the institution and steps toward the introduction of best practice corporate governance principles*.'[36]

Authoritarian Structure

The Bar Association of Queensland considered the new structure to be overly authoritarian, submitting:

> *The handing of increased power within the Commission to the chairman is brought about by changes to ss.251 and 269 of the Act. The new s.69 delegates the bulk of the Commission's functions to the Chairman and a number to the chief executive officer. Section 251 gives the*

[33] New section 251.
[34] New section 252.
[35] New section 253.
[36] Queensland Law Society, Submission No. 29, page 19.

> *Commission a strategic leadership role and responsibility for certain planning and reporting documents.*[37]

CEO as a Commissioner

The former Commissioners considered the proposed structure contained in the Bill was not consistent with the recommendation made by the PCMC in its inquiry into the CMC's release and destruction of Fitzgerald Inquiry documents. That recommendation required the CM Act to be amended *'to cause structural separation of the role of Chairperson and CEO'* with the new CEO reporting directly to the commission ('the board').[38] The PCMC's rationale for the proposed creation of a CEO (as understood by the former Commissioners) was:

> *…the insight that appointees as chairperson, while otherwise distinguished, may be unlikely to possess a background in corporate management and may possess little experience in managing a complex organisation like the CMC. An additional rationale is that if the commission is to discharge the core governance function of holding management accountable for its performance it is logical to attempt to separate, as far as possible, management from its oversight committee (that is, the commission).*[39]

The former Commissioners argued that '*by what amounts to little more than a slight of hand*' the intent of the PCMC's recommendation is entirely subverted by the governance scheme in the Bill.[40]

The QLS similarly raised issues with the new CEO having a role on the commission, submitting:

> *The Society has significant concerns at the CEO being themselves a commissioner of the Commission. It is understood that the position of CEO is to manage the operational affairs of the Commission and is: responsible to the commission for the administration of the commission.*
>
> *QLS is concerned that the role of CEO and commissioner may be confused by that individual holding two positions. From a corporate governance perspective it is not best practice to have a CEO who is charged with operational management and is responsible to the Commission, as a member of the body that oversees their conduct. The Society is well aware that there are in industry managing directors of private companies, but those positions are subject to significant external regulatory regimes through the* Corporations Act 2001 *(Cwth) and the Australian Securities and Investment Commission, the courts and a well-established body or law relating to conflict of interest and fiduciary duty.*
>
> *The role of CEO of the Commission appears to be inconsistent with being a full time commissioner. A further concern with the CEO being a full time commissioner is that it may also be uncertain in many circumstances who is leading the organisation, the CEO or Chair, depending on whether the issue of the day is characterised as 'operational'. This is an unsatisfactory result for a pivotal institution such as the Commission. There must be clear lines of authority and responsibility to promote transparency and independence.*[41]

In contrast, former Chairperson and CEO of the CMC, Professor Ross Martin, QC submitted from his experience in the dual role:

> *There is no one right way for such arrangements to be set up and there is no reason in principle why the CEO may not be a Commissioner.*

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37 Bar Association of Queensland, Submission No. 12, page 5.

38 Parliamentary Crime and Misconduct Committee, Report No. 90, *Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Inquiry documents,* April 2013, Recommendation 19.

39 Julie Cork, David Gow, Ann Gummow, Judith Bell and Philip Nase, Submission No. 33, pages 8-9.

40 Julie Cork, David Gow, Ann Gummow, Judith Bell and Philip Nase, Submission No. 33, pages 8-9.

41 Queensland Law Society, Submission No. 29, pages 19-20.

> *I found administrative matters of that sort burdensome in the sense that I bore responsibility for them and so had to give them significant attention.*
>
> *I have no problem with a CEO having the legislative responsibilities proposed. In the case of conflict between the CEO and the Chairman, the Bill reposes power in the commission to resolve it.*[42]

Committee Comment

The Committee accepts there are competing views on what could be considered a 'preferred approach' to the structural separation of the two roles of Chairperson and CEO. The delineation of roles and functions is clear in the Bill and the Committee does not anticipate that the people filling the new roles will have any difficulty in understanding the respective requirements of the new roles. The Committee is satisfied that (a) there is sufficient scope in the Bill for conflicts between the two roles to be resolved appropriately and (b) the new structure will at least be reviewed by the oversight parliamentary committee by 30 June 2016.

The Committee does not share the views proposed by some stakeholders that the proposed structure could lead to a danger of corruption and is satisfied the governance structure proposed in the Bill is sound and will enable the new Crime and Corruption Commission to function efficiently and effectively.

The Bill provides the PCMC with a new function of periodically reviewing the new structure of the commission, including the relationship between the types of Commissioners and the roles, functions and powers of the commission, Chairman and Chief Executive Officer and to table in the Legislative Assembly a report about the review, including any recommendations for changes to the CM Act.

The Committee addresses this function at part 2.8 of this report.

Appropriateness of roles, functions and delegations

Separate from the new governance structure of the new commission itself, the QLS raised general concerns with the functions and powers vested in the new roles, highlighting the Bill:

> *…introduces a new function for the CEO to issue a direction about how commission officers are to decide whether a complaint involves, or may involve, a more serious case of corrupt conduct or a case of systemic corrupt conduct within a unit of public administration. The CEO is subject to control and direction of the Chair. The Society notes that these matters are directly relevant to threshold policies, with a direct operational impact, and do not appear to be merely managerial.*
>
> *The CEO's role is focussed upon the Commission's administration, not the operational achievement of its core aims. We suggest that consideration should be given to whether the Commission itself, or the Chair, is better placed to be issuing directions about complaint handling, as this role is central to the CMC's legislative functions.*[43]

The QLS went on to state that under the new section 269(5), the Chairman may sub-delegate a function or power of the commission delegated to the Chairman under subsection (1) to an appropriately qualified commission officer.

[42] Professor Ross Martin QC, Submission No. 25, page 8.
[43] Queensland Law Society, Submission No. 29, page 9.

The QLS considered:

> *The powers of the Chair which may be delegated include most powers of the Commission. The Society is concerned that such delegation can take place without the ratification or agreement of the commission as a whole. We suggest this be reconsidered.*[44]

More particularly, the QLS submitted the amendment to section 146ZU of the CM Act contained in clause 25 of the Bill allows the new Chairman to delegate powers in relation to assumed identities (which are detailed in part 6B of the CM Act) to the new CEO or to any senior executive officer. The Committee understands, currently the delegation in that section is limited to the Assistant Commissioner (crime) and the Assistant Commissioner (misconduct) only. The QLS stated:

> *Section 146O of the* [CM] *Act deals with the purpose of Part 6B and states that the, "main purpose of this part is to facilitate investigations and intelligence gathering in relation to misconduct offences." The powers in relation to assumed identities are therefore quite significant and the Society maintains that these powers are best placed with the chairperson. These powers should only be delegated to assistant commissioners in strictly controlled circumstances. The Society does not support the delegation of these broad powers to the chief executive officer or a senior executive officer.*[45]

The QLS also raised additional concerns with the delegations in clause 26 of the Bill which broaden the scope of who must conduct hearings of the commission. The QLS was concerned that with the appointment processes for Senior Executive Officers under the Bill not requiring Governor in Council approval (which is the case for existing Assistant Commissioners) – the delegation to senior officers in section 178 of the CM Act to conduct hearings was inappropriate.[46] The QLS submitted:

> *…These roles are essentially staff appointments by the chairperson that do not require any further approvals by persons who are external to the Commission. The appointment of staff to conduct hearings is a significant change which, in our view, may diminish the accountability and independence of these hearings and will certainly have the potential to impact upon public perceptions in this regard. This is especially concerning due to the nature of closed hearings and the expansive powers that may be used against people who appear before the Commission. The Society does not support the proposed amendment.*

The QLS also raised concerns with section 179 of the CM Act which allows (a broader range of persons who qualify as) a presiding officer conducting a closed hearing to give a direction about who may be present at the hearing. The QLS submitted:

> *..this situation has the potential for serious abuse and might also function to reduce the public's confidence in the commission. The Society submits that this provision be repealed.*[47]

Committee Comment

The Committee considers the delegations contained in the Bill are appropriate for the new governance structure and does not recommend any amendments.

[44] Queensland Law Society, Submission No. 29, page 21.
[45] Queensland Law Society, Submission No. 29, pages 14-15.
[46] Queensland Law Society, Submission No. 29, page 15.
[47] Queensland Law Society, Submission No. 29, page 16.

Changes to the qualifications of Commissioners

Due to the changes in the nature and makeup of the commission, the Bill also amends the qualifications required for appointment as a Commissioner as follows.

The qualification for appointment as the Chairman and Deputy Chairman is that the person must have served as, or is qualified for appointment as, a judge of either the Supreme Court of any State or the High Court of Federal Court.[48] This is comparable to the current qualification for Chairperson.

In relation to the new role of Chairman, the Attorney-General stated:

> *The chairman is responsible for the proper performance of the functions and exercise of the powers delegated to the chairman under the act. The chairman is to report to the commission on the performance of the commission's functions but is not bound by any direction of the commission in the performance of functions or exercise of powers in an investigation, hearing, operation or other proceeding.*[49]

The qualification for appointment as the new CEO (new section 225(1)) is that the person must have qualifications, experience or standing appropriate to perform the functions of the Chief Executive Officer. This is a new position and the qualification is stated broadly. The Attorney-General explained:

> *The CEO is pivotal to the effective management of the commission. The CEO is responsible to the commission for the administration of the commission; and is to perform the functions and exercise the powers delegated to, or conferred on, the CEO under the act or specifically delegated to the CEO by the chairman. The CEO will be responsible for matters such as the employment, management and discipline of commission staff, the management of the commission's documents, including the Fitzgerald Commission of Inquiry documents, and the preparation and compliance with the commission's budget. The CEO is subject to the chairman's direction in respect of functions or a power delegated to the CEO by the chairman and is otherwise subject to the commission's direction in respect of performing a function or exercising a power under the act.*[50]

The qualification for appointment as one of the part-time or ordinary Commissioners (new section 225(2)) is that a person must have qualifications, experience or standing appropriate to assist the commission to perform its functions. This is a broader statement of qualifications than the existing requirement of – expertise in one or more of the areas of: public sector management and review; criminology; sociology; crime research or crime prevention; or community service experience or experience relating to public sector officials and public sector administration.

The concept of part-time Commissioners being community representatives will be removed from the CM Act under the Bill. Similarly, the requirement for one of the part-time Commissioners to be a woman will also be removed from the CM Act under the Bill.[51]

The specific requirement for a 'civil liberties' part-time Commissioner will be removed from the CM Act under the Bill. As a consequence, there is no requirement for either the Bar Association of Queensland or the QLS to be consulted on the appointment of that particular Commissioner.

[48] Clause 35 of the Crime and Misconduct and Other Legislation Amendment Bill 2014.
[49] *Record of Proceedings (Hansard)*, 19 March 2014, page 703.
[50] *Record of Proceedings (Hansard)*, 19 March 2014, page 703.
[51] Clauses 36 – 28 of the Bill amend the qualifications for appointment as Commissioners.

Community representation

In relation to the qualification requirements for Commissioners in the Bill, the Bar Association of Queensland noted:

> *These structural changes take away the informed community expertise input into the Commission's operation. The two full-time positions are likely to weight discussions along pre-ordained lines and limit the questioning and testing of decisions that might have occurred under the previous structure.*
>
> *The Association supports the creation of a statutory CEO position for the Commission to share the Chairperson's workload and to deal with human resources and budgetary matters in the first instance. However, the inclusion of that position in the Commission as a voting member at the expense of a community position is not supported.*
>
> *The removal of the community requirements, including the civil liberties position, takes away one important safeguard against the appointment of people (by a government) who are less independent and less questioning of government partisan outlook than the previous structure provided.* [52]

The QLS noted in relation to proposed section 225(1), the drafting did not appear to contribute materially to deciding whether any particular individual is suitable to hold the position of CEO, and should be reconsidered.[53]

Removal of the requirement for at least one Commissioner to be a woman

A number of submissions[54] were concerned with the removal of the requirement in current section 230 of the CM Act for at least one of the part-time Commissioners to be a woman.

On this aspect of the Bill, Kate Galloway, Senior Lecturer at James Cook University submitted:

> *In light of the disproportionate number of men who rise to executive positions and positions of authority in the institutions of the law despite suitably qualified women, there will inevitably be a bias – based on the uniformity of experience of those in positions of power. The existing provision for one woman part time member serves to mitigate somewhat the implicit and inevitable bias of an entirely male commission.*
>
> *Statements have been made that public appointments are made 'by merit', there is no suggestion that the woman member not be equally as qualified as other members; simply that one place is reserved for a woman of merit. The concept of 'merit' is extensively critiqued in the literature as a means of excluding those who do not form part of the dominant group.* [55]

Civil liberties Commissioner

The QLS submitted that *'given the significantly extended powers of the Commission to hold private hearings and have individuals incarcerated for refusing to answer a question, rights-based oversight is essential to ensure that the Commission does not become a weapon of oppression in the course of its worthwhile goal of combatting organised crime and corruption.'* [56]

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52 Bar Association of Queensland, Submission No. 12, page 4.
53 Queensland Law Society, Submission No. 29, page 19.
54 Queensland Law Society, Submission No. 29; Bar Association of Queensland, Submission No. 12.
55 Kate Galloway, Submission No. 11, page 3.
56 Queensland Law Society, Submission No. 29, pages 18-19.

The QLS considered that a rights-focused Commissioner position similar to the existing civil liberties commission was retained in the CM Act.

Committee Comment

The Committee considered these matters at length noting the written submissions and also the evidence taken by witnesses at the public hearing. Ultimately, the Committee considers (as stated by the Director-General, Mr John Sosso at the public hearing) eligible women and people with an interest in civil liberties are not precluded from being appointed to Commissioner roles. In the words of Mr Sosso at the hearing:

> *…because these attributes are not specifically mentioned in the legislation, does not mean that they would not be appointed. The government wants the best person or people appointed to the position and positions, irrespective of the gender of that person or persons. Merit and merit alone is the criteria that should be considered not only for those appointments but any other appointment to statutory bodies.*[57]

Further, the Committee notes the Department's advice that no Australian jurisdiction includes legislative requirements for a Commissioner to have an interest in civil liberties and no Australian jurisdiction has a statutory requirement that a person must be of a particular gender. The Committee therefore does not recommend any changes to the qualifications for Commissioners.

Appointment process of Commissioners – removal of the requirement for bipartisan support

In relation to consultation and appointment processes of Commissioners, the existing processes are also changed in the Bill. The appointment of Commissioners remains an appointment by the Governor in Council under the CM Act,[58] and not under the PS Act.

The nomination and consultation process prior to the appointment will change significantly under the Bill. Although consultation must occur with the PCMC, the requirement for the Attorney-General to nominate a potential Commissioner, only with the bipartisan support of the committee, is removed.[59] Consultation with the Chairman for the appointment of Commissioners other than the Chairman remains.

The Bill also enables a Commissioner's appointment to be extended for a further term or terms of up to five years, capped at a maximum of 10 years in total.[60] The new consultation process applies to the reappointment of a Commissioner.

The categories listed in Schedule 2 of the CM Act which make a person ineligible to be appointed as a Commissioner remain unchanged.

Issues raised in submissions

Removal of the requirement for bipartisan support of the oversight Committee

The removal of the requirement for bipartisan support of appointments of Commissioners has, among all matters raised in submissions, garnered the most criticism. It appears the objection to this major shift in policy has been heightened by the fact no apparent rationale was provided by the Attorney-General as to why the removal of this requirement was included in the Bill - in either his

[57] *Transcript of Proceedings (Hansard),* Public Hearing, Legal Affairs and Community Safety Committee, 16 April 2014, page 3.
[58] Clause 38 – new section 229 Appointment of Commissioners.
[59] Clause 38 – new section 228 Consultation before nominating persons for appointment.
[60] Clause 39 – new section 231((2).

introductory speech or in the Explanatory Notes accompanying the Bill's introduction.[61] However the Attorney-General does refer to a modern corporate governance which gives appropriate responsibility to those whose task is to carry out the objectives in this Bill.

Views of former CMC Commissioners

All former Commissioners of the CMC who provided submissions to the Committee considered it was folly to remove the bipartisan appointment process from the CM Act and queried where the impetus for this policy position had come from.

In the joint submission from former part-time Commissioners - Julie Cork, David Gow, Ann Gummow, Judith Bell and Philip Nase, it was pointed out:

> *Not one of the three recent reviews of the CMC—the Callinan-Aroney Review, the Keelty Review, and the PCMC's Report— nor the Queensland Government's response to those reviews raises, discusses or recommends changes to s. 228 in general, or to the "bipartisan support" requirement of s. 228(3).*
>
> *In all the discussion, we can find no reference to a problem, deficiency or shortcoming in the current appointment procedure that the proposed amendment is designed to address or remedy. Indeed, we know of no body or person who has explicitly advocated for the abrogation of the requirement for bipartisan agreement or argued the CMC, in performing its functions, should not be independent of executive government. We note that the Attorney-General has said, on behalf of the government, that what the government wants is a strong and independent CMC. We infer this is the fundamental starting position of the government when considering the Bill.*[62]

Submissions from stakeholders

The move away from obtaining bipartisan support of the PCMC in the Commissioner appointment process was not only criticised by former Commissioners but was also denounced in other submissions - with the QLS,[63] Bar Association of Queensland,[64] the Law and Justice Institute (Queensland) Inc.,[65] Hon. Tony Fitzgerald AC, QC,[66] Craig Myatt,[67] Russell Wattie,[68] Kevin Lindeberg,[69] Dan McIntyre,[70] George O'Farrell,[71] the Whistleblowers Action Group,[72] the Australian Lawyers for Human Rights,[73] the Australian Lawyers Alliance,[74] Professor Charles Sampford,[75] and Professor AJ Brown[76] - all submitting the independence of the new CCC would be compromised if the appointment of its Commissioners were made in a partisan manner.

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61 Don Willis, Submission No. 1, page 1; Robert Needham, Submission No. 7, page 2;
62 Julie Cork, David Gow, Ann Gummow, Judith Bell and Philip Nase, Submission No. 33, page 3.
63 Queensland Law Society, Submission No. 29, pages 16-18.
64 Bar Association of Queensland, Submission No. 12, page 4.
65 Law and Justice Institute (Queensland) Inc., Submission 28, pages 2, 5-6.
66 Hon. Tony Fitzgerald AC, QC, Submission No. 4, pages 5-6.
67 Craig Myatt, Submission No. 5, pages 1, 3-5.
68 Russell Wattie, Submission No. 6, page 2.
69 Kevin Lindeberg, Submission No. 14, pages 17-18.
70 Dan McIntyre, Submission No. 18, page 1.
71 George O'Farrell, Submission No. 20, page 1.
72 Whistleblowers Action Group, Submission No. 21, page 6.
73 Australian Lawyers for Human Rights, Submission No. 22, pages 4-5.
74 Australian Lawyers Alliance, Submission No. 23, page 5.
75 Professor Charles Sampford, Submission No. 32, page 11.
76 Professor AJ Brown, Submission No. 34, pages 15-16.

Similar appointment processes

The bipartisan appointment process contained in the CM Act is unique to Queensland and within Queensland, is unique to the CMC. The Department confirmed at the public hearing that no other appointment processes which involved parliamentary committees included a requirement for bipartisan support.[77] With positions such as the Queensland Ombudsman, the Electoral Commissioner, the Information Commissioner and the Integrity Commissioner – the relevant parliamentary oversight committee is simply consulted by the Minister.

In his objection to the removal of the bipartisan process, Professor Charles Sampford neatly summed up the history of the bipartisan process for CMC Commissioners and distinguished the appointment process from that of judicial officers as follows:

> *Removing the requirement for bi-partisan support of appointment to the Commission abandons a very important innovation in Queensland's integrity system of which we should be proud.*
>
> *I am naturally aware that appointments to other highly responsible positions are made by the government of the day – particularly judicial office. This could be an argument for the improvement of other appointment procedures rather than changing those for the CMC. But in any case, I would distinguish judicial appointments in that:*
>
> - *Judges do not have as much discretion.*
> - *With few exceptions they play their role in open court.*
> - *They have to give reasons for their decision.*
> - *They are subject to appeal.*
> - *They are generally appointed one at a time and enter a very strong culture.*
> - *They have much longer tenure.*
>
> *I am very aware that many great appointments have been made by governments without securing the support of oppositions – including quite a few Royal Commissioners, many judges and, as I understand it, the first appointees to EARC.*
>
> *I am also aware that bipartisan appointment was agreed by the major parties after Fitzgerald reported. This decision merely indicates how good ideas can come out of bi-partisan discussion and that such bi-partisan discussion can lead to improvements on Fitzgerald's recommendations. We should celebrate those party leaders in 1989 who came up with this very important innovation.*
>
> *Anti-corruption commissions are very powerful bodies. There is a temptation to appoint commissioners who will go much harder on the opposition than the government. In other jurisdictions, governments have succumbed to this temptation and anti-corruption commissions have been used as a way to entrench power. This temptation creates a serious governance risk that has materialised. Recognising that risk and 'insuring' against it by requiring bi-partisan support for commissioners is an excellent risk management strategy. One does not have to suspect, let alone accuse, a government of harbouring such intentions. One does not even have to suspect that a particular government is likely to give in to that temptation. The question is whether it is wise to create a temptation where none has been present for a quarter of a century.*[78]

[77] *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 16 April 2014, pages 3-4.

[78] Professor Charles Sampford, Submission No. 32, page 11.

Professor Martin similarly considered that comparison of CMC Commissioners to judicial officers would not be helpful, stating:

> *There are other potentially contentious positions (such as judicial positions) the appointment to which does not require bipartisan support. Comparison of those positions with the Chairperson of the CMC is unhelpful, however; the differences for present purposes are greater than the similarities.*
>
> *The CMC is an investigative body which rightly has wide, invasive, proactive powers it can use of its own motion in a way that courts do not. The CMC initiates, courts adjudicate. Courts only decide cases that are brought before them, and they decide them in public. A failure by the CMC to be proactively courageous in initiating investigations against people in power would be disastrous, as would a mere perception of such failure. Decisions by the CMC not to investigate or prosecute are typically taken in private. The key tactic of the corrupt is to make their best efforts to ensure that their conduct never sees the light of day. That moment has passed once the matter is before a court. But if there is suspicion that a body like the CMC is not as independent of the executive as human ingenuity can make it, cynicism about its willingness to expose the corrupt in the first place will fester, to the calamitous detriment of its mission.*[79]

The joint submission from former part-time Commissioners also commented on whether such a comparison with judicial officers was appropriate:

> *Recently the Attorney-General is reported to have argued that if it is acceptable to appoint judges without bipartisan support, then it must be acceptable to appoint CMC commissioners without bipartisan support. The validity of the argument is dependent upon the validity of the analogy drawn between judges and CMC commissioners. The analogy however is not valid.*
>
> *Judges' independence flows from the nature of judicial tenure and the constitutional position of the courts in our system of government. Once appointed a judge enjoys life tenure and is not otherwise dependent upon political favour. By way of contrast, a CMC commissioner's independence under the CM Act flows primarily from the process of appointment (that is, the process of bipartisan appointment) and not from the nature of the position. While the position of CMC commissioner is a statutory appointment, unlike a judge a commissioner does not enjoy life tenure as the appointment is normally for 2 or 3 years with an option for extension by the government to an overall total of 5 years. The proposal to extend the tenure of commissioners to a total of 10 years (including the new chairman and new CEO) may tend to increase the dependency on executive government for continuous extensions to his or her appointment.*[80]

Committee Comment

It cannot be argued that at the time when the requirement for bipartisan support of the oversight committee for the appointment of Commissioners was enshrined in the legislation, it was not warranted. As alluded to in the many submissions received on this aspect of the Bill, there was a need for the provision at that time. However, the Committee is not convinced that need still exists.

The Committee notes the Bill, as drafted, does not intend to remove the oversight committee from the appointment process altogether but simply aligns the appointment process to that of other senior appointments which occur within Queensland. These were described above i.e. appointment of the Queensland Ombudsman, Integrity Commissioner etc.

[79] Professor Ross Martin QC, Submission No. 25, page 2.

[80] Julie Cork, David Gow, Ann Gummow, Judith Bell and Philip Nase, Submission No. 33, pages 3-4.

While the Committee does not accept the bipartisan appointment process currently contained in the CM Act is necessarily required for the Commissioners, in considering what should be a recommended appointment process for Commissioners, the Committee believes that rather than having regard to the other processes for appointments in Queensland, regard should be had to the appointment processes in other jurisdictions for their corresponding integrity agencies.

The Department provided a comparison of appointment processes in other jurisdictions to the Committee, with its initial written briefing.[81] Except for the Australian Crime Commission[82], all appointment processes involve a relevant parliamentary committee with a summary of the involvement in the appointment processes set out below.

Table 1: Comparison of appointment processes.

New South Wales			**Victoria**	**South Australia**	**Western Australia**	**Tasmania**	**Commonwealth**
Independent Commission Against Corruption	NSW Crime Commission	Police Integrity Commission	Independent Broad-based Anti-Corruption Commission	Independent Commissioner against Corruption	Corruption and Crime Commission	Integrity Commission	Australian Crime Commission
Minister refers to the Committee a proposal for the appointment. The Committee may veto the proposed appointment.	Minister to submit proposed nomination to the Committee. The Committee may veto the proposed nomination.	Minister to submit proposed nomination to the Committee. The Committee may veto the proposed nomination.	Minister to submit proposed nomination to the Committee. The Committee may veto the proposed nomination.	Minister to refer proposed nomination to the Committee. Committee approves the appointment.	Minister is to consult the Committee on the appointment.	Minister is to consult the Committee on the appointments.	Minister invites nominations from the Inter-Governmental Committee for CEO. Consultation with the Board takes place.

From the above table, it can be seen that no other jurisdictional appointment process requires the bipartisan support of the relevant parliamentary oversight committee; however in a number of appointments, involvement by the relevant committee exceeds simply 'consultation'. Further to the Committee's comments above, the Committee recognises it would be appropriate for the oversight committee to be involved to a greater extent than consultation. As set out in the many submissions on this point, integrity commissions such as the proposed CCC are powerful bodies with wide ranging powers and the Committee considers it appropriate that the parliamentary oversight committee is sufficiently involved in the appointment process.

In considering a range of models currently in use around the country, the Committee considers the appointment process used in New South Wales for appointment of Independent Commission Against Corruption (ICAC) Commissioners is preferred and that the parliamentary committee is provided with a power of veto over the appointment process.

Recommendation 2

The majority of the Committee recommends the Bill be amended to provide the new Parliamentary Crime and Corruption Committee with a power of veto over the appointment of Commissioners. The Committee considers a process similar to that used in New South Wales for the appointment of Independent Commission Against Corruption Commissioners is appropriate.

[81] Letter from the Department of Justice and Attorney-General, 26 March 2014, Attachment 1 – Cross-jurisdictional comparison.

[82] The Inter-Governmental Committee is not a parliamentary committee.

Re-appointment of Commissioners

The Bill will extend the maximum period for which a Commissioner may serve as a Commissioner from five years to ten years. Only a small number of submissions commented on this aspect with the Bar Association submitting:

> *Callinan/Aroney were very critical of senior officers of the Commission staying in their roles for long periods. It was said to create a potential for corruption to develop among other things.*
>
> *Against that background, the Association is surprised that the maximum limit on the time that Commissioners can serve (over more than one term) is lifted from five to ten years.*
>
> *The change is not supported.*[83]

The Australian Lawyers Alliance similarly submitted:

> *The ALA notes that this change is contrary to the findings of the Callinan/Aroney Review and the Keelty Review. The authors noted that long appointments negatively impact a public authority's integrity and efficiency respectively.*[84]

The QLS submitted *'reappointment can create a potential tension and opportunity for political influence of appointed individuals. Under the proposals in the Bill, there is a significant risk of a perception if not the reality that a commissioner could be inclined to take action favourable to an incumbent Government in order to maximise chances of reappointment.'*[85]

The QLS included in its submission a proposal for an appointment process which included various members of the legal profession in addition to Members of Parliament. The selection panel proposed would comprise:

- *The Chief Justice or his/her nominee;*
- *The Attorney-General or his/her nominee;*
- *The leader of the Opposition or his/her nominee;*
- *The President of the Bar Association of Queensland or his/her nominee;*
- *The President of the Queensland Law Society or his/her nominee;*
- *2 non-legal members chosen jointly by the Attorney-General and the Leader of the Opposition.*[86]

The QLS argued: *'A process such as this would divorce those holding these key positions from any allegation of political patronage or favouritism and would be more truly independent.'*[87]

Committee Comment

While the Committee acknowledges the detail the QLS has gone into in providing its proposal to the Committee, the Committee considers the ICAC process referred to above is preferable. The Committee does not share the concerns of submitters above in relation to the extension of the maximum term of for a Commissioner of 10 years. The Committee notes this is a maximum term and it does not automatically follow that every Commissioner will be extended for a term or terms that reach that maximum threshold.

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83 Bar Association of Queensland, Submission No. 12, page 5.
84 Australian Lawyers Alliance, Submission No. 23, page 6.
85 Queensland Law Society, Submission No. 29, page 18.
86 Queensland Law Society, Submission No. 29, page 18.
87 Queensland Law Society, Submission No. 29, page 18.

Sessional Commissioners

The Bill enables the new CCC Chairman to appoint sessional Commissioners to assist the Chairman in the performance of the commission's functions or exercise the commission's powers in conducting hearings, examining witnesses or conducting specific investigations.[88]

The qualifications for a sessional Commissioner are the same as those for the Chairman and the eligibility requirements in the CM Act, similarly apply to the appointment of a sessional Commissioner.

Committee Comment

Only the QLS referred to the appointment of sessional Commissioners in submissions stating its approval of the provisions.[89] The Committee supports this additional feature being included in the Bill and notes that it will formalise the existing process where the CMC engages external counsel to conduct investigations or assessments in accordance with its functions, such as occurred with the engagement of the Hon. Richard Chesterman, AO, RFD, QC for the assessment of allegations contained in a purported public interest disclosure.[90]

2.4 Changing the definition of 'official misconduct' in the *Crime and Misconduct Act 2001* to 'corrupt conduct' and establishing a new corruption function

The Callinan/Aroney Review stated that early on in its process, it was obvious there were a very high number of complaints processed by the CMC and the vast majority of them were trivial, vexatious, or misdirected.[91] The Callinan/Aroney Review concluded that ways should be found to deter baseless complaints, not least so that proper and sufficient attention can be given to the genuine and substantial ones.[92]

After conducting a detailed comparative analysis of anti-corruption commissions around Australia including an analysis of definitions used by those commissions in the area of 'corruption' or 'misconduct',[93] one such way to assist in the proper focus of the CCM on substantial complaints was to amend the definition of 'official misconduct' as it appeared in the CM Act. From the comparison with other jurisdictions, the review concluded 'official misconduct' had a wider application than in interstate anti-corruption legislation; and that the threshold for what constitutes official misconduct should be narrowed.[94] The report went on to set out a comprehensive recommendation in relation to what should constitute official misconduct:

> ***Recommendation 3A***
>
> *The Crime and Misconduct Act should be amended in the manner indicated below so as to raise the threshold of what conduct constitutes "official misconduct":*

88 New section 239 of the *Crime and Misconduct Act 2001*.

89 Queensland Law Society, Submission No. 29, page 20.

90 See report No. 87 of the Parliamentary Crime and Misconduct Committee, *A report on the Crime and Misconduct Commission's assessment of a public interest disclosure*, July 2012.

91 The Honourable Ian Callinan AC and Professor Nicholas Aroney, *Review of the Crime and Misconduct Act 2001 and related matters*, March 2013, page 204.

92 The Honourable Ian Callinan AC and Professor Nicholas Aroney, *Review of the Crime and Misconduct Act 2001 and related matters*, March 2013, page 204.

93 The Honourable Ian Callinan AC and Professor Nicholas Aroney, *Review of the Crime and Misconduct Act 2001 and related matters*, March 2013, pages 42-70.

94 The Honourable Ian Callinan AC and Professor Nicholas Aroney, *Review of the Crime and Misconduct Act 2001 and related matters*, March 2013, page 204.

Meaning of conduct

Conduct *includes neglect, failure and inaction.*

Meaning of misconduct

Misconduct *is conduct, or a conspiracy or attempt to engage in conduct, that would, if proved, be-*

(a) a criminal offence; or

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

Meaning of official misconduct

Official misconduct *is misconduct that –*

(a) affects, or could adversely affect, directly or indirectly, the honest and impartial performance of functions or exercise of powers of a unit of public administration or any person holding an appointment in a unit of public administration; or

(b) is engaged in by a person who holds, or at 1he time held, an appointment in a unit of public administration and which involves-

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

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

(iii) a misuse of information or material acquired in or in connection with the performance of the person's functions as the holder of the appointment, whether the misuse is for the person's benefit or the benefit of someone else.

The term "misconduct", wherever it appears in the [CM] *Act apart from the term "official misconduct" or "police misconduct", should be replaced by "official misconduct or police misconduct". The definition of "police misconduct" should be amended by the substitution of the word "behaviour" for the word "conduct".*[95]

The Government accepted the recommendation in it response to the Callinan/Aroney Review stating:

…the current definition of 'official misconduct' in the Crime and Misconduct Act 2001 *provides for a lower threshold for complaints being potentially classified as 'official misconduct' if they were to be proved. The outcome is the CMC deals with more complaints than what it should be doing.*[96]

[95] The Honourable Ian Callinan AC and Professor Nicholas Aroney, *Review of the Crime and Misconduct Act 2001 and related matters*, March 2013, page 213.

[96] Government Response: *Parliamentary Crime and Misconduct Committee – Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Commission of Inquiry documents;* and *The Honourable Ian Callinan AC and Professor Nicholas Aroney - Review of the Crime and Misconduct Act 2001 and related matters,* page 23.

The Government referred the proposed amendment (as a guide to indicate the intent of the proposed change) to the Implementation Panel for consideration and advice to the Premier and the Attorney-General on how best to implement the recommendation's intention.[97]

In its written briefing, the Department stated:

> *Comparing the proposed definition in the Bill with the other jurisdictions… the ICAC Act definition is most similar. However, the proposed definition in the Bill is "tighter" than the ICAC Act definition, which means it has a higher threshold for what conduct would be considered corrupt conduct because:*
>
> - *the proposed definition uses the conjunction 'and' between the subsections, while the ICAC Act definition uses 'or'. Therefore, in the proposed definition each of the elements in each of the subsections must be satisfied, whereas in the ICAC Act definition the conduct need only satisfy one of the subsections;*
> - *the proposed definition requires that the intent of the conduct is either for a benefit or detriment, whereas the ICAC Act definition does not have this requirement;*
> - *the proposed definition includes the additional requirement for conduct comprising 'a breach of trust' to be undertaken either 'knowingly or recklessly' whereas the ICAC Act definition does not have this requirement; and*
> - *the proposed definition states that if the conduct could fall within the type of offences/behaviours in subsection (2), it is only corrupt conduct if all the elements in subsection (1) are also met. In contrast the list of offences included in the definition in the ICAC Act may independently comprise corrupt conduct.*[98]

In relation to the revised definition of corrupt conduct, as contained in the Bill, the Attorney-General stated:

> *To understand the full extent of the changes effected by the new definition of `corrupt conduct', new sections 14 and 15 being inserted by the bill must be considered with other amendments to reduce the number of matters referred to, and investigated by, the CMC.*[99]

The other matters referred to are:

- raising the threshold of when public officials are to notify the new CCC of suspected corrupt conduct from `suspicion to `reasonable suspicion';
- expanding the use of the section 40 directions issued by the new CCC to agencies to ensure only the more serious corrupt conduct matters are referred to the CCC; and
- requiring complaints to be in the form of a statutory declaration unless the commission decides that exceptional circumstances exist which warrant a waiver of this requirement.

These matters are explored further at part 2.5 of this report.

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97 Government Response: *Parliamentary Crime and Misconduct Committee – Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Commission of Inquiry documents;* and *The Honourable Ian Callinan AC and Professor Nicholas Aroney - Review of the Crime and Misconduct Act 2001 and related matters,* page 23.

98 Letter from the Department of Justice and Attorney-General, 26 March 2014, page 8.

99 *Record of Proceedings (Hansard)*, 19 March 2014, page 704.

Issues raised in submissions

The change of definitions from 'official misconduct' to 'corrupt conduct' received general support in submissions however a number of individual matters were raised in submissions.

Transfer of matters to other agencies

With the increase in the threshold of what constitutes 'corrupt conduct' from the lesser 'official misconduct', the Queensland Ombudsman submitted:

> *The requirement that the Commission focus on corrupt conduct, rather than misconduct, will lead, with limited exception, to a significant transfer of matters from the Commission's jurisdiction to the Ombudsman's jurisdiction. The administrative actions of state agencies, including complaints management, are within the Ombudsman's jurisdiction, whereas, the actions of the Commission are specifically excluded from the Ombudsman's jurisdiction.*
>
> *Under the current legislative regime, a complaint made to the Ombudsman, which concerns an allegation of official misconduct, is referred to the Commission. Generally, the Commission's subsequent handling of the matter is not within the Ombudsman's jurisdiction. In practical terms, the changes will mean that many matters which were previously excluded from the Ombudsman's jurisdiction (namely allegations of official misconduct that fall short of corrupt conduct) will now be included.*[100]

The Department responded to this concern as follows:

> *The department notes the Ombudsman's concerns and notes that this is a matter that the Ombudsman should monitor to determine if the change in definition affects the number of complaints the Ombudsman receives.*[101]

Committee Comment

The Committee accepts this to be a natural consequence of these amendments and similarly considers the Queensland Ombudsman should monitor any increase in complaints in the near future to calculate what the level of increase is. The Committee considers this will be a matter for discussion with the Queensland Ombudsman as part of this Committee's parliamentary oversight role.

Treatment of Police Misconduct

The Queensland Police Union of Employees (QPU) raised a perceived issue with the new definition of corrupt conduct. The QPU was concerned that the word 'corruption' as defined in the Bill includes both 'corrupt conduct' and 'police misconduct'. The QPU submitted that '*most police misconduct is not corrupt in nature, in fact only very few instances of police misconduct are ever and rarely corrupt in nature.*'[102]

The QPU provided the following examples of conduct which could be considered police misconduct but would in no way have any elements of corrupt behaviour:

- *not wearing a police hat whilst in public and on duty;*
- *not having your shoes polished; and*

[100] Queensland Ombudsman, Submission No. 19, page 1.
[101] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 50
[102] Queensland Police Union of Employees, Submission No. 38, page 2.

- *handing in paperwork in a tardy manner.*[103]

The QPU was concerned that in such instances, a police officer should not and must not be subjected to the stigma of 'corruption', unless it is truly warranted. The QPU noted that if a police officer conducted themselves in a corrupt manner, the officer would appropriately be captured by the definition of 'corrupt conduct' as defined in the Bill however submitted the term police misconduct should be removed from the definitions of 'corruption' and 'corruption offence'.[104]

At the public hearing the Director-General of the Department confirmed with the Committee the intent of the Bill was:

> *...to not make one iota of change so far as the police are concerned. I will clarify that in our written submission next week, but if the committee is looking for a succinct response the intent is not to change matters.*[105]

In its response to submissions, the Department further provided:

> *Corruption is the term used in the Act to describe the 'function' the CMC has and the more relevant term is 'corrupt conduct'. The Act and Bill is drafted this way as the commission has an overriding responsibility for both 'corrupt conduct' and 'police misconduct'.*
>
> *When dealing with police misconduct, it will be dealt with as 'police misconduct' and not as 'corruption'. Therefore, in no circumstances would the conduct of the police officer be 'prosecuted as corruption', which is the substance of the QPUE submission.*[106]

Committee Comment

The Committee accepts the Bill is not intended to and does not include 'police misconduct' within the meaning of 'corrupt conduct'. In fact, 'police misconduct' will be amended by the Bill to specifically exclude corrupt conduct –

> ***police misconduct*** *means conduct, other than corrupt conduct, of a police officer that—*
>
> *(a) is disgraceful, improper or unbecoming a police officer; or*
>
> *(b) shows unfitness to be or continue as a police officer; or*
>
> *(c) does not meet the standard of conduct the community reasonably expects of a police officer.*[107]

However, the definition of corruption, although it is used to describe the commission's functions specifically includes police misconduct:

> ***corruption*** *means corrupt conduct or police misconduct.*[108]

The Committee considers that this problem has arisen with blanket renaming of 'official misconduct' to 'corrupt conduct' throughout the Bill. The Committee considers that an analysis of the relevant provisions, should enable the term 'police misconduct' to be separated from the bundled definition of 'corruption' and both terms – 'corrupt conduct' and 'police misconduct' to be used side by side to indicate they are separate and distinct concepts.

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[103] Queensland Police Union of Employees, Submission No. 38, page 2.
[104] Queensland Police Union of Employees, Submission No. 38, page 2.
[105] *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 16 April 2014. page 62.
[106] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 55.
[107] Schedule 2 – Dictionary – as amended.
[108] Schedule 2 – Dictionary – as amended.

The Committee considers Chapter 2 – *'Commission functions*, *Investigations and Reporting'* should be split to ensure there are separate parts dealing with corruption and police misconduct.

Recommendation 3

The majority of the Committee recommends the Bill be amended to ensure that the term 'police misconduct' is completely detached from the definition of 'corruption' or 'corrupt conduct' in all possible aspects. This should be done by including separate parts to deal with corruption and police misconduct.

The QPU also raised a number of issues in relation to the CMC's role in dealing with police misconduct. As the Department stated at the public hearing:

> *Callinan/Aroney did not make any recommendations in relation to how the CMC deals with police misconduct and, in fact, noted that their terms of reference did not specifically ask them to go into that matter. The bill does not include any amendments to change the way in which police misconduct is managed by the CMC or the Queensland Police Service.*[109]

The Committee has not considered the additional matters raised by the QPU as they are not the subject of this Bill.

Renaming the CMC to the CCC

While on its face, the rebranding of the CMC to the CCC appeared to be a non-issue, however the CMC itself set out in its submission there could be potential for confusion with the already established Corruption and Crime Commission in Western Australia:

> *The Commission notes the proposed new name of the Commission (the Crime and Corruption Commission) is similar to that of the Corruption and Crime Commission in Western Australia. Such similar branding may create potential confusion with the Western Australian body, causing concern to both bodies in terms of requests for information, correct attribution of information sources, and more general national recognition issues.*
>
> *Such confusion could be avoided by the Commission adopting the name the Queensland Crime and Corruption Commission, to be known as the "Q-Triple-C" rather than the "Triple C" -which is already established within our peer agency community as referring to our Western Australian counterpart.*[110]

Similar issues were raised by Kevin Lindeberg in his submission:

> *It is submitted nevertheless that the inevitable clash over the usage of the acronym/abbreviation "CCC" will be unfortunate, if not confusing, in certain areas of operation especially given the regular interstate co-operation and interactions between the various jurisdictions in the Commonwealth in the fight against organised crime, all of which now have these types of tribunals. It would therefore seem appropriate and sensible that somewhere in the commission's title 'Queensland' should sit, and thus become, for example, the "QCCC".*[111]

[109] *Transcript of Proceedings (Hansard),* Public Hearing, Legal Affairs and Community Safety Committee, 16 April 2014, page 5.

[110] Crime and Misconduct Commission, Submission No. 30, page 3.

[111] Kevin Lindeberg, Submission No. 14, pages 19-20.

Committee Comment

The Committee acknowledges there is potential for confusion between new Queensland CCC and the existing Western Australian counterpart, possibly with requests for information, correct attribution of information sources, and more general national recognition issues.

The Committee agrees that as both submitters have suggested, adding the 'Q' for Queensland to the start of the new organisation's name may go some way to addressing these concerns.

Recommendation 4

The majority of the Committee recommends the Government give consideration to adding Queensland to the title of the new Crime and Corruption Commission to ensure that there is no confusion with the Western Australian integrity agency.

2.5 Improving the complaints management system

As stated earlier at part 2.4, the Callinan/Aroney Review considered the CMC was dealing with too many complaints, the majority of which should not be taking up the precious resources of the CMC. In addition to changing the definition of 'official misconduct' to 'corrupt conduct' and raising the threshold for the complaints that come within the CMC's jurisdiction, Callinan/Aroney also recommended a number of other strategies designed to improve the complaints management system and reduce the number of complaints the commission has to deal with.

The combined effect of the amendments is to reduce the number of matters referred to, and investigated by the new CCC would be much less.[112] Each of the individual policy objectives to improve the complaints management system are examined below.

Raising the threshold of when public officials are to notify the CCC of corrupt conduct

In addition to the threshold jurisdiction of the commission being raised by the change in jurisdiction to corrupt conduct, the Bill also raises the threshold of when public officials are to *notify* the commission of corrupt conduct. Clause 17 of the Bill amends section 38 so that notification is only required to be provided to the commission when a public official *reasonably suspects* corrupt conduct. Currently, a public official has a duty to notify the CMC if he is she *suspects* conduct involves or may involve official misconduct.

Issues raised in submissions

Submitters generally considered raising the threshold for reporting was not the preferred approach. In relation to this aspect of the Bill, Mr Kevin Lindeberg submitted:

> *I am not convinced that lifting the threshold (as Clause 17 of the Bill does) to a "reasonable suspicion" instead of a "suspicion" before section 38 is triggered is sound public policy.*
>
> *Such a framework of public sector management invites keeping these matters as an "internal" affair for units of public administration. If and when it later explodes (probably via a whistleblower's PID at considerable personal risk), the public official concerned, who currently must act on a mere suspicion otherwise he/she may be engaging in official misconduct, could run the line of defence that what he/she thought at the time was "reasonable."*

[112] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 5.

> *Sound public policy requires that public administration should operate without suspicions of wrongdoing being ignored, and while it is understood that by having the threshold at a "mere" suspicion being the reporting trigger that a considerable workload will ensue on the commission as a sorting point–which in fact may discover a network at play - it is submitted that all corruption which starts from a bud, where it is possible, should be nipped as a bud, and not be allowed to take root which the threshold of being "reasonable" is likely to allow. This is because what is reasonable for one person is not always for another whereas, generally speaking, a suspicion is always a suspicion.*[113]

Professor Martin had similar concerns setting out the basis for the current reporting threshold as:

> *The reason the very low threshold presently exists is to prevent matters being swept under the carpet. At the moment, departmental heads have almost no flexibility in the decision about whether to report something to the CMC because the threshold is so low.*
>
> *This serves to protect CEOs from pressure to hide things, or to use contrived rationalisations to convince themselves that a matter is not reportable.*[114]

In relation to raising the threshold, Professor Martin submitted:

> *The effect of the changes is to put into the hands of the departmental heads power to decide whether their suspicion is "reasonable" or whether something "would" amount to corrupt conduct, thus allowing a malleable departmental head considerable flexibility to decide (or to be pressured into deciding) that there is a defensible basis not to report a matter.*
>
> *Further, there is no reference to the potential seriousness of the allegations as justifying a mandatory report to the CMC, only to the level of evidence then existing in support of it. An allegation that a public servant is stealing pencils may have exactly the same initial level of evidentiary support as an allegation that a Minister is taking bribes, but clearly the latter should in principle be referred even if the former is not. Corruption hides in such nooks and crannies. it may be that a power inserted' elsewhere serves as a corrective to this problem, but that is not certain.*
>
> *Moreover, it is undesirable that departments muddy the waters of investigations before the CMC uses its resources to undertake an investigation. A clumsy investigation to decide if there is enough basis to refer a matter to the CMC might, for example, tip off an offender and put him on his guard, thereby defeating later investigations, or unduly "friendly" interviews of the suspect or witnesses might compromise any subsequent case brought.*[115]

Professor Martin went on to state he considered it was really a balancing exercise in setting where the threshold ought to be set and that there were competing priorities in determining where to set the threshold:

> *The question that then emerges is the size of these risks, measured against the cost of the CMC's being exposed to large numbers of low level complaints. That is a matter for judgment. The cost is relatively low, and it may be that the cost of dealing with complaints about public officials is simply a price of being a democracy. The assessment of these matters by the CMC can be done very quickly, at relatively little cost, simply on the face of the complaint. In the vast majority of referred cases, there is no need for elaborate investigation by the CMC. But while the cost per unit item might be low, the thousands of complaints received does make the expense add up.*

[113] Kevin Lindeberg, Submission No. 14, pages 20-21.
[114] Professor Ross Martin, QC, Submission No. 25, pages 6-7.
[115] Professor Ross Martin, QC, Submission No. 25, pages 6-7.

> *Against the advantages of the present system is the disadvantage that in a deluge of low grade matters, the gold is sometimes missed. Human nature is subject to concentration fatigue, and to falling into the trap of assuming that the next file across the desk will be just like all the dozens of unremarkable ones which came before. There is no empirical evidence that a low threshold for mandatory reporting uncovers any more corruption than the threshold proposed. But it is true that sometimes unpromising, low grade complaints turn out to be very serious indeed.*
>
> *On balance, for my part I would prefer to retain the present reporting arrangements while reducing the burden on the CMC by administratively refining the process by which referred cases are dealt with. I accept, for the reasons given above, that other views are open on this point.*[116]

The QLS considered the practicality of raising the threshold and considered the Bill should be amended to ensure there was a level of objectivity in the test which is applied:

> *Practically, it is difficult to envisage a scenario in which a person who suspected corruption would hold such a suspicion unreasonably. Indeed it would be difficult to establish that a belief was not, subjectively, held reasonably given that suspicion is by its very definition a subjective state of mind.*
>
> *For the sake of clarity, it may be better to phrase this as a 'suspicion based on reasonable grounds'. This not only imports an element of objectivity into the test, but it makes the need for objectivity far more obvious for the person with the relevant suspicion. Subsequent events might indicate that a suspicion was not reasonably held, but the grounds of the suspicion, and the subjective state of mind of the person, may well have been different at the relevant time. These factors will serve to discourage people from making mandatory notifications.*[117]

Committee Comment

While there is a level of balancing required when setting the threshold for reporting corruption to the commission, the Committee considers that more must be done to reducing the number of complaints which are referred. By raising the reporting threshold, the recommendations from the Callinan/Aroney Review will be achieved and the CCC will be able to focus on the more serious instances of corruption.

While the Committee has no specific view on the wording of proposed section 38, the Committee notes the Department is considering the QLS submission for potential amendment to the Bill.[118]

Expanding the use of section 40 directions issued to units of public administration

Hand in hand with the above amendments, the second policy objective targeted at improving the complaints management system will expand the use of section 40 directions issued from the commission to units of public administration. Directions under section 40 of the amended Act will now also specify what complaints need or need not be notified to the commission as well as when and how complaints are to be notified to the commission.

The only issue raised in relation to the use of section 40 directions was by the QLS, where it considered that in the interest of transparency, the commission should publish any directions that it makes – thus making them available for scrutiny by the public and the oversight Committee.[119]

[116] Professor Ross Martin, QC, Submission No. 25, pages 6-7.
[117] Queensland Law Society, Submission No. 29, pages 10-11.
[118] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 28.
[119] Queensland Law Society, Submission No. 29, page 11.

The Department considered publication of directions was a matter for the commission.[120] The Committee agrees.

Requiring the CCC to only investigate the more serious cases of corrupt conduct

Amendments to sections 5 and 35 of the CM Act will make simple changes that ensure the commission must focus on only the more serious cases of corrupt conduct and cases of systemic corrupt conduct within a unit of public administration.

Issues raised in submissions

Submitters were split on this aspect of the Bill with submissions from the Bar Association of Queensland, George O'Farrell and Robert Needham supporting the change in focus of the Commission. In relation to the amendment, Robert Needham submitted:

> *I support the change of name and role of the Commission to concentrate its efforts on corruption. This change will conclude and formalize what had been occurring at the CMC for many years of "devolving" responsibility for dealing with the less serious allegations of official misconduct to the Police Service and departments. This devolution was certainly an aim I held during my period as Chairman of the Commission, though I did not feel the time had yet arrived to seek the necessary legislative change to formalize it.*
>
> *A proper culture of integrity can only be established and maintained within a unit of public administration by the managers of that unit taking responsibility for its culture. That this occurs is properly oversighted by the Public Service Commission, though I am heartened to see that it is proposed that the Crime and Corruption Commission will retain an important overall role by being able to assess the appropriateness of the complaints handling systems within a unit of public administration and to provide advice and recommendations thereon (see s.35(i) and (j) proposed to be inserted by clause 14 of the Bill). This is important as systemic corruption within a unit of public administration is usually preceded by a slippage in the culture of integrity within the unit.*[121]

Others, including the QLS, Professor Sampford, Professor Brown and the Law and Justice Institute (Queensland) Inc. considered the amendments could have practical difficulties in application. The QLS stated:

> *The Society notes that the proposed amendments could in effect raise the threshold of what acts of corruption would be addressed by the Commission. The Society notes that it will be important to ensure that acts of corruption not falling within the Commission's remit are still investigated. Public confidence in our public institutions can be as easily damaged by the accumulation of small abuses of office as it can by the 'headline' acts that now seem intended to be the principal focus of the new Commission. It is vital that across the public service, there be no reduction in the overall scrutiny and attention given to alleged acts of improper conduct, whether they fall within the definition of 'corrupt conduct' or otherwise.*[122]

Professor Brown considered the amendment while consistent with the recommendation from the Callinan/Aroney Review could, unnecessarily, raise difficult legal questions, submitting:

> *This amendment is consistent with the recommendations of the Review Panel, but gives effect to them in a way that similarly – but unnecessarily – raises difficult legal questions by*

[120] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 51.
[121] Robert Needham, Submission No. 7, page 1.
[122] Queensland Law Society, Submission No. 29, page 9.

> *further narrowing the range of conduct and potentially provoking litigation over the jurisdiction of those conducting investigations under the Act.*
>
> *For example, the amendment is likely to provide grounds for persons to seek to escape investigation or action under the Act by asserting that their 'case' does not amount to a 'more serious' case, nor a 'systemic' case, relative perhaps to other cases, sufficient to attract the 'focus' of the Commission; and thus that the Commission lacked jurisdiction to conduct particular investigations or make particular findings.*[123]

Similar practical issues were raised by the Law and Justice Institute (Queensland) Inc.:

> *No definition of 'serious' corruption is found in the Bill. Nor is it found in the Explanatory Notes. If the intention is to raise the threshold for what constitutes 'serious' corrupt conduct and to reduce complaints received, a clear definition would be essential to those who have to investigate such matters, those alleged to have committed serious corruption and those advising and / or defending clients in relation to such allegations. In other words, without a clear definition, the provision fails a fundamental test of legal adequacy.*[124]

Finally, Professor Sampford stated in relation to these amendments:

> *There is a practical difficulty with this in that the seriousness of the corruption may not become evident until investigation has been completed. It may also give an apparent (and presumably false) signal that lower levels of corruption are not really a problem and of minor concern to the State of Queensland.*[125]

Committee Comment

In relation to the concerns by the Law and Justice Institute (Queensland) Inc., the Committee notes the Department's response to submissions:

> *…regarding a definition of "serious" corrupt conduct, the department notes that "serious" is used to describe the focus of the commission's investigations (clause 7 of the Bill- new section 5(3)) and performance of its corruption function (clause 14 of the Bill- new section 35(3)) rather than part of the definition of corrupt conduct.*
>
> *The department further notes that clause 15 of the Bill introduces new section 35A which allows the chief executive officer to issue a direction (subject to the direction and control of the chairman) about how commission officers are to decide whether a complaint involves or may involve a more serious case of corrupt conduct or a case of systemic corrupt conduct.*[126]

The Committee is satisfied with the Department's response and does not consider there are any issues with the drafting of this section.

The Committee considers these amendments will not leave the less serious matters left un-investigated; they will simply not be investigated by the CCC unless they are considered serious enough. The Committee considers it is entirely appropriate for units of public administration to deal with the less serious allegations of corruption and establish strong cultures of integrity within their own business units.

[123] Professor AJ Brown, Submission No. 34, page 7.
[124] Law and Justice Institute (Queensland) Inc., Submission No. 28, page 2.
[125] Professor Sampford, Submission No. 32, page 7.
[126] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 22.

Expanding the grounds upon which the CCC may dismiss or take no action in relation to a complaint

Currently, the grounds in the CM Act under which the commission may dismiss a complaint or take no action are limited to those that are:

- frivolous or vexatious;
- lacks substance or credibility; or
- dealing with the complaint would be an unjustifiable use of resources.

The Bill amends section 46(2)(g) of the CM Act to expand the grounds upon which the commission may dismiss or take no action in relation to a complaint to also include when the complaint is:

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

Issues raised in submissions

Apart from the second to last category above (not in the public interest), this expansion of the commission's discretion to dismiss a complaint received general support.

In relation to dismissing a complaint when it is determined not to be in the public interest, the QLS submitted:

> *The Bill and Explanatory Notes do not give further detail on what is meant by "not in the public interest". We suggest clarification whether this will be subject to a direction or guide to ensure the public is informed of what this will mean in practice.*[127]

Hon. Douglas Drummond QC considered this exercise of this discretion in further detail, linking it to the delegation of the commission's functions to the Chairman in proposed new section 269:

> *Even if the conduct the subject of a complaint provided to the commission satisfies the CEO's test for "serious corruption", it can still be dismissed at any time between receipt of the complaint and completion of its investigation if "the commission" is satisfied that "dealing with the complaint would not be in the public interest": new sec 46(2)(g)(ii)(A).*
>
> *This is a new and extraordinary power.*
>
> *Firstly, "the commission" will never get to make a decision about whether or not to dismiss a complaint capable of amounting to serious corruption on this ground. New section 269(1)(b) of the Bill itself delegates this decision-making power to the chairman acting alone and without any oversight by the commission: new sec 252(3). Further, the Bill leaves it entirely to the chairman to exercise an extremely broad and what will in practice be a legally uncontrollable discretion to refuse to deal with a complaint, even though it may involve "serious corruption" as defined by the CEO and the chairman.*

[127] Queensland Law Society, Submission No. 29, page 11.

> *If the chairman does not want the commission to investigate a particular matter or decides that a continuing investigation should be stopped, no matter how strong the indications are that serious corruption has occurred, he can kill the investigation. His decision to stop an investigation will be final and unreviewable and he need not provide any explanation to anyone for what he has done. Further, if the public is told about it, the decision will be described as a decision of the entire commission, not just the personal decision of the chairman: see new sec 252(4).*[128]

Committee Comment

The Committee notes the situation as described by Hon. Drummond QC is unlikely to occur as the any Chairman of the commission while holding a delegation as described above, is still responsible for the proper performance of the commission's functions as delegated to him or her. The Committee notes under section 251(3) the Chairman may request assistance from the commission in the performance or exercise of the commission's powers delegated to the Chairman. It is considered the exercise of discretion that a matter not be proceeded with due to it not being in the public interest, may be such a matter with which assistance is sought.

In relation to what 'in the public interest' means, the Committee notes the Department's response where it stated:

> *The department is aware that the 'Public Interest' has been judicially determined in a variety of contexts and circumstances and careful consideration of legal precedent should be taken.*
>
> *The department notes that when used in a statute, the expression imports a discretionary value judqment to be made by reference to undefined factual matters, limited only by the subject matter and the scope and purpose of the Act (within which the decision making power sits). O'Sullivan v Farrer (1989) 168 CLR 210 at 216.*
>
> *Therefore, consideration of 'public interest' will generally require consideration of a number of competing arguments about the public interest and will involve weighing benefits and detriments. However, how those various factors are weighed is a matter for the decision-maker.*[129]

The Committee is satisfied the expanded grounds under which the commission may dismiss a complaint or take no action are appropriate, and will assist in achieving a reduction in complaints as envisaged by the Callinan/Aroney Review. The Committee notes the Department's response that these additional grounds are similar to those used by similar integrity agencies to the commission in interstate jurisdictions.[130]

Enlarging the grounds upon which the commission may prosecute a person

Section 216 of the CM Act currently allows the commission to prosecute a person for making a frivolous complaint to the commission. The fifth element of improving the complaints management system expands the grounds upon which the commission may prosecute a person in relation to making a complaint so that it will now include complaints that are made vexatiously; not made in good faith; made primarily for a mischievous purpose; or made recklessly or maliciously.[131] It will also be an offence for a person to counsel or procure another person to make a complaint in one of the above manners.

[128] Hon. Douglas Drummond QC, Submission No. 16, page 4.
[129] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 39.
[130] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 54.
[131] Proposed new section 216A.

The Explanatory Notes to the Bill set out in relation to new section 216A:

> *The ambit of the new offence in section 216A is not as wide as recommended in the Callinan/Aroney report as it does not include circumstances when the complainant relies upon information received from another party or has not complied with a procedural step. The offence is limited to those complaints made for an ulterior purpose and not for genuine reasons*.[132]

Issues raised in submissions

A number of submissions[133] were critical of the additional power to prosecute a person who makes a complaint for the above purposes. The Bar Association of Queensland expressed concerns the new powers were heavy handed:

> *The Association is concerned that this is a heavy handed means of saving Commission resources. The Association is concerned that the provision in this form may intimidate potential complainants a number of whom may be able to provide some evidence of serious corruption. Non-lawyers, in the Association's experience, do have knowledge of matters that are very useful to law enforcement agencies. Laypersons with such information may not always be able to conduct the analysis as to how far their information goes in proving the matters about which their suspicions have been raised.*
>
> *If the public generally have the perception that a mistake on their part may land them a year in jail, many may choose to keep silent. Some of these are likely to have important information that may have triggered successful corruption investigations.*
>
> *The Association is strengthened in its view that the new s.216A is too heavy handed by the terms of the existing ss. 217 and 218 which criminalise the provision of material that is false or misleading to the Commission as part of a complaint.*[134]

The Whistleblowers Action Group (Queensland) supported the position taken by the Queensland Bar Association. The Whistleblowers Action Group (Queensland) believed that any move in this regard would be counter-productive, too heavy handed, and did not support any move to criminalise complaints.[135]

The Australian Lawyers for Human Rights considered the effect of the new offence clause would discourage complainants from lodging what may be genuine complaints about corruption, because of fear of prosecution. The Australian Lawyers for Human Rights stated:

> *Many whistle-blowers and others who lodge complaints about maladministration and misconduct have experienced retaliation. The prospect of prosecution will be sufficient to deter many already apprehensive about reprisals.*
>
> *The Parliamentary Criminal Justice Committee noted in 2001 that "Much information given to the CJC comes from 'whistle-blowers' who make public interest disclosures. It is important that such people feel safe in providing information to the CJC and, for this reason, whistle-blower support is vital to the CJC in receiving information about official misconduct."*

[132] *Explanatory Notes*, Crime and Misconduct and Other Legislation Bill 2014, page 10.

[133] See for example – Professor Brown, Submission No. 34, pages 10-11; Professor Sampford, Submission No. 32, page 8.

[134] Bar Association of Queensland, Submission No. 12, page 2.

[135] Whistleblowers Action Group (Queensland), Submission No. 21, page 7.

> *The Human Rights Council has noted that "The act of whistle-blowing also plays an important role in ensuring accountability for human rights violations. If people who expose illegal conduct or misconduct in public service administration are not protected by law, they are less likely to disclose information that might be of significant public interest.*
>
> *Members of the community must not be discouraged from coming forward to make complaints about perceived corruption.*[136]

The QLS submitted in relation to the wording used in the provision that the offence should only relate to the making of a complaint and should not extend to the giving of information or matter to the commission.[137] The QLS noted the existing offence in section 216(3) appeared to be limited to making a complaint only and considered this should apply equally to the new offence being created.[138]

The QLS also noted that unlike the existing provision 216:

> *…no notice will be provided to a person in the first instance in this new offence. Section 216 provides a process by which a person is given notice, and only then if they make the same or substantially the same complaint to the commission would the person commit an offence. We suggest this same process must be adopted for the new offence provision.*
>
> *The Explanatory Notes explaining why the notice provision has not been included state:*
>
> > The notice requirement in section 216 (Frivolous complaint) is not included in the new offence provision because the new offence is dealing with complaints that are made vexatiously; not in good faith; primarily for a mischievous purpose; or recklessly or maliciously; as opposed to frivolous complaints.
>
> *It is not clear from this statement exactly what distinguishes frivolous complaints from the other grounds stated. The Society is of the view that the notice provision should be included. We also note that section 216(4) provides a defence, which has not been replicated. Again, for consistency we consider that this defence provision should be equally applied to proposed s216A.* [139]

The QLS expressed concerns that both offence sections could be applied unfairly where complainants were suffering from mental health issues such as paranoia, or schizophrenia, but falling short of insanity. The QLS suggested there should simply be discretion for the Commissioner to dismiss or decline to investigate in these types of circumstances.[140]

The Department responded to the concerns of submitters as follows:

> *The ambit of the new offence in section 216A is not as wide as recommended in the Callinan/Aroney report as it does not include circumstances when the complainant relies upon information received from another party or has not complied with a procedural step.*
>
> *The decision to prosecute under section 216A will be at the discretion of the commission.*

[136] Australian Lawyers for Human Rights, Submission No. 22, pages 6-7.
[137] The distinction between making a complaint and giving information or matter to the commission is explored further below.
[138] Queensland Law Society, Submission No. 29, page 12.
[139] Queensland Law Society, Submission No. 29, page 12.
[140] Queensland Law Society, Submission No. 29, page 12.

> *The Bill provides an appropriate alternative to what was recommended by Callinan/Aroney and will ensure that only genuine complaints are lodged with the commission. As noted above, the commission maintains discretion as to whether prosecute under this section and the decision to prosecute.*[141]

Committee Comment

The Committee considers the expanded grounds under which the commission may prosecute a person are warranted and are an appropriate means of achieving the objectives in the Callinan/Aroney Review in reducing the number of complaints sent to the Commission.

However, the Committee shares the concerns of the QLS that sections 216 and 216A will not be equally applied. The Committee does not consider there should be any difference in the application of either the existing section 216 or the new section 216A.

Recommendation 5

The majority of the Committee recommends the Bill be amended to ensure there is consistency in the application of existing section 216 and new section 216A.

Requirement for a Statutory Declaration to accompany a complaint

The final and possibly the most contentious of the improvements to the complaints management system is the introduction of a new requirement in section 36 (3) of the CM Act to require a complainant to submit a complaint about corruption by way of a statutory declaration.

Proposed section 36 (3) provides that a statutory declaration would not be required, if the commission decided, exceptional circumstances existed. A non-exhaustive list of examples is included following section 36(3) which includes situations such as:

- fear of retaliation for making the complaint;
- the literacy level of a complainant or his or her competency in English; or
- that the complainant has a disability that affects the person's ability to make the complaint by statutory declaration.

Proposed section 36(4) provides the statutory declaration is not required for a person giving information or matter involving corruption to the commission – and applies only to persons making a complaint about corruption.

The Department advised the Committee in its initial briefing the Government considers this amendment will ensure complaints are made for genuine purposes.[142]

Issues raised in submissions

Submissions were mixed on this policy objective with a number of issues being raised in relation to the workability and use of statutory declarations in the complaints process. The Lockyer Valley Regional Council supported the use of statutory declarations,[143] as did Grant Wilson who stated he worked for a large council. Mr Wilson considered the use of statutory declarations was suitable for

[141] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 29.
[142] Letter from the Department of Justice and Attorney-General, dated 26 March 2014, page 9.
[143] Lockyer Valley Regional Council, Submission No. 24.

the CMC and submitted the concept should be extended to all complaints to units of public administration.[144]

Other submitters were not so approving, raising a number of issues with the new statutory declaration regime. The Queensland Ombudsman considered the requirement for complaints to be made by way of a statutory declaration was a retrograde proposal stating:

> *...it will have the effect of deterring all citizens, not just those with inappropriate motives, from making complaints about alleged corrupt behaviour to the Commission.*
>
> *I note the capacity of the Commission to establish circumstances when a statutory declaration will not be required. However, I do not believe that this is sufficient to overcome the negative impact of the proposal. I note that the clause, in defining examples of exceptional circumstances, includes that a person 'fears retaliation for making the complaint in relation to the person's employment, property, personal safety or wellbeing'. This appears to relate, at least in part, to the potential conflict between this new provision and the* Public Interest Disclosure Act 2010 *(PID Act) which provides that public interest disclosures may be made in any form, including anonymously and verbally. Given that the majority of public interest disclosures in 2012-13 were related to official misconduct, any inconsistency between the amended Act and the PID Act is a concern. In this regard, the Commission will remain a proper authority to receive public interest disclosures about corrupt conduct under the amended Act.*
>
> *Finally on this clause, the requirement to complete a statutory declaration applies only to persons complaining to the Commission and does not include complaints referred to the Commission by other agencies under the amended s.38. It would appear that a complaint made to another body can, and indeed in certain circumstances must, be referred to the Commission without the requirement for a statutory declaration. I submit that such a distinction may encourage persons wishing to make an allegation about corrupt conduct to the Commission to utilise this alternative route.*[145]

In relation to the Queensland Ombudsman's concerns with the *Public Interest Disclosure Act 2010* (PID Act), the Department stated:

> *The Ombudsman refers to potential conflict between the statutory declaration requirement and the PID Act. Section 17(1) of the PID Act provides that a person may make a disclosure to a proper authority (which includes the CMC) in any way, including anonymously.*
>
> *Under section 17(2) of the PID Act, if the proper authority has a reasonable procedure for making a public interest disclosure to the proper authority, then person must use that procedure. The department is considering the interrelationship of the two Acts.*[146]

The CMC provided evidence of anonymous complaints, that presumably evidence of which may not have been forthcoming if there was a requirement for a statutory declaration to be provided:

> *Examples of important investigations resulting from an anonymous complaint have included the $16 million Health fraud matter, the investigation into the alleged misuse of public monies and a former ministerial adviser, and the investigation and prosecution of Gordon Nuttall.*[147]

[144] Grant Wilson, Submission No. 3, page 1.
[145] Queensland Ombudsman, Submission No. 19, page 2.
[146] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 12.
[147] Crime and Misconduct Commission, Submission No. 30, page 3.

Professor Martin submitted that the commission requiring statutory declarations was, in effect, a flawed policy position that may not in fact lessen the number of complaints at all:

> *…a statutory declaration will not stop complaints that turn out to be ill-founded. If a complainant of either of the sorts exemplified above swears in a statutory declaration to what they know directly and believe by inference, those things are not prosecutable lies, even if the belief that there was corruption turns out to be baseless- it was the complainant's belief.*
>
> *Moreover, this process will not deter the fixated but misguided people who are convinced (through mental illness or merely overvalued ideas) that they have uncovered a nest of corruption but no-one will believe them, and who keep writing and writing to try to find someone who will listen.*[148]

Professor Martin also raised the issue that valuable information may be missed if barriers such as statutory declarations are included in the complaints process:

> *Generally, I am not in favour of erecting barriers to complaints. The simple reason is that some valuable investigations have come from unpromising material, including anonymous complaints. The investigation against Nuttall started from unpromising material. It was only when, in the course of dealing with that, someone noticed some curious regular deposits into a bank account that Nuttall's offending came to light. The costs, it seems to me, are outweighed by the successes.*
>
> *The costs can be reduced by more robust internal guidelines rather than risk throwing the baby out with the bathwater.*[149]

The QLS suggested a more workable solution would be to simply allow the commission to make a policy to require statutory declarations to be made in certain circumstances, giving the following examples:

> *…where coercive hearings may be involved, or where matters may be high profile, or there is a concern a complaint may have been motivated by the desire to gain political advantage. This allows the Commission the flexibility to ensure that all relevant information is still being received and considered, and that a statutory declaration would not be required in every instance.*[150]

This appears to be consistent with the CMC's own submission which suggested:

> *Based on its experience, the Commission believes that the strict wording of this clause may inhibit the CCC's ability to effectively investigate some complaints of serious corruption and that it would be prudent for it to retain some flexibility in this area. In addition to the clause set out in the Bill, the following might be considered:*
>
> 1. *Complaints by or about elected officials should require a statutory declaration.*
> 2. *In other cases, a discretion for the Commission would be desirable as follows:*
>   a. *It could demand a statutory declaration for a non-political complaint, or*
>   b. *Consideration might be given to requesting that a complainant provide all relevant information to the CCC with the potential for the application of the CCC's special powers should they not comply.*[151]

[148] Professor Ross Martin QC, Submission No. 25, page 8.
[149] Professor Ross Martin QC, Submission No. 25, page 8.
[150] Queensland Law Society, Submission No. 29, page 10.
[151] Crime and Misconduct Commission, Submission No. 30, page 3.

The QLS considered the Bill as drafted would not reduce the drain on the commission's resources as time would still be taken up in determining whether exceptional circumstances exist in cases where a statutory declaration was not provided. The QLS suggested that the examples of exceptional circumstances be widened in the Bill as follows:

> *Making this a matter for Commission policy will allow for more specific guidance to the public and Commission staff about these issues. If the Bill is to proceed as currently drafted, we suggest that the complainant's status as a child should be specifically included as an "exceptional circumstance" in consequence of which a complaint does not need to be verified by statutory declaration. Further, we suggest the examples of exceptional circumstances be widened to include not only illiteracy, but also persons suffering some other personal or physical disadvantage which might result in the making of a sworn complaint difficult or impossible.*
>
> *Take for example an elderly person living in a remote indigenous settlement. That person may be entirely literate and competent, but live in an area that is not serviced by the internet, or even reliable and regular postal services. Their most common means of external communication may be the telephone. To require that person, perhaps wishing to complain about the actions of a visiting police officer or public health official for example, to complete a statutory declaration, would be too onerous.*[152]

Professor AJ Brown set out detailed commentary on why he considered this particular amendment was unworkable and should not be proceeded with:

> *…there is **no disadvantage** to the Government's stated objectives in not proceeding, because its other amendments and administrative reforms are already more than sufficient to support the goal of simplifying and redistributing the misconduct complaint loads generated under the Act.*
>
> *…the declaration proposed by subsection 36(3) represents an even more unworkable requirement than that recommended, and one likely to jeopardise the effective operation of the Act ...*

Professor Brown set out a number of reasons why he considered the provisions were unworkable including:

- *The required content, consequences or purpose of the declaration is **entirely undefined**, leaving it unclear as to what would represent a sufficient or satisfactory declaration under the sub-section; and*
- *Proposed sub-section 36(4) has the effect of **negating** any clear value in the proposed change, since it means that a statutory declaration is only required in respect of a '**complaint**' about corruption, but does not otherwise apply to a person '**giving information or matter**' involving corruption to the Commission;*[153]

Professor Brown considered the lack of definition around these terms made the application of the provisions unclear and carried the risk there would be inconsistency in the way the provisions applied from case to case. It was further submitted the lack of clarity was compounded throughout the Bill and CM Act as the terms 'complaint', 'information' and 'matter' were referred to generically as 'complaint' in a number of other provisions.[154] Professor Brown considered that:

> *Without substantial clarifying amendments throughout the Act, it is likely to be impossible to administer or sensibly interpret on this issue. With such clarifying amendments, however,*

[152] Queensland Law Society, Submission No. 29, page 10.
[153] Professor AJ Brown, Submission No. 34, page 9.
[154] See (sections 38(3); 42(1); 44(2); 46(1); 47(4); 48(4); 48A(4); 216A) of the *Crime and Misconduct Act 2001*.

> *the Act would also only be likely to become even more convoluted and bureaucratic to administer than at present, defeating many of the objectives of the Review.*[155]

Further reasons as to why the requirement for a statutory declaration was lacking were explained as follows:

- *The proviso that the Commission may waive the requirement for a statutory declaration in 'exceptional circumstances' does nothing to increase the workability of the provision. Rather, it further **complicates the task** of Commission officers who receive and assess information regarding suspected corrupt conduct, since it is unclear whether or when this discretion itself would be triggered (for example, whether it would be triggered in respect of information that appears to represent a 'complaint', which is not already made by way of statutory declaration; or whether it is triggered by any information or approach which could constitute a complaint, which is then unlikely to be formally made unless the requirement is waived);*
- *The first example of proposed 'exceptional circumstances' in which the declaration requirement may be waived, that of a person who '**fears retaliation for making the complaint**', does nothing to assist with the resolution of these issues, especially because it is not clear why a person's fear of retaliation is relevant to whatever purposes are intended to be served by the declaration in the first place. All existing research and policy knowledge regarding the making of complaints, especially by internal sources (i.e. whistleblowers), indicates that a procedural requirement such as a statutory declaration itself acts as a deterrent to the provision of valid information and the making of valid complaints, by: - Directly raising the fear in the mind of the source that they will be subject to prosecution for having sworn a false or misleading statement, or other formal retaliatory action, in the event that any aspect of the information they provide proves to be incorrect or is not able to be substantiated.*[156]

The Accountability Round Table (ART) submission also detailed its objection to the statutory declaration provisions:

> *The ART submits that it is very important that all citizens should be able to air their concerns about possible misconduct by government officials, and that it is very much in the public interest that they not be intimidated from doing so.*
>
> *As the Review Panel said in their report, "the system can tolerate some of these". But it is clear, as was the Review Panel's intention, that the requirement to make a complaint only by way of statutory declaration would inevitably prevent many genuine persons from making complaints to the CMC.*
>
> *Given the hidden nature of corruption, the ART contends that the seemingly insignificant allegation which leads to the uncovering of serious corruption would under the proposed regime usually not be made the subject of complaint because of the changes proposed, in particular the necessity for the suspicious or inquisitive member of the public to make a statutory declaration. Inevitably serious corruption will be left undisclosed because of the unwillingness of public officials and members of the public to take the risk of making the necessary statutory declaration.*[157]

[155] Professor AJ Brown, Submission No. 34, page 9.
[156] Professor AJ Brown, Submission No. 34, page 10.
[157] Accountability Round Table, Submission No. 26, page 3.

In response to the submissions on the statutory declarations provisions, the Department confirmed:

> *Callinan/Aroney were of the view that this requirement would reduce the number of matters going to, and being dealt with by, the CMC. The Bill does not implement this recommendation in full but achieves the policy objectives behind the recommendation.*
>
> *The Bill requires a complaint to be made by way of a statutory declaration, except if the commission determines exceptional circumstances exist (such as: a fear of retaliation for making the complaint; the literacy level of a complainant or his or her competency in English; or that the complainant has a disability that affects the person's ability to make the complaint by statutory declaration). The list of exceptional circumstances is not exhaustive.*[158]

The Department also clarified to whom the provision applies:

> *The requirement for a statutory declaration applies only to complaints made under section 36 of the CM Act and does not apply to notifications made by public officials under sections 37 or 88 of the CM Act or to any information or matter given to the commission under section 36 of the CM Act.*[159]

The Department also confirmed the requirement to specify the form and manner in which a complaint can be made to an integrity body was not unique to the Bill and set out a response to how the provision would work in practice:

> *…there are two jurisdictions that limit the form or manner in which a complaint can be made to their respective integrity body: Victoria which requires a complaint to be written unless IBAC determines there are exceptional circumstances; and Tasmania, which requires a written complaint but allows anonymity. All the submitters that raised this issue were concerned that the statutory declaration would prevent persons who had genuine and real complaints about corruption from making the complaint.*
>
> *The department notes that some of the submissions to the committee (for example the QLS and the CMC) raise alternative approaches to the statutory declaration requirement to that contained in the Bill.*
>
> *The department also notes that some submitters have sought clarification about what matters are to be attested to in the statutory declaration. While the legislation is silent on this, the department is of the view that the complainant would be required to attest that the complaint, to the best of the complainant's knowledge and belief is true and correct, as is the case in most statutory declarations.*[160]

Committee Comment

The submissions on this point have presented the Committee with a number of recommendations on the use of statutory declarations ranging from extending the use of statutory declarations to other bodies, to tweaking the provisions to make them more workable to removing the provisions from the Bill altogether.

The Committee is satisfied that the use of statutory declarations in the complaints management process will assist in achieving Callinan and Aroney's goals of reducing the number of complaints however agrees that the provisions, as drafted, require some amendments.

[158] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 12.
[159] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 12.
[160] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 12.

It seems reasonable and balanced, to expand the list of exceptional circumstances to include complainants who are under a legal disability. This would include children and others who are suffering some other personal or physical disadvantage which might result in the making of a solemn declaration difficult or impossible.

Recommendation 6

The majority of the Committee recommends the Bill be amended to include further examples of exceptional circumstances to the list under section 36(3) such as the person making the complaint is a child; or is suffering from some other personal or physical disadvantage which might result in the making of a statutory declaration difficult or impossible.

The Committee considers that while the provisions are aimed at lessening the number of complaints which are submitted to the commission, there will be a general discretion with the commission under the Bill to allow a complaint to be investigated even if the complainant does not complete the requisite declaration as the provision does not 'prohibit' the commission from acting on a complaint that is not submitted in the required manner.

The Committee considers it would be careless of the commission to ignore a complaint simply because it is not accompanied by a statutory declaration, and that there should be some flexibility in the complaints management process for the commission to demand a statutory declaration, if warranted. This aspect of the operation of the provisions should be clarified for the benefit of the House.

Point of clarification

The majority of the Committee requests the Attorney-General and Minister for Justice clarify whether the Commission will be able to demand a statutory declaration be submitted in the instance where a complaint is made without an accompanying declaration and the commission requires a declaration to test the veracity of the complaint.

Finally, the Committee notes the provision requiring a statutory declaration to be submitted has been drafted in a particular manner, however due to the concerns raised in submissions, the Committee considers further clarity is required around the terms 'complaint' 'information' and 'matter'.

Point of clarification

The majority of the Committee requests the Attorney-General and Minister for Justice clarify, for the benefit of the House the various meanings of the terms 'complaint', 'information' and 'matter' and confirm in what instances a statutory declaration is required under the Bill and in what circumstances a statutory declaration is not required.

2.6 Removing the commission's responsibilities for the 'prevention' of corruption in units of public administration

The CM Act provides for various functions of the CMC. Currently, one such function is to help to prevent major crime and misconduct.[161] It is defined as the CMC's 'prevention function'.

Recommendation 4 of the Callinan/Aroney Review stated: *'The CMC's preventative function should cease, except for such advice and education as may be appropriate and incidental to matters uncovered or found by the CMC in the course of an investigation'.*[162] The rationale behind the recommendation was that removal of the prevention function would allow the CMC to focus on investigating serious cases of corrupt conduct.[163] Recommendation 4 of the Callinan/Aroney Review continued, suggesting the remaining preventative functions should largely be undertaken by the PSC.[164]

According to the Explanatory Notes, the Bill amends section 23 of the CM Act, and makes consequential amendments to other provisions of the CM Act, to remove the CMC's function for the prevention of corruption in units of public administration.[165] Specifically, the Bill amends:

- section 23 to remove the CMC's responsibility for the prevention of 'misconduct' (amended by this Bill to be called 'corruption');[166]
- section 24 to remove any references to, or activities about, the CMC's responsibility for the prevention of 'misconduct' (amended by this Bill to be called 'corruption') as a consequence of the commission no longer being responsible for the prevention of 'misconduct' - the CCC retains the CMC's prevention function in respect of major crime;[167]
- section 33 to redefine the CMC's misconduct functions (amended by this Bill to be called the 'corruption function') by removing references to the CMC's responsibilities for the prevention of corruption and the integrity of units of public administration - the CCC's corruption function is to ensure complaints about corruption are dealt with in an appropriate way having regard to the principles in section 34 as amended by the Bill; and[168]
- section 34 to omit from the 'principles' any references that relate directly to the CMC's current responsibilities for the prevention of misconduct (amended by this Bill to be called 'corruption') and the integrity of units of public administration.[169]

[161] *Crime and Misconduct Act 2001*, section 23.
[162] The Honourable Ian Callinan AC and Professor Nicholas Aroney, *Review of the Crime and Misconduct Act 2001 and related matters*, March 2013,, page 215.
[163] *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 6.
[164] The Honourable Ian Callinan AC and Professor Nicholas Aroney, *Review of the Crime and Misconduct Act 2001 and related matters*, March 2013, page 215.
[165] *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 6.
[166] Clause 10 of the Bill; *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 18.
[167] Clause 11 of the Bill; *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 18.
[168] Clause 12 of the Bill; *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, pages 18-19.
[169] Clause 13 of the Bill; *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 19.

Issues raised in submissions

In its written submission to the Committee, the CMC stated:

> *For the purposes of clarification, the Commission presumes that the Bill as currently drafted would not prevent the CMC providing a report in relation to a specific investigation which includes comments on corruption prevention measures or educative outcomes, such as those included in the public reports on Queensland Health and the University of Queensland in 2013.*[170]

Whilst appearing as a witness at the Committee's public hearing, Dr Ken Levy, Acting Chairperson of the CMC, clarified this matter. In response to questioning from the Committee Chair, Dr Levy spoke of the CMC's interpretation of the proposed amendments:

> *…we would still have power with an investigation to make recommendations about prevention in the matter that was investigated, and that certainly is important. That is our interpretation of it. There was other prevention work that was done which was probably helpful to some agencies, but I think the level of resources that was put into it previously was probably seen as perhaps not being cost effective, and I think that is the main change in that.*[171]

In its written response to submissions received by the Committee, the Department confirmed *'…the CMC's presumption that the Bill's policy intent is not to prevent the commission providing a report in relation to a specific investigation which includes comments on corruption prevention measure or educative outcomes'.*[172]

In its written submission, the Bar Association of Queensland raised concerns with what it considered was the downgrading of the prevention function.[173]

Although Professor Martin rejected the view that corruption prevention can be treated substantially as a management issue, he argued that management requires specific, constructive support originating from a source external to the subject organisation:

> *Where that outside support comes from is, in principle, of no particular concern. It might come from the Public Service Commission or some other body as well as the CMC, but not doing it comes at a cost.*[174]

Professor Martin argued that moving the relevant corruption prevention positions from the CMC to the PSC (or whatever other body is charged with discharging the role) '*…seems somewhat pointless*'.[175] He claimed '*…prevention is a good fit within the CMC, given that corruption is one of its key areas of concern*'.[176]

Concluding his remarks on the proposed amendment, Professor Martin championed on-going efforts to prevent corruption, rejecting the notion that prevention efforts are a failure, merely because an example of corruption emerges:

> *A function of the police is to prevent crime, but no-one says the police have failed just because crime continues to exist. It is impossible to reliably measure the success of*

[170] Crime and Misconduct Commission, Submission No. 30, page 2.
[171] *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 16 April 2014, page 15.
[172] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 20.
[173] Bar Association of Queensland, Submission No. 12, page 2.
[174] Professor Ross Martin QC, Submission No. 25, page 5.
[175] Professor Ross Martin QC, Submission No. 25, page 5.
[176] Professor Ross Martin QC, Submission No. 25, page 5.

> *prevention initiatives in this field because offences of this sort are relatively uncommon (how do you count crimes that didn't happen?). But that doesn't mean the effort should be abandoned.*[177]

In its written submission to the Committee, the QLS supported ongoing training and awareness to ensure prevention of corruption, and expressed '*grave concerns'* about the apparent downgrading of proactive anti-corruption measures:

> *The Society understands that the Callinan/Aroney Report recommended that some of these preventative functions should be* transferred *to the Public Services Commission. Our reading of the amendments is that they will be removed from the Commission's functions, but further explanation should be provided as to whether these functions will indeed be carried out in a coordinated way by the Public Services Commission. This issue does not appear to be directly addressed by the Explanatory Notes. Unless such functions are properly and completely addressed elsewhere within the public sector, the removal of the preventative function from the CMC is a seriously retrograde step.*
>
> *We particularly note the proposal to remove specific functions in current s24 relating to misconduct (now to be called corruption)…*[178]

Additionally, the QLS observed the importance of the CMC's ability to analyse intelligence and report on ways to prevent misconduct:

> *The Fitzgerald Report stated in relation to the Official Misconduct Division that "The Division should also perform an educative or liaison role with other agencies and Departments and private institutions and auditors. It should give them advice and assistance in relation to preventing and detecting official misconduct, including how to improve their organizations and systems."… As the Commission is the central point for intelligence on corruption issues, the Commission may be best placed to perform this role (particularly for identifying ways to prevent corruption in future).*[179]

Professor AJ Brown contended the proposed amendments represent an unnecessary overreaction to the issues seen as relevant by the Callinan/Aroney Review, because they conflate three separate elements of present prevention functions:

> *(i) The Commission's current 'lead agency' role in anti-misconduct education and capacity building.*
>
> *Clauses 7 and 13 of the Bill remove this.*
>
> *(ii) Skills and expertise in corruption detection and investigation which the Commission imparts to agencies with which it deals, as a means of prevention.*
>
> *Clause 14 of the Bill* ***strengthens*** *this, by amending sub-section 35(1) of the Act to give the Commission clearer roles in: '(i) assessing the appropriateness of systems and procedures adopted by a unit of public administration for dealing with complaints about corruption'; and '(j) providing advice and recommendations to a unit of public administration about dealing with complaints about corruption in an appropriate way'.*

[177] Professor Ross Martin QC, Submission No. 25, pages 5-6.
[178] Queensland Law Society, Submission No. 29, pages 7-8.
[179] Queensland Law Society, Submission No. 29, page 8, including quote from the *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, 1989, Hon. Tony Fitzgerald AC, QC, page 314.

> *(iii) Intelligence functions which should enable the Commission to more pro-actively identify areas of corruption risk within the Queensland public sector, and so more efficiently investigate and deal with minor corruption as a means of preventing its development into major or systemic corruption*
>
> *This is an important area which like (ii) above, needs to be supported and not undermined by the amendments, if the Government's objectives are to be achieved.*[180]

Professor Brown continued, observing: *'Despite the continuing importance of the latter two functions, clauses 10 and 11 of the Bill propose to limit the Commission's functions by removing all reference to any prevention functions from sections 23 and 24 of the Act*'.[181]

In conclusion, Professor Brown characterised the effect of the proposed amendments as leaving the CCC with crime prevention functions, but removing any functions related to corruption prevention:

> *These amendments thus undermine confidence that the Commission is intended to continue to have power to undertake its responsibilities effectively, and send a worrying message that corruption prevention is not only less important than crime prevention in Queensland, but totally unimportant.*[182]

In its written response to submissions, the Department observed all submitters who raised the proposed amendment expressed concerns that government may consider prevention of corruption as unimportant: '*Many of these submitters suggested the commission, given its central role in anti-corruption activities, is the most appropriate organisation to co-ordinate and lead in prevention activities*'.[183]

The Department noted prevention encompasses education and training activities, which every department and agency should be undertaking: '*Callinan and Aroney emphasised throughout their report the need for departments and agencies to take greater responsibility for dealing with corruption and the need for the commission to stay focused on the investigation of serious cases of corruption*'.[184]

The Department continued, observing that whilst the Callinan/Aroney Review recognised educative functions have generally been conferred on anti-corruption bodies in each State, ultimately, the Review concluded the task of prevention of corruption should be undertaken by the PSC.[185] The Department clarified the role of the PSC:

> *The PSC will provide advice support and assistance to public service agencies under the new CaPE service to be implemented by the PSC. In addition, the amendments proposed to the* Public Service Act 2008 *(PS Act) in the Bill will support the CaPE service.*
>
> *The PSC also, in accordance with section 46 of the PS Act, has an important role in upholding and enhancing the public service ethical culture and ethical standards; and in particular conducting prevention activities.*[186]

[180] Professor AJ Brown, Submission No. 34, page 14.
[181] Professor AJ Brown, Submission No. 34, page 14.
[182] Professor AJ Brown, Submission No. 34, page 14.
[183] Letter from the Department of Justice and Attorney-General, 24 April 2014, pages 19-20.
[184] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 20.
[185] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 20.
[186] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 20.

Committee Comment

The Committee acknowledges Recommendation 4 of the Callinan/Aroney Review and its rationale that removal of the prevention function would allow the CMC to focus on investigating serious cases of corrupt conduct. The Committee notes the effect of the Bill's proposed amendments to the CM Act, being the removal of the CMC's function for the prevention of corruption in units of public administration. On balance, the Committee supports the amendments and their implementation by the Bill.

The Committee is satisfied with the Department's advice that the Bill's policy intent is not to prevent the CCC providing a report in relation to a specific investigation which includes comments on corruption prevention measure or educative outcomes. Further, the Committee notes the Department's clarification of the PSC's future role in providing advice, support and assistance to public service agencies.

2.7 Refocussing the commission's research function

Background

The research function of the CMC stems back to the Fitzgerald Inquiry itself, where it was recommended the original CJC have an independent research function. The Fitzgerald Report stated:

> *The administration of criminal justice involves dealing with deep and peculiar problems which are not addressed by ad hoc fragmented responses to issues by individual agencies.*
>
> *There is 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.*
>
> *The distinguished and valuable service rendered by the Law Reform Commission has been noted elsewhere. It should be made plain that the recommendations in this report do not, impliedly or otherwise, recommend the abolition of or downgrading of the Law Reform Commission. The recommendations pre-suppose a continued (and, indeed, enhanced) functioning of the Law Reform Commission. Nevertheless the establishment of an independent agency to continually address matters relevant to the criminal law is vital. It is proposed that a Research and Co-ordination Division be formed in the CJC.*[187]

Hon. Fitzgerald listed a number of functions for the proposed research division including, to:

- *define emerging trends in criminal activity including organized crime, identifying competing needs and establishing priorities for the allocation of law enforcement resources;*
- *develop compatible systems for and foster co-operation between law enforcement, prosecution, judicial, and corrective services agencies to promote optimum overall use of available resources;*
- *co-ordinate and develop procedures and systems for co-ordinating the activities of the CJC;*
- *provide information to the Parliament, judiciary, law enforcement and prosecution agencies in relation to criminal justice matters;*

[187] *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, 1989, Hon. Tony Fitzgerald AC, QC, page 316.

- *co-ordinate with other Government departments with respect to criminal justice related issues;*
- *research and recommend law reform pertinent to criminal justice and reform of administrative processes to enforce criminal law;*
- *review the effectiveness of Police Department programmes and methods on a continuing basis, especially compliance with CJC recommendations or policy instruction, community policing, prevention of crime, and those related to selection, recruitment, training and career progression of police officers and supporting staff;*
- *review Police Department use or treatment of criminal intelligence including as required by the Intelligence Division;*
- *report to the CJC on all the above to aid its determinations and alert it as necessary.*

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 programmes 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 to supplement direct reporting by the Commissioner of Police to the Criminal Justice Commission.

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.[188]

The research function has evolved over the life span of the CJC and CMC. The current CM Act lists the CMC's research functions as:

(1) The commission has the following 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;

(d) to undertake research into any other matter relevant to any of its functions.

(2) Without limiting subsection (1)(a), the commission may undertake research into—

(a) police service methods of operations; and

(b) police powers and the use of police powers; and

[188] *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, 1989, Hon. Tony Fitzgerald AC, QC, pages 316-317.

(c) law enforcement by police; and

(d) the continuous improvement of the police service.[189]

The PCMC noted the CMC's research role in its most recent three yearly review, where it was stated:

> *The CMC's Applied Research and Evaluation Unit has undergone considerable re-structure since the last three year review, which was acknowledged by the Acting Chairperson, Mr Warren Strange at the public hearing for this review. Mr Strange informed the* [PCMC]*:*
>
> > …[the CMC] *research area continues to work to provide a legitimate, robust and independent evidence base for public policy and legislative change. That unit has undergone some very significant change in recent times to ensure it can deliver high-quality, timely and applied research outcomes to government and to our other stakeholders. Some of those changes include a name change, from Research to Applied Research and Evaluation to better reflect the type of work that the unit undertakes and its relevance to the primary objects of the CMC.*
> >
> > *They have restructured the area to align more closely with the primary functions of Crime and Misconduct and Witness Protection, implementing a revised communication strategy and reviewing their planning and project management processes and implementing an improved human research ethics process to ensure that all relevant research projects have appropriate ethical considerations, clearance and approvals in place. They are also working, as part of their communication strategy, to improve their consultation and relationship with key government agencies.*[190]

The PCMC went on to state it had *'closely monitored the internal re-structure of the CMC's Applied Research and Evaluation unit and is satisfied that after a period of instability, the unit's change of direction is now allowing it to perform its evidence based research at a high level.'*[191] The PCMC considered the CMC Research unit was well placed to provide valuable data and information, specific to the CMC's various work units.[192]

The Callinan/Aroney Review, conducted less than a year later, considered non-specific research by the CMC was a distraction and not such as to justify the expense and resources needed for it, further that the research function of the CMC should be reduced and sharpened.[193] Recommendation 12 of the Callinan/Aroney Review further recommended as follows:

> *The research undertaken by the CMC should be limited to that which is referred to the CMC by government, with the qualification that it should be at liberty to make submissions to the Attorney-General, that it be permitted to research particular issues or matters on the ground that they are emergent, important and not able to be addressed by other bodies, or is research incidental to an investigation of a specific matter. No such research should be undertaken without the approval in advance from the Attorney-General*.[194]

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189 Section 52, *Crime and Misconduct Act 2001*.

190 Parliamentary Crime and Misconduct Committee, Report No. 86, *Three Yearly Review of the Crime and Misconduct Commission*, May 2012, page 126.

191 Parliamentary Crime and Misconduct Committee, Report No. 86, *Three Yearly Review of the Crime and Misconduct Commission*, May 2012, page 127.

192 Parliamentary Crime and Misconduct Committee, Report No. 86, *Three Yearly Review of the Crime and Misconduct Commission*, May 2012, page 127.

193 The Honourable Ian Callinan AC and Professor Nicholas Aroney, *Review of the Crime and Misconduct Act 2001 and related matters*, March 2013, page 207.

194 The Honourable Ian Callinan AC and Professor Nicholas Aroney, *Review of the Crime and Misconduct Act 2001 and related matters*, March 2013,Recommendation 12, page 218.

The PCMC's response to this recommendation was:

> *The* [PCMC] *received advice from the CMC that it recently restricted its research activities to matters relevant to current investigations and matters before it. The* [PCMC] *notes the high regard in which CMC research is held by the wider law enforcement community. The* [PCMC] *also understands that the research of the CMC has driven policy change in a number of areas including recent Taser reforms.*
>
> *On the basis of the CMC's own refocus of its research activities, the* [PCMC] *does not support this recommendation which would require the CMC, an independent statutory body, to seek the advance permission from a Minister of the Executive Government before conducting broader research.*[195]

Relevantly, Mr Michael Keelty, the former Commissioner of the Australian Federal Police, also considered the research area of the CMC in his review of the CMC (Keelty Review) undertaken on behalf of the Public Service Commissioner and the Government in response to the Callinan/Aroney Review. The Keelty Review was issued on 19 November 2013. In his report, Mr Keelty noted as follows:

> *An examination of the research outputs from the CMC over the past twelve months reveals a very insular and myopic approach to research. The research area of the CMC does not enjoy a good reputation. The skill-set of staff within the research unit may not be as contemporary as might be expected of a unit within an organisation with a significant public profile, entrusted with significant powers.*[196]

The Keelty Review made the following three key recommendations in relation to the research functions of the CMC:

1. The CMC's role in research can and should be revised in line with national developments in policing research, identifying opportunities to collaborate or leverage off existing projects (Recommendation 10).
2. That the research unit of the CMC be reduced in size and be directed to collaborate on research with other institutions (Recommendation 11).
3. That the research unit, once reduced in size, be put to much more stringent testing on the subject matters for research to ensure that their research outputs influence a measurable change of behaviour in police and public servants through a reduction in the reporting of corruption matters (Recommendation 12).[197]

Overview of amendments

Recommendation 12 of the Callinan/Aroney Review and Recommendations 10-12 of the Keelty Review are the apparent impetus for clause 21 of the Bill which amends section 52 of the CM Act to redefine and refocus the CCC's role in relation to research.[198] The amendments also require the CCC

[195] Parliamentary Crime and Misconduct Committee response to The Honourable Ian Callinan AC and Professor Nicholas Aroney, *Review of the Crime and Misconduct Act 2001 and related matters*, March 2013, letter dated 30 May 2013, page 6.

[196] Letter dated 19 November 2013 from M J Keelty AO to Mr John Sosso, Director-General, Department of Justice and Attorney-General, enclosing a report regarding the reform of the CMC, pages 8-10.

[197] Letter dated 19 November 2013 from M J Keelty AO to Mr John Sosso, Director-General, Department of Justice and Attorney-General, enclosing a report regarding the reform of the CMC, pages 8-10.

[198] *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 16 April 2014, page 7.

to prepare a three year research plan to be approved by the Minister on an annual basis, which includes details of the research the CCC proposes to undertake during that period.[199]

The CCC must submit this research plan to the Attorney-General, as soon as practicable after the end of each financial year, for approval. The plan must contain proposed research for the financial year in which the plan is prepared and the following two financial years and may be amended with approval of the Minister on further request from the CCC. The areas of research available to the CCC will be limited to the following:

(a) research to support the proper performance of its functions;

(b) research required to be undertaken by the CCC under another Act; and

(c) research into any other matter referred to the CCC by the Minister.[200]

The overall effect of these amendments in the Bill will be to bring all research conducted by the new CCC under the direction of the Attorney-General.[201]

In preparing its research plan, the CCC must consult with units of public administration and identify the priorities for the research it proposes to undertake in the period to which the plan relates, having regard to its strategic and business plans; and any other relevant matter.[202]

Issues raised in submissions

Nearly a quarter of the submissions received by the Committee included substantive comments about the proposed changes to section 52 of the CM Act relating to the CCC's research functions. While a few submissions concurred with some fettering of the research functions of the CCC,[203] none of the submissions relating to this part of the Bill were in total support of the proposed changes. They raised a number of general and specific concerns, a number of which are summarised below for the attention of the Legislative Assembly.

Description of research function as a 'distraction' questioned

The description by the Callinan/Aroney Review of the undertaking of non-specific research by the CMC as a 'distraction' was questioned by a former CMC Chairperson, Professor Martin, in his submission:

> *One of the criticisms of the research function is that is said to be a "distraction". Distraction to whom? Unless one conceives of organisations like the CMC as monolithic single minds, I find it difficult to respond to this. I was not distracted by the research function. Substantial organisations like the CMC can do more than one thing at once. The research work was done by other people and I fitted such supervision of it into my program as was necessary, which was not a great call on my time, and practically no call at all on the time of investigators. If what is meant is a distraction of resources (which seems unlikely), then removing the resources from the research division will not necessarily result in more resources going to investigations, etc. The orthodox public service response to removing a function is to remove the funding that supported it, meaning that no more resources would*

[199] *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 20.
[200] Clause 21 – Replacement of section 52 (Research Functions).
[201] Clause 21 – Replacement of section 52 (Research Functions).
[202] Clause 21 – Replacement of section 52 (Research Functions).
[203] Professor Ross Martin QC, Submission No. 25, page 3; Bar Association of Queensland, Submission No. 12, page 5.

> *be available to other functions without express Executive intervention, which can be done anyway.*[204]

Importance of an independent research function

The importance of the independence of the research functions of the CMC generally was also explained by Professor Martin in his submission:

> *The research section of the CMC is a substantial State asset. It is independent of the police service in particular but also of the executive in general. It can provide an empirical basis to drive policy debate and it does so on an ongoing basis, with respect to such things as police use of force, use of Tasers, use of firearms, high speed chases, and so on. Government departments have policy officers, but they do not have the numbers of staff, time or training that the CMC's research section does to undertake work of the type done by the CMC. Policy officers within departments are, in my experience, people of integrity, but they are not visibly and manifestly independent of government. The research section can also provide research in areas that may be potentially politically fraught. Examples include political donations, licensing laws, gambling, and prostitution.*[205]

The proposal to limit the independence of the research function was queried by Profession AJ Brown from the Centre for Governance and Public Policy at Griffith University:

> *The new section 52, proposed by clause 21, proposes to limit the independence of the Commission in its research function, in ways that are inconsistent with its continued independence in all other matters of corruption prevention and investigation.*
>
> *Even if the Review Panel's concerns regarding the quality and relevance of Commission-led research were correct, this would not provide an argument for reducing the Commission's independence. This is especially the case when the research function, exercised properly, may inform the Commission's intelligence functions and play a significant role in the identification of areas of corruption risk, which may or not be conducive to the short-term political interests of the Government of the day, or specific agencies of Executive government who might find it more convenient to escape the scrutiny of the Commission.*[206]

Alternative options for external oversight

Former CMC Chairperson, Mr Robert Needham suggested that if external oversight is deemed to be required then a parliamentary committee should be given this role rather than the Executive:

> *If it is thought that some further external oversight is required, then that oversight should be through the Parliamentary Committee, not the Executive, whose political interests might conflict with the proper carrying out of the Commission function.*[207]

Professor Martin also recommended that a parliamentary committee, specifically the PCMC, would be better placed to oversee the research functions of the CCC:

> *The better approach is for a government to blunt whatever political problem it might perceive by, where appropriate, asking for research at the outset of policy development, and then agreeing or disagreeing at the end on an informed and principled basis rather than stifling empirical examination at birth. …*

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[204] Professor Ross Martin QC, Submission No. 25, page 3.
[205] Professor Ross Martin QC, Submission No. 25, page 3.
[206] Professor AJ Brown, Submission No. 34, page 15. See also the following submissions: Professor Tim Prenzler, Submission No. 8, page 1; Law and Justice Institute (Queensland) Inc., Submission No. 28, page 9.
[207] Mr Robert Needham, Submission No. 7, page 4.

> *Research needs to be supervised first at the level of the Commission, and above that at the level of the PCMC. Subject to matters or topics that are investigatively sensitive (as opposed to politically sensitive), there is no reason in principle why the CMC should not make its research program public unless there are reasons why doing so would defeat its value. This way, the program can be the subject of scrutiny and defence as required.*[208]

Three year plan unworkable

Professor AJ Brown also questioned the workability of the requirement under the Bill that the CCC prepare a three-year research plan requirement:

> *Further, the solution proposed by the amendments – a three-year research plan which must be reviewed and approved by the Attorney-General every year – appears to be unworkable, since there is no guarantee that approval will remain in place even for research requiring three years, in the event that the Attorney-General changes, or determines that a previously approved research priority is no longer convenient to the interests of the Government.* [209]

Important public education role

The QLS highlighted in its submission the important public education role of the current CMC:

> *The Society considers that the Commission prepares well researched publications on criminal law and law enforcement issues that play an important public education role. In the absence of government structures, such as the Sentencing Advisory Council, the Commission performs this valuable public education role. In this regard, we also note that the Commission for Children and Young People and Child Guardian role will soon be subsumed into the Public Guardian and the Commission's previous role in publishing public education documents will be dissolved. We also take this opportunity to note that interstate bodies, such as the New South Wales Independent Commission Against Corruption views that part of its role is to, "educate the community about NSW public sector corruption… through… investigation reports and other publications".* [210]

Suggestion to collaborate with other institutions

Both the Keelty Review and Professor Brown, in his submission, put forward the suggestion that the CMC work collaboratively with other institutions, such as universities, instead of being subject to Ministerial approval. In this regard, Professor AJ Brown made the following recommendation in his submission:

> *Mr Keelty's advice regarding the CMC also noted the potential value of the research function, but made suggestions more consistent with the importance of the Commission engaging in collaborative research with other institutions, than making it subject to direction by the Government of the day.*[211]

Professor AJ Brown then made the following recommendation:

> ***Recommendation 6**. That clause 21 of the Bill not be proceeded with; and instead replaced with a new section 52 which simply requires the Commission to develop a research plan in support of its functions, and to consult with the Minister, universities, and other relevant agencies in the development of the plan; and to give priority in the development of the plan to a specific range of considerations conducive with ensuring more focused and higher value*

[208] Professor Ross Martin QC, Submission No. 25, page 3.
[209] Professor AJ Brown, Submission No. 34, page 15.
[210] Queensland Law Society, Submission No. 29, page 13.
[211] Professor AJ Brown, Submission No. 34, page 15.

research, including opportunities for collaboration with other research institutions, rather than relying on Ministerial approval. [212]

The Department's response on the submissions included the following points:

Interstate Comparison: The department understands that not all other integrity agencies within Australia have legislative provisions requiring them to undertake research. Queensland, Victoria and Tasmania appear to be the only jurisdictions to include specific legislative provisions requiring their respective agencies (CMC, IBAC and IC) to undertake research to support their functions.

The amendments in this Bill will allow the CMC to identify for approval suitable research activities to support its functions. This differs from the Callinan/Aroney recommendation, which provided that the CMC was only to research matters that were referred by the Minister.

The proposed changes to the research function ensure that research will be focussed and relevant by requiring that the research: supports the commission's functions; is required to be undertaken by the commission under an Act; or is referred to the commission by the Minister. [213]

Committee Comment

The Committee acknowledges that the research functions of the CMC are an important function and have provided valuable reports over a number of years, however the Committee also accepts that the research functions could be more focussed and would benefit from some external oversight.

The Committee also accepts that the proposal in clause 21 of the Bill will reduce the independence of the CCC. In the Committee's opinion, it is vital that the CCC research unit retain some element of independence from the Executive.

Accordingly, the Committee recommends the Bill be amended to ensure that the Attorney-General is required to consult the parliamentary oversight committee on the research plans submitted by the CCC.

Recommendation 7

The majority of the Committee recommends that the Bill be amended to require the Attorney-General and Minister for Justice to consult with the parliamentary committee on the approval of the proposed research plans prepared annually by the Commission.

2.8 Strengthening the transparency and accountability of the Commission

The Bill includes a number of amendments to promote accountability and transparency of the CMC's decision-making, operations and activities. Each of these matters is dealt with in turn below.

Requiring parliamentary committee meetings with the commission be held in public

As part of the its oversight of the CMC, it has been a long standing practice of the parliamentary oversight committee – currently the PCMC - to meet with the CMC Chairperson, Commissioners, and other senior officers on a regular basis. Until recently, the PCMC conducted those meetings, almost without exception, in private. In more recent times, the parliamentary committee has held meetings

[212] Professor AJ Brown, Submission No. 34, page 15.
[213] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 16.

with the CMC in public, going into private session when necessary to discuss matters of a confidential or operational nature.

The Explanatory Notes state the policy objectives of the Bill include:

> *…strengthen the transparency and accountability of the commission by … requiring meetings between the commission and the Parliamentary Crime and Corruption Committee (the parliamentary committee) to be held in public as much as possible*.[214]

To give effect to this policy objective, clause 69 of the Bill will insert a new provision which would require any meeting of the parliamentary committee to be public unless the exceptions in the proposed subsection 302A(2) apply. The exceptions are as follows:

> *The Committee may close all or part of a meeting where the Committee considers it necessary to avoid the disclosure of:*
>
> *a) confidential information or information the disclosure of which would be contrary to the public interest; or*
>
> *b) information about a complaint about corrupt conduct dealt with, or being dealt with, by the Commission; or*
>
> *c) information about an investigation or operation conducted, or being conducted, by the commission in the performance of its crime function, corruption function or intelligence function.*

Issues raised in submissions

The proposed section received little attention from submitters. The Bar Association of Queensland stated:

> *Although this maintains in practice the status quo, the Association supports the principle that the committee's hearings and deliberations should be, as far as possible, in public.*[215]

Committee Comment

The Committee notes the PCMC has commenced holding public meetings with the commission except for discussing confidential or sensitive information and that the proposed amendment to require public meetings formalise the current practice. The Committee believes proper observance of the carrying out of the functions of the parliamentary oversight committee is necessary to maintain public confidence in the new CCC. To this end, the Committee believes it is appropriate that public meetings of the oversight committee be the rule - not the exception.

The Committee notes the parliamentary oversight committee will, at times, consider matters which would not be appropriate for discussion in an open meeting due to their being contrary to the public interest. Where this occurs, the Committee considers the exceptions provided for in Bill are sufficient.

The Committee notes the private deliberation of Parliamentary Committees provided for in the Parliament's Standing Orders and believes it entirely appropriate for portfolio-oriented committees such as this Committee. The work of the Parliamentary oversight committee and its integral role in ensuring accountability of the Crime and Corruption Commission; however, serves to differentiate it from the other parliamentary committees.

[214] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 2.
[215] Bar Association of Queensland, Submission No. 12, page 5.

Members of the PCMC should be able to discuss matters and conduct meetings in private where appropriate and the Committee is satisfied the imprimatur for this is provided for in the aforementioned exceptions in the proposed subsection 302A(2).

Clarification of terms

The Committee seeks clarification on the use of the word 'meeting' in the new clause. The recommendation of Callinan and Aroney, in promoting the transparency of activities of the commission stated:

> *…the* Crime and Misconduct Act 2001 *be amended to require that the Parliamentary Committee's hearings be public, subject only to the retention of the principle of confidentiality with which we deal elsewhere in this Report, the necessity not to compromise uncompleted investigations or covert functions, and non-disclosure of the making of complaints.*[216]

In its response to the PCMC's Report No. 90 and to the Callinan/Aroney Review, the Government stated:

> *The Government further notes that the PCMC has commenced public hearings of its regular meetings with the CMC, apart from any sensitive information which is heard in camera.*
>
> *The Government will work with the PCMC to ensure that the amendment requiring PCMC hearings to be in public achieves the correct balance and has due regard to the fact that some sensitive and confidential matters cannot be dealt with in a public hearing.*[217]

While the PCMC has in the past described its meetings with the CMC as 'joint meetings', in reality these events are properly characterised as hearings of the PCMC. The wording of recent recommendations and responses on this issue reflects that reality, referring to hearings of the committee.

The Committee notes that throughout the Standing Orders, the words 'hearings' and 'meetings' are used somewhat interchangeably. The Committee considers that to avoid any doubt as to which meetings or hearings the proposed section 302A is to apply, it would assist the House if the Attorney-General could clarify the intent of the section in the Government response to this Report.

Point of Clarification

The majority of the Committee requests the Attorney-General and Minister for Justice clarify to which 'meetings' or 'hearings' of the parliamentary committee, the new clause 302A(2) is to apply.

Enlarging the powers of the Parliamentary Commissioner

As a result of a recommendation in the Callinan/Aroney Review, the Bill will also expand the role of the renamed Parliamentary Crime and Corruption Commissioner (the Parliamentary Commissioner) by enabling the Parliamentary Commissioner to investigate complaints on his or her own initiative.

[216] The Honourable Ian Callinan AC and Professor Nicholas Aroney, *Review of the Crime and Misconduct Act 2001 and related matters*, March 2013, page 219.

[217] Government Response: *Parliamentary Crime and Misconduct Committee – Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Commission of Inquiry documents;* and *The Honourable Ian Callinan AC and Professor Nicholas Aroney - Review of the Crime and Misconduct Act 2001 and related matters* - (available at http://www.justice.qld.gov.au/data/assets/pdf_file/0020/204536/queensland-government-response-to-cmc-reviews.pdf).

At present, the Parliamentary Commissioner may only investigate a matter or hold a hearing with the bipartisan approval by the parliamentary committee.

Under the new provisions the Parliamentary Commissioner will be able to hold hearings in certain circumstances and reports of the Parliamentary Commissioner may be used by the commission's Chief Executive Officer in deciding whether to take disciplinary action, and what disciplinary action should be taken, against commission officers.

Issues raised in submissions

Differing views were received in submissions on whether the Parliamentary Commissioner's powers ought to be expanded. Former CMC Chairperson and former Parliamentary Commissioner, Robert Needham submitted against the expansion of the Parliamentary Commissioner's powers:

> *The oversight role over the Commission was properly given by the Criminal Justice Act to the Parliamentary Committee and maintained ever since. It was found that some practical difficulties, confidentiality, etc necessitated the appointment of a person to act as the agent of the Committee to look more closely into matters within the Commission and report to the Committee. This included any necessary investigations of allegations of misconduct involving the Commission or its officers.*
>
> *Originally, the Parliamentary Commissioner was given the power to hold hearings at his/her own discretion. With the enactment of the* Crime and Misconduct Act 2000*, this own discretion in the Commissioner was removed and the approval of the Parliamentary Committee was required for a hearing. Additionally the Parliamentary Commissioner could only investigate matters as referred by the Committee.*
>
> *In 2002 I was appointed as the Parliamentary Commissioner and served as such for three years. I agreed with the requirement for Committee approval of investigations and hearings. In fact I never felt the need to hold a hearing, even though I investigated many matters, but I always felt that if I had a good reason to need to investigate a matter or to hold a hearing, Committee approval would have been forthcoming.*
>
> *However, the oversight role was the Committee's; I was its agent. It is appropriate that the Committee should determine when and how its investigations are to be carried out.*
>
> *It is the Committee that is responsible for the carrying out of its functions to the Parliament and ultimately, through Parliament, to the people.*
>
> *The role of the Parliamentary Commissioner is not amenable to judicial review by the courts, as being covered by parliamentary privilege.*
>
> *The proposed amendment would mean that the Parliamentary Commissioner could carry out investigations and hold hearings and merely advise the Committee of what he is doing. The Committee would be unable to control or direct the Commissioner in these matters.*
>
> *In effect, the unelected Parliamentary Commissioner in this role would be above any form of control, parliamentary or judicial. This would be a situation totally contrary to all the usual standards of public administration and should not be allowed.*[218]

[218] Robert Needham, Submission No. 7, page 4.

Taking an alternate view, the QLS submitted the role of the parliamentary commission should have more independence:

> *Clause 73 widens the powers of the parliamentary commissioner to investigate matters on his or her own initiative, to provide notice to the parliamentary committee and to report to the parliamentary committee. The Society has long advocated for this to be the position, and commends this proposed change.*
>
> *The parliamentary commissioner's role should involve an independent discretion to investigate, and not be bound by only those matters referred to it by the parliamentary committee.*[219]

The Whistleblowers Action Group (Queensland) similarly supported the expansion of the Parliamentary Commissioner's powers:

> *WAGQ supports the changes pursuant to Clause 74. Notwithstanding the expectation that the Parliamentary Commissioner will be a barrister of considerable experience in the area of criminal justice law, and enjoy bipartisan support, WAG supports the legislative change of a complainant being able to approach him/her directly with a grievance concerning how the Commission handled a complaint.*[220]

The CMC provided the Committee with some observations of the expanded role of the Parliamentary Commissioner noting the experience of the Western Australian Corruption and Crime Commission when an impasse developed between the WA commission and the equivalent Parliamentary Commissioner, the WA Parliamentary Inspector. The CMC submitted:

> *The process of engagement between the two officers over a disagreement about findings of the Commission resulted in the Commission devoting 992 hours in responding to issues directly arising out of the Parliamentary Inspector's inquiries in a period of just over two months, including almost 90 hours of the Chair's time.*
>
> *Such a situation could be avoided if the current provisions, by which the Parliamentary Commissioner requires a referral from the Parliamentary Committee, are retained.*[221]

Committee Comment

The Committee notes the powers for the Parliamentary Commissioner to commence an investigation at his or her own initiative only apply in limited circumstances and require the Parliamentary Commissioner to notify the parliamentary committee when he or she intends to conduct a hearing. The Committee further notes the Bill proposes to make no change in relation to the appointment process of the Parliamentary Commissioner.

The Committee accepts with the Parliamentary Commissioner being subject to the parliamentary committee's direction and control on some matters and having no restrictions on others (subject to the provisions of the CM Act, as amended) there may be some co-ordination issues that occur, with certain referrals. However the Committee does not consider this should be a barrier to the increase of the Parliamentary Commissioner's powers.

The Committee considers providing the Parliamentary Commissioner with enlarged powers will achieve the Bill's intended objectives of increasing the transparency and operation of both the commission and the parliamentary committee, and provide the public with greater awareness of the operations and role of this important position within Queensland's integrity framework.

[219] Queensland Law Society, Submission No. 29, page 23.
[220] Whistleblowers Action Group (Queensland), Submission No. 21, page 6.
[221] Crime and Misconduct Commission, Submission No. 30 , page 2.

Parliamentary Commissioner's ability to table certain documents

In relation to an investigation by the Parliamentary Commissioner on his or her own initiative under the new provisions, proposed new section 314A in the Bill enables the Parliamentary Commissioner, if an investigation takes place under new section 314(4), to table in the Legislative Assembly – certain documents depending on the outcome of the Commissioner's investigation, i.e. a referral to the DPP about a possible prosecution or a recommendation to the Minister that disciplinary action against a Commissioner should be considered.

The Committee notes however that although the Parliamentary Commissioner is an officer of the Parliament, that position is not afforded a right to table a document in the Legislative Assembly. Under the Standing Rules and Orders of the Legislative Assembly, tabling of documents is restricted to Members of Parliament only.

The Committee notes there is one existing provision in the CM Act which also requires the Parliamentary Commissioner to directly table a report in the Legislative Assembly.[222] The Committee understands that as section 59 of the *Parliament of Queensland Act 2001* (Tabling of Report when Assembly not sitting) requires either the Speaker or a Minister to receive and table a document through the Clerk out of session, the current practice is that the Parliamentary Commissioner provides the report to the Speaker of the Legislative Assembly who then causes the document to be tabled.

With other reports of the Parliamentary Commissioner, the relevant Act[223] provides a process whereby the Chair of the PCMC tables a report of the Parliamentary Commissioner on his or her behalf.

The Committee considers that given the extreme importance and sensitivity of the matters being dealt with by the Parliamentary Commissioner, there should be no uncertainty in the process required for the Parliamentary Commissioner to table documents required under the CM Act.

The Committee recommends that a new provision be included in the CM Act similar to section 69 in Tabling requirements that specifically deals with the tabling of certain documents by the Parliamentary Commissioner and that it is clear that the relevant documents are required to be provided to either the Speaker or the parliamentary committee as the conduit for tabling.

Recommendation 8

The majority of the Committee recommends a new provision be added to the Bill setting out the process for Parliamentary Commissioner documents to be tabled in the Legislative Assembly.

Own motion powers – Parliamentary Privilege

Currently, any work conducted by the Parliamentary Commissioner is afforded the protection of parliamentary privilege because the work is undertaken at the direction of the parliamentary committee. The privilege of the committee attaches to the work of the Commissioner.

An investigation and report conducted under the Parliamentary Commissioner's new own motion investigation powers will not be protected by parliamentary privilege. Clause 79 of the Bill therefore amends existing section 336 to include additional protections for the Parliamentary Commissioner and Parliamentary Commissioner officers modelled on the protections given to commission officers in sections 335(3) and (4) of the CM Act. This includes a defence of absolute privilege in defamation proceedings in relation to a publication to or by the Parliamentary Commissioner.

[222] Section 146ZQ – Report about authorities for assumed identities etc.

[223] See section 363 of the *Police Powers and Responsibilities Act 2000.*

Committee Comment

The Committee is satisfied that the protections afforded to the Parliamentary Commissioner are warranted in the circumstances.

Parliamentary Committee reviews of the CMC

The Bill makes amendments to the functions of the PCMC, more particularly in relation to the PCMC's function in section 292(f) of the CM Act of reviewing the activities of the CMC and tabling a report of that review in the Legislative Assembly.

Currently the CM Act provides the PCMC is to review the activities of the CMC – '*at a time near to the end of 3 years from the appointment of the PCMC's members*'.[224] The Bill will amend this review function from approximately every three years to every five years by deleting the above sentence in italics and inserting – '*by 30 June 2016, and by the end of each 5-year period following that day'.*[225] The PCMC has in its last two reports of its review of the CMC under section 292(f) (in 2009 and 2012), noted that this time frame does not allow sufficient time for recommendations to be implemented and monitored before the next review is to occur and recommended a five (5) year interval between reviews is more appropriate.[226]

The Bill also inserts a new function which requires the PCMC to specifically examine the structure of the CMC. The new function is stated as:

> *To periodically review the structure of the commission, including the relationship between the types of commissioners and the roles, functions and powers of the commission, the chairman and the chief executive officer, and, for each review, to table in the Legislative Assembly a report about the review, including any recommendations about changes to the Act.*[227]

There is no guidance in the section as to what such a period between reviews should be.

Issues raised in submissions

A number of submitters considered extending the period between reviews by the PCMC from three to five years was too long. See for example submissions from the Whistleblowers Action Group (Queensland) Inc.,[228] the QLS[229] and the Queensland Nurses' Union (QNU).[230] However these submissions did not appear take into account the submissions from the PCMC itself in its past two three yearly review reports. The PCMC has stated in multiple reports that the three year timeframe does not allow sufficient time for recommendations to be implemented and monitored before the next review is to occur and recommended a five year interval between reviews is more appropriate.[231]

[224] Section 292(f), *Crime and Misconduct Act 2001*.
[225] Clause 67, Crime and Misconduct and Other Legislation Amendment Bill 2014.
[226] Parliamentary Crime and Misconduct Committee, Report No. 86, *Three Yearly Review of the Crime and Misconduct Commission*, May 2012, page 167; Parliamentary Crime and Misconduct Committee, Report No. 79, *Three Yearly Review of the Crime and Misconduct Commission*, April 2009, page 112.
[227] Clause 67, Crime and Misconduct and Other Legislation Amendment Bill 2014.
[228] Whistleblowers Action Group (Queensland), Submission No. 21, page 6.
[229] Queensland Law Society, Submission No. 29, page 22.
[230] Queensland Nurses' Union, Submission No. 15, page 4.
[231] Parliamentary Crime and Misconduct Committee, Report No. 86, *Three Yearly Review of the Crime and Misconduct Commission*, May 2012, page 167; Parliamentary Crime and Misconduct Committee, Report No. 79, *Three Yearly Review of the Crime and Misconduct Commission*, April 2009, page 112.

The CMC also noted in its submission:

> *The CMC has been the subject of 19 reviews in the past 10 years and 9 in the past four years, which includes the three reviews of 2013 (PCMC Report No.90, the Callinan and Aroney Review and the Keelty Review).*
>
> *While these reviews have achieved desirable outcomes, by their nature they require investment of significant time and other resources.*
>
> *The Commission notes that as a law enforcement agency it has a legal focus, and so may require, in particular, additional external managerial or administrative, rather than legislative, review.*
>
> *We note that any or all of the following may be called upon to review the Commission as required and the Commission supports these mechanisms:*
>
> - *The Parliamentary Committee has scope to comment on the Commission's structure within its current statutory functions.*
> - *The Auditor General is empowered to undertake performance audits.*
> - *The Minister has the required statutory power under section 260 to receive reports on efficiency, effectiveness, economy and timeliness of the Commission's systems and processes.*[232]

Committee Comment

The recommendations for extending the timeframe between the parliamentary committee reviews of the CMC have originated from the 7th and 8th PCMCs after conducting their own reviews of the CMC as required under the CM Act. In relation to certainty, the most recent PCMC three yearly review stated:

> *The* [PCMC] *considers that a fixed date for the review of the CMC will add certainty to the operations of the PCMC and the CMC and will avoid reviews occurring too closely together. The* [PCMC] *notes that although the term of the 53rd Parliament has been closer to three years than the previous two Parliaments, this review will be the fourth report tabled on the activities of the CMC within just over 8 years.*[233]

The Committee notes the four reviews of the CMC in just over eight years (as at May 2012) does not include the Callinan/Aroney Review in 2013 nor does it include the PCMC's subsequent inquiry into the release and destruction of Fitzgerald Commission of Inquiry documents also in 2013 or the Keelty Review.

In relation to the timeframe between reviews, the 8th PCMC stated:

> *The timeframe of three years between reviews is highlighted as being insufficient in the* [former] *Premier's own submission to this review where it was detailed that the review of Chapters 3 & 4 of the C&M Act arising from the Government's response to the 7th PCMC's 2009 Report is still underway.*

[232] Crime and Misconduct Commission, Submission No. 30, page 4.

[233] Parliamentary Crime and Misconduct Committee, Report No. 86, *Three Yearly Review of the Crime and Misconduct Commission*, May 2012, page 167.

> *Further, the Committee notes the CMC has again sought the Committee's support for a number of amendments to the C&M Act in its submission to this review - which were supported by the former Government in its response to the previous PCMC review, but are yet to be implemented.*[234]

The Committee notes the review of chapters 3 and 4 of the CM Act which was supported by both the former and current Government is still yet to be implemented. This highlights the argument by both previous PCMCs that the period of three years is too short to allow the full cycle of review, implementation and monitoring, to take its course.

The Committee also notes the Government response to these recommendations was originally not supported by the current Government. The Government response to the 8th PCMC three yearly review stated:

> *The Newman Government agrees a five year timeframe in between reviews is too long taking into account the nature of the CMC's work and the importance in the CMC's operations and activities being regularly scrutinised. The Government supports the current position of reviews being linked to the parliamentary terms of the Government.*[235]

The Committee considers the change in position on this matter by the Government is appropriate and that fixing the timeframe between reviews at five years will provide both the newly established CCC and the oversight committee certainty in relation to timing of the review and allow sufficient time between reviews for the Government to consider and implement any recommendations.

In relation to the additional review function included in the Bill to '*periodically review the structure of the commission*', the Attorney-General stated:

> *…because the government is genuinely committed to making sure the upper governance structure works, the bill inserts a new provision which allows the Parliamentary Crime and Misconduct Committee to conduct periodic reviews of the structure of the commission.*[236]

The Committee considers there is clearly value in conducting such a review however without any guidance as to the timeframe of when such a review should occur, this may again lead to reviews being undertaken without leaving enough time for implementation to occur. The Committee notes the comments from the CMC in this regard in that there is much time, effort and resources devoted to each and every review that is undertaken.

The Committee considers sufficient time should elapse between structural reviews to allow for any change in the structure of the CMC, if any, to be bedded down and operate for a reasonable amount of time prior to it being reviewed again. The CMC must be able to get on with its core business without undergoing reviews on a too frequent basis. The Committee considers a similar period of five years could be used between structural reviews.

Taking this into account the Committee considers the new function might sit better bundled with the five yearly review function, that is, combining the amended section 292(f) and the new section 292(g) together as:

292(f) To review:

(a) the activities of the commission; and

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[234] Parliamentary Crime and Misconduct Committee, Report No. 86, *Three Yearly Review of the Crime and Misconduct Commission*, May 2012, page 167.

[235] Government response to the 8th Parliamentary Crime and Misconduct Committee, Report No. 86, May 2012, *Three Yearly Review of the Crime and Misconduct Commission*, page 14.

[236] *Record of Proceedings (Hansard)*, 19 March 2014, page 703.

(b) the structure of the commission, including the relationship between the types of commissioners and the roles, functions and powers of the commission, the chairman and the chief executive officer;

by 30 June 2016, and by the end of each 5-year period following that day, and, for each review, table in the Legislative Assembly a report about any further action that should be taken in relation to this Act or the functions, powers, structure and operations of the commission.

The Committee notes such a timeframe is consistent with the strategic reviews conducted every five years of other independent statutory bodies such as the Queensland Ombudsman and the Office of the Information Commissioner which are undertaken by this Committee.

Recommendation 9

The majority of the Committee recommends proposed new section 292(g) be combined with existing section 292(g) to ensure that reviews on the structure of the commission are undertaken at the same time as the oversight committee's review of the activities of the commission, that is, every 5 years.

Section 329 Notifications

The Bill makes a number of amendments to section 329 of the CM Act which deals with notifications from the CMC to the PCMC about conduct by a CMC officer that involves, or may involve improper conduct.[237]

Currently under section 329, the responsibility for the notification to the PCMC rests with the CMC Chairperson only. The Chairperson must advise the PCMC of the conduct of a CMC officer that the Chairperson suspects involves, or may involve, improper conduct.

Under the existing section of the CM Act, improper conduct 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.

On receipt of a notice under section 329 of the CM Act, the PCMC may decide to take action under section 295(2) of the CM Act, if warranted. The matter is then treated similarly to any other complaint received under section 295, with the options before the PCMC including:

- seeking a report from the CMC;
- asking the CMC to investigate the matter and report;
- referring the matter to the Parliamentary Commissioner for investigation and report.

The CMC and the PCMC have agreed protocols in place for dealing with these notifications as the CM Act states the notification must be made, in the way, and within the time, required by the PCMC.[238]

The Chairperson of the CMC is the final decision maker in relation to any disciplinary action taken against an employee of the CMC, however the Committee may be involved in the process and kept informed of the Chairperson's intended actions against the CMC officer.

[237] See Clause 77, Crime and Misconduct and Other Legislation Amendment Bill 2014.
[238] *Crime and Misconduct Act 2001*, section 329(1)

Notifier

Under the proposed changes to section 329, the responsibility to notify the Committee will now shift from a duty solely on the Chairperson for all CMC officers (including himself) to a duty on different officers depending on who is the subject of the notification.

The Bill provides that a person in column 1 of the table below, must notify the PCMC of improper conduct or suspected improper conduct of a person in column 2 of the table:

Column 1 - notifier	**Column 2 – person subject of the notification**
Chairman	Commissioner (other than the Chairman)
Deputy Chairman	Chairman
Chief Executive Officer	officer other than a Commissioner

Further, proposed new section 329(2) states the notifier, in forming a suspicion in relation to the conduct of a person in column 2, must disregard the intention of the person engaging in the conduct.

Improper Conduct

Further, under the proposed changes, the type of conduct which will meet the definition of ***improper conduct*** is greatly expanded. The new definition of improper conduct, by a person, means:

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

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

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

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

(e) failure to ensure—

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

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

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

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

(h) exercise of a power conferred on the person under this or another Act in a way that is an abuse of the power.[239]

[239] Clause 77 of the Crime and Misconduct and Other Legislation Amendment Bill 2014.

Who must be notified

The proposed changes to section 329 provide the relevant CMC officer (from the table above), must not only notify the PCMC of the conduct, but the Parliamentary Commissioner must also be notified. This is a shift away from the current position where it is at the discretion of the PCMC as to whether the Parliamentary Commissioner is involved in the assessment or otherwise of a section 329 notification.

Committee Comment

The Committee considers the new section 329 is a vast improvement on the current section. The type or types of conduct which is considered to be improper conduct is much clearer and leaves no doubt about what should be subject to investigation or otherwise by the oversight committee.

The Committee considers the notification requirements are an improvement of the current situation and does not leave the Chairman in the unenviable position where he or she would need to notify themselves.

Finally, the Committee notes these provisions will enable the Parliamentary Commissioner to determine whether he or she considers a matter ought to be investigated without a referral from the committee. While it appears there may need to be some co-ordination between the committee and the Parliamentary Commissioner in how they deal with matters, especially in the circumstance where there are differing opinions, the Committee expects policies or protocols to be developed between the two entities to ensure matters are dealt with appropriately. In any event, the Committee considers the new section 329 will add to the transparency and accountability of the CCC which in some instances, as evidenced in recent inquiries, has been severely lacking.

2.9 Clarifying the grounds for discipline and what disciplinary action may be taken by the commission in relation to conduct of commission officers

Clause 62 of the Bill inserts a new division into the CM Act which deals with disciplinary action for senior officers and commission staff and agents.

The Department advised the new division was required to:

> *…clarify the disciplinary action the chief executive officer may take in relation to conduct of commission staff, including senior officers, persons employed under section 254 of the CM Act, persons seconded under section 255 of the CM Act and persons engaged under section 256. Senior officers include the senior executive officers who are appointed under the amended section 245 of the CM Act – the senior executive officer (crime) and senior executive officer (corruption). The grounds for disciplinary action and the disciplinary action that may be taken are broadly modelled on certain provisions applying to public sector employees and other government employees such as ambulance officers.*[240]

CMC officers are currently either employed under a written contract of employment or subject to the *Crime and Misconduct Commission Employees Award – State 2012*. The new disciplinary provisions will apply to both existing and future contract and award employees but will not apply to the employee if the conduct occurred prior to commencement of the new provisions.

The Committee understands the CMC currently has a disciplinary policy which applies to officers, however there are no disciplinary procedures set out in legislation which currently apply to CMC officers.

[240] Letter from the Department of Justice and Attorney-General, 26 March 2014, page 11.

In both the Explanatory Notes[241] and in its brief to the Committee,[242] the Department confirmed that although the Bill does not include specific appeal procedures in respect of disciplinary action, CMC officers have access to the industrial dispute resolution mechanisms provided under their award and also pursuant to Chapter 7 of the *Industrial Relations Act 1999*. Further, CMC officers may also have access to unfair dismissal proceedings (an application for re-instatement) under Chapter 3 of that Act.

CMC officers who are on a contract are also able to seek a remedy based on breach of contract.

Issues raised in submissions

The Bar Association of Queensland noted the equivalent appeal provisions contained in sections 193 and 194 of the PS Act were not included in the Bill.[243]

The QLS suggested examples should be shown after a number of provisions which set out the circumstances under which the CEO may discipline a commission officer.[244] For example, in relation to use of substances, without reasonable excuse, that adversely affect the competent performance of the officer's duties – the QLS submitted:

> *There may be many legal substances a person may use that may adversely affect their performance, for example:*
>
> - *The use of antihistamines may make a person drowsy*
> - *The use of headache medication for migraines*
> - *A glass of wine at a work function.*
>
> *We recommend that the clause give an example of the types of substances which if used, may invoke this section.*[245]

Similarly, the QLS considered the Bill should set out examples of the types of conduct which takes place in a private capacity that reflects seriously and adversely on the Commission.[246]

The QLS also raised concerns with the application of new section 273D in the Bill, which enables disciplinary declarations to be made against a person for a period of up to two years after they end, for any reason, their employment with the CMC. The QLS stated:

> *We are concerned that proposed s273D(3) is retrospective in nature and may have unintended consequences. Proposed ss273B(2) and 273D set out that a formerly employed Commission officer may have findings or actions taken against them "within a period of 2 years after the end of the relevant commission's officer's employment." The clause is also silent on whether the former employee had been previously disciplined, which raises issues of fairness with the proposed retrospective application.*
>
> *The clause is unnecessarily punitive and we recommend that the clause and the corresponding section in the* Public Service Act 2008 *be removed and repealed from the Bill and Act respectively.*[247]

[241] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 11.
[242] Letter from the Department of Justice and Attorney-General, 26 March 2014, page 11.
[243] Bar Association of Queensland, Submission No. 12, page 4.
[244] Queensland Law Society, Submission No. 29, pages 21-22.
[245] Queensland Law Society, Submission No. 29, page 21.
[246] Queensland Law Society, Submission No. 29, page 21.
[247] Queensland Law Society, Submission No. 29, pages 21-22.

The QLS also raised issues with the proposed new section 273F(2) which sets out natural justice is not required if a person is suspended on normal remuneration. The QLS did not consider that suspension on 'normal remuneration' was an adequate basis of denying a person natural justice and due process. The QLS recommended this section also be removed from both the Bill and the PS Act respectively.

Committee Comment

The Committee has reviewed the provisions which will apply for CCC staff after commencement of the Bill and notes the proposed provisions are largely consistent with the provisions contained in Chapter 6 of the PS Act.

The Committee is not convinced examples would be required as submitted by the QLS and that the application and operation of the relevant provisions sections are clear, as drafted in the Bill. The Committee is also satisfied the provisions relating to disciplinary declarations will only apply to an officer's conduct after commencement of the Bill and that there will be no adverse issues with respect to 'retrospectivity'. Similarly, the Committee does not consider that any issues of 'double jeopardy' arise.

The Committee is satisfied the Bill aligns the disciplinary processes for CCC staff and senior officers with processes that apply to the greater public service and provides adequate appeal mechanisms for CCC officers. The issue of natural justice is dealt with at part 3 of this report under Fundamental Legislative Principles.

The Committee supports the amendments as contained in the Bill.

2.10 Transitional arrangements

The Bill contains a number of transitional arrangements: for senior appointments to deal with the shift in governance arrangements under the CMC to that which is proposed under the CCC; and for other processes to deal with the change in the way the new CCC will perform its functions.

The transitional arrangements are set out in clauses 80 and 81 of the Bill - clause 80 having immediate effect on the date the Bill was introduced and clause 81 commencing on a date to be proclaimed.

The Committee addresses the main transitional provisions below.

Continuation of Acting Chairperson appointment

Clause 80 (which has effect from the Bill's introduction date into the Legislative Assembly) inserts a new section 397 to the CM Act that extends the appointment of the current Acting Chairperson, Dr Ken Levy, as Chairperson of the CMC beyond his current (as at the Bill's introduction) end date, despite the provisions in the *Acts Interpretation Act 1954* which provide acting appointments cannot exceed 12 months.

Hand in hand with the above clause, clause 81, which inserts new section 402 and provides that upon commencement (on a date to be proclaimed), Dr Levy will by virtue of the Bill become the first (and acting) Chairman of the CCC until the earlier of either 31 October 2014 or the date when the first permanent appointment of a Chairman of the CCC is made.

A number of submitters raised issues with the above clauses due to the fact they relate directly to the current Acting Chairperson of the CMC, Dr Levy and that a Select Committee on Ethics is currently investigating matters relating to evidence given by Dr Levy to the PCMC during 2013. As the Select Committee on Ethics has not reported at this time, it is inappropriate for this Committee to comment on the matters raised in submissions.

The Committee agrees with the response provided by the Department which confirmed the provisions will allow for continuity in the role of Chairperson and then Chairman, and will ensure a smooth transition period for the CCC post the commencement of the amendments.

The Committee agrees the appointment of a new Acting Chairperson at this time would simply lead to unnecessary disruption to the current significant changes taking place in the CMC.

Continuation of part-time Commissioner appointments

Clause 80 also inserts a new section 398 to the CM Act that applies to all current part-time Commissioners and acting part-time Commissioners. The provision ensures that the person's appointment will continue until the commencement day on the same terms and conditions despite any other provision relating to the term of the appointment.

Upon commencement of the Bill, all Commissioners' appointments will end (including the Acting Chairperson, part-time Commissioners and acting part-time Commissioners' appointments). However, as set out above, the Bill includes a deeming provision for the continuation of the Chairperson's appointment as the Chairman until 31 October 2014 or until a Chairman is appointed (whichever is the earlier).

If a person who was a part-Commissioner or acting part-time Commissioner prior to commencement is appointed as a Commissioner under the new provisions, the term that the person has been appointed for as a Commissioner or acting Commissioner must be taken into consideration when determining the total period the person has been appointed in that position (maximum appointment of 10 years).

New section 405 will validate any action that may be taken to appoint a Commissioner (such as advertising, selection process, and Governor in Council appointment) that may occur before the commencement of the appointment provisions as contained in the Bill.

Assistant Commissioner appointments

The Bill also contains a number of provisions to enable the transition of Assistant Commissioners to the positions of senior executive officer (crime) or (corruption) – as designated.

The person is deemed to be employed under the contract under which the person was previously employed before commencement and the person has the same employment terms, conditions and entitlements as the person had applying to them prior to commencement. Continuity of service and all entitlements apply and it is not to be considered a termination of employment.

Similar to the provisions relating to Commissioners, the term of the person's appointment as an Assistant Commissioner is to be taken into consideration when determining the person's total term of appointment as a senior officer under section 247.

An acting Assistant Commissioner appointment will end on the commencement day. Again, if the person is subsequently appointed as a senior officer, the period of appointment for which the person acted as Assistant Commissioner is to be taken into consideration when determining the person's total term of appointment as a senior officer under section 247.

Validation of actions and savings of processes

The Bill includes provisions to validate actions of previous Commissioners and Assistant Commissioners and continue any hearings or investigations being conducted by a Commissioner or Assistant Commissioner prior to commencement and allow the hearing or investigation to continue under the new organisational structure.

New section 416 will deal with existing complaints, that is a complaint made before, but not finalised before the commencement day. That section will provide that complaints will be dealt with by the CCC or public official in accordance with the provisions as in force *after* commencement except as follows:

- the person who has made the complaint need not make the existing complaint in a statutory declaration as required by new section 36(3);
- the offence provision in section 216 continues to apply to an existing complaint; and
- the new offence provision, section 216A, will not apply to existing complaints.

For an existing complaint that involved official misconduct, which after commencement would not meet the threshold for corrupt conduct, the CCC or public official is to take no action on that complaint as corrupt conduct under the CM Act. However, the public official (and not the CCC) must continue to deal with the complaint in accordance with any other Act or requirement.

Any action by the commission or public official in relation to a complaint that prior to commencement was official misconduct and that after commencement is no longer corrupt conduct is validated.

Parliamentary Commissioner

New sections 413-415 relate to the functions and powers of the Parliamentary Commissioner. The Bill provides that the new provisions relating to the expanded role of the Parliamentary Commissioner (own motion investigations, hearings and reports) will only apply in relation to conduct which occurs on or after the commencement day (investigations) or to matters which come to the knowledge of the Parliamentary Commissioner on or after commencement (hearings) and in relation to reports, that they may only be used if the investigation started on or after the commencement day.

Committee Comment

The Committee is satisfied the transitional arrangements appropriately deal with matters to ensure the smooth transition from the current operations of the CMC to the new organisation.

2.11 Implementing recent recommendations of public reports about the commission's investigation of alleged official misconduct at the University of Queensland

Duty to notify Commission

As amended by the Bill, section 38 of the CM Act obliges public officials, who *reasonably* suspect a complaint involves, or may involve, *corrupt conduct*, to notify the CCC of the complaint.[248] The CM Act's definition of 'public official' remains unchanged and means the Ombudsman, the Chief Executive Officer of a unit of public administration (including the Commissioner of Police), or a person who constitutes a corporate entity that is a unit of public administration.

Section 40 of the CM Act provides the CCC may issue directions about how and when a public official must notify the CCC of complaints under sections 37 and 38. The Bill expands this to provide, in addition, the CCC may issue directions about the kinds of complaints a public official must notify or need not notify the commission about under those sections.[249] Section 40 is also amended so that the commission is also required to consult with, and consider the views of the PSC before issuing a

[248] Clause 17 of the Bill amends section 38 of the *Crime and Misconduct Act 2001*.
[249] Clause 18 of the Crime and Misconduct and Other Legislation Amendment Bill 2014..

direction under this section that relates to the Chief Executive Officer of a department or a public service office within the meaning of the PS Act.

CMC Investigation

According to the Explanatory Notes, the application of section 38 (as currently drafted) is problematic when the public official is the subject of suspected corrupt conduct.[250] This issue was highlighted by the CMC in its September 2013 report, '*An examination of suspected official misconduct at the University of Queensland*' ('CMC UQ Report'). The CMC examination investigated complaints of nepotism involving the University of Queensland:

In December 2010, a decision was made at the University of Queensland for a student to receive an offer which was not warranted according to the admission criteria at the time. The student who received the offer was the daughter of the then Vice-Chancellor.

> *…Formal complaints about the December 2010 decision were not made until nine months later…*[251]

On 19 December 2011 and 11 January 2012, the Queensland Police Service (QPS) referred (under section 38 of the CM Act) criminal complaints it had received from a member of the public on the basis that the matters involved possible official misconduct. On 23 January 2013, the CMC advised UQ that in the public interest it would undertake a misconduct investigation into potential criminal misconduct.[252]

In the CMC UQ Report, the CMC *'…set out the circumstances and decisions which led to the forced offer to the student, the outcomes of the CMC's misconduct investigation following a referral from the Queensland Police Service, the review of the University of Queensland's handling of the matter, the results of a qualitative review of their integrity system and lessons learned for the broader public sector'.*[253]

In the report's concluding remarks, the CMC Commissioners' noted:

> *The University did not immediately report suspected official misconduct concerning its most senior officers to the CMC; it completed an independent investigation before doing so. The CMC acknowledges, however, that the CM Act placed no obligation on the Chancellor or the Senate to report the matter. Under the Act, it is the public official —in this case the Vice-Chancellor —who is obliged to report such a matter.*[254]

In commenting on issues relevant to corporate governance in publicly funded organisations, the CMC UQ Report made the following conclusions and recommendation:

> *The* Crime and Misconduct Act 2001 *obliges the public official of a unit of public administration to report suspected misconduct to the CMC. However, in circumstances where the allegations of suspected official misconduct relate to the public official, under the Act there is no similar obligation requiring another person to report the alleged suspected misconduct.*

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[250] *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 8.

[251] Crime and Misconduct Commission, *An examination of suspected official misconduct at the University of Queensland*, September 2013, Foreword.

[252] Crime and Misconduct Commission, *An examination of suspected official misconduct at the University of Queensland*, September 2013, page 32.

[253] Crime and Misconduct Commission, *An examination of suspected official misconduct at the University of Queensland*, September 2013, Foreword.

[254] Crime and Misconduct Commission, *An examination of suspected official misconduct at the University of Queensland*, September 2013, page 39.

> *The CMC has observed that most units of public administration have policies to cover situations in which the public official is the subject of the misconduct allegation, by placing the obligation on another person to report to the CMC. However, in order to remove the uncertainty regarding who must report official misconduct to the CMC in those circumstances, the CMC makes the following recommendation.*
>
> ***Recommendation***
>
> *That the* Crime and Misconduct Act 2001 *be amended to prescribe who must report suspected official misconduct to the CMC in circumstances where the public official is the subject of the allegations.*[255]

To address this issue, the Bill includes:

> *…a new section 48A that requires a public official of a unit of public administration to prepare a policy that deals with how a unit of public administration for which the public official is responsible will deal with a complaint that involves or may involve corruption (that is, corrupt conduct or police misconduct) of the public official. The policy may include a nomination of another person who is responsible to notify the commission of a complaint under sections 37 and 38 of the CM Act.*[256]

The policy is to be developed in consultation with the new CCC.[257]

Issues raised in submissions

Whilst not commenting on proposed new section 48A in its written submission to the Committee, the QLS did address the expansion of section 40 to allow the commission to issue directions about the kinds of complaints a public official must notify or need not notify the commission about: '*In the interests of transparency such directions should be made available for scrutiny, particularly by the public and the Parliamentary Committee which is tasked with monitoring the Commission's activities*'.[258]

Committee Comment

The Committee recognises the CM Act's current failure to provide appropriate safeguards for instances where the public official charged with referring a matter of official misconduct to the CMC is himself or herself involved in the relevant official misconduct.

The Committee notes the commentary in the CMC UQ Report relating to the absence of an appropriate safeguard and supports that report's recommendation that the CM Act be amended to prescribe who must report suspected official misconduct to the CMC in circumstances where the public official is the subject of the allegations.

The Committee supports the inclusion of the proposed new section 48A and considers it successfully implements the CMC recommendation outlined in the CMC UQ Report.

[255] Crime and Misconduct Commission, *An examination of suspected official misconduct at the University of Queensland*, September 2013, page 39.

[256] *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 20; new section 48A is inserted by clause 20 of the Bill.

[257] *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 8.

[258] Queensland Law Society, Submission No. 29, page 11.

Independence of judicial office holders

Section 58(1) of the CM Act prescribes matters for which the CMC must have regard in the performance of its functions or the exercise of its powers, in relation to the procedures and operations of State courts or in relation to the conduct of a judicial officer. The section requires the CMC to have proper regard for (and proper regard for the importance of preserving) the independence of judicial officers. The CM Act presently limits the investigative powers of the CMC in relation to judicial officers to misconduct of a kind that, if established, would warrant the judicial officer's removal from office.[259] The CM Act's definition of 'judicial officer' remains unchanged by the Bill and means a judge of, or other person holding judicial office in, a State court; or a member of a tribunal that is a court of record.

PCMC Investigation

The Explanatory Notes draw attention to the PCMC's observation in its September 2013 Report No. 92, '*Complaint about the CMC investigation into the University of Queensland*' (PCMC UQ Report), that section 58 of the CM Act currently limits the CMC's ability to fully review the appropriateness of how an agency manages misconduct of its officers when a judicial officer is a member of the decision-making body of that agency.[260]

The University of Queensland matter highlights the limitations of section 58, because a judicial officer, Justice Daubney, was a member of the University of Queensland Senate and played a key role in handling the misconduct allegations.[261] In its consideration of the appropriateness of section 58, the PCMC supported the view that '*…judicial officers, who wish to participate in public life in roles outside of their judicial role, should be held accountable for their actions in that role*', but that '*…this accountability should be balanced with safeguards to ensure that vexatious or vindictive complaints are not progressed against judges by those who are merely unhappy with a judge's actions and decisions in their judicial capacity*'.[262]

The PCMC UQ Report outlined the PCMC's concerns that conduct of a judicial officer, particularly when not acting in a judicial capacity, can not be investigated by the CMC unless that conduct could amount to misconduct which would warrant the removal of the judge from judicial office:

> *The CMC report on the UQ matter, tabled in the Legislative Assembly, does not consider or comment on the role of Justice Daubney as a member of the UQ Senate as section 58 of the CM Act prohibits it from doing so…*
>
> *Section 58 of the CM Act severely limits the ability of the CMC to appropriately and effectively review the way in which UQ handled those allegations simply because a judicial officer is a member of the UQ Senate.*
>
> *Section 58 of the CM Act… does not provide sufficient accountability of judicial officers when acting in a capacity other than a judicial capacity, e.g. on a board or decision making body of a unit of public administration. It follows that, should a unit of public administration wish to avoid scrutiny of its actions, it need only appoint a judicial officer to a board or committee etc. Where any such actions are not in the public interest, but fall short of official misconduct, section 58 of the CM Act curtails the CMC's ability to review or investigate such conduct.*

[259] Queensland Law Society, Submission No. 29, page 13.

[260] *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 8.

[261] Parliamentary Crime and Misconduct Committee, Report No. 92, *Complaint about the CMC investigation into the University of Queensland*, September 2013, page 10.

[262] Parliamentary Crime and Misconduct Committee, Report No. 92, *Complaint about the CMC investigation into the University of Queensland*, September 2013, page 10.

> *The Committee considers this position untenable and contrary to the expectations of the Queensland community.*[263]

The PCMC made one recommendation in the PCMC UQ Report: *'…to amend section 58 of the CM Act to balance the need to protect judicial officers from malicious or vexatious complaints while ensuring that judicial officers in non-judicial roles in units of public administration are held accountable for their actions and conduct when occupying non-judicial roles.'*[264]

Proposed amendments

The Explanatory Notes summarise the Bill's proposed amendments to the CM Act:

> *Clause 22 amends section 58 to allow the commission to investigate a decision-making body of an agency when a judicial officer is a member of that decision-making body. The amendments also provide for the procedure the commission must follow in determining how investigations are to be conducted. In particular, the chairman may delegate to a senior officer of the commission the investigation concerning a complaint involving a judicial officer who is a member of a decision-making body. All other investigations or hearings concerning judicial officers are to be conducted by the chairman.*[265]

Submissions

In its written submission to the Committee, the QLS acknowledged the limitations of section 58 of the CM Act, but raised concerns with the Bill, seeking clarification of the extended scope of the CCC's investigative powers:

> *Clause 22 proposes to extend the Commission's powers to include investigation of judicial conduct on "decision-making bodies". Decision-making bodies are deemed to include a governing body or a board of management by virtue of proposed section 58(2A). However, the term decision-making is not defined in the Dictionary. The Society is concerned about the lack of definition of "decision-making body" and the extension of the Commission's investigative powers. It appears that the proposed amendment is intended to empower the Commission to undertake investigations relating to decision making bodies of which a judicial officer is a member in circumstances where the potential misconduct of the judicial officer falls short of that which would warrant removal from office. We acknowledge that this has been the subject of comment from the PCMC in a recent report involving a tertiary institution. The Society would appreciate clarification in this regard.*[266]

The QLS's concerns are heightened due to the aforementioned introduction of delegable powers, where the Chairman may delegate certain investigative powers to a senior officer:

> *The Society is concerned with the delegation of these functions to a senior officer of the commission. In the Society's view, this is an undesirable delegation of power. In our view, the current provisions of section 58(2)(b) of the Act should be maintained, that is:*
>
> > *(b) the investigation must be exercised in accordance with appropriate conditions and procedures settled in continuing consultations between the chairperson and the Chief Justice.*

[263] Parliamentary Crime and Misconduct Committee, Report No. 92, *Complaint about the CMC investigation into the University of Queensland*, September 2013, pages 10-11.

[264] Parliamentary Crime and Misconduct Committee, Report No. 92, *Complaint about the CMC investigation into the University of Queensland*, September 2013, page 11.

[265] *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 20.

[266] Queensland Law Society, Submission No. 29, pages 13-14.

The Society does not support the proposed amendment.[267]

Whilst complimentary of the Government for its consultation with the Chief Justice, Chief Judge, Chief Magistrate, President of the Court of Appeal and President of the Queensland Civil and Administrative Tribunal, the QLS observed that '*…the Explanatory Notes do not detail whether the judiciary generally supported the proposed amendments…*' and reserved its position until clarification of the issues raised in its submission.[268]

The Law and Justice Institute (Queensland) Inc. submitted the proposal to give the commission the authority to investigate the conduct of judicial officers when acting as a member or representative of a decision-making body in a unit of public administration does not adequately reflect the need to protect judicial officers from frivolous, baseless or vexatious complaints.[269]

No other submissions received by the Committee during its public consultation process for the Bill commented on the limitations of section 58 and the Bill's proposed amendments to the section.

In its response to submissions, the Department reiterated content included in the Explanatory Notes to the Bill, stating the proposed amendment implements the PCMC recommendation in the PCMC UQ Report.[270] The Department confirmed that all heads of jurisdiction, apart from the President, Queensland Civil and Administrative Tribunal, responded to the Attorney-General's request for comments on the draft amendments.[271]

All responses were in support of the amendment.[272]

Committee Comment

The Committee shares the concerns raised by the PCMC in that committee's consideration of the CMC UQ Report. Specifically, the Committee is concerned the CMC was unable to consider the conduct of a judge who was a board member of the University of Queensland, by virtue of the fact he was a judge and the conduct complained of would not warrant his removal from office. The Committee acknowledges the need to remove the existing limitation, which is inappropriately hampering the exercise of the CMC's investigative powers.

The Committee concurs with the PCMC's view that, subject to suitable safeguards, judicial officers who wish to participate in public life in roles outside of their judicial role should be held accountable for their actions in that role.

The Committee supports the inclusion of proposed clause 22 in the Bill. Amending section 58 of the CM Act to allow the CCC to investigate a decision-making body of an agency when a judicial officer is a member of that decision-making body, will enable the CCC to better serve the public interest without unnecessary encumbrance on its investigative powers.

2.12 Other amendments to the CM Act

Refocusing the Act's purposes

The Bill amends the purposes of the CM Act to clarify the new CCC has a primary purpose to *'combat and reduce the incidence of major crime'* and a secondary purpose to *'reduce the incidence of corruption in the public sector'*.[273] The Bill removes the purpose of continuously improving the

[267] Queensland Law Society, Submission No. 29, page 14.
[268] Queensland Law Society, Submission No. 29, page 14.
[269] Law and Justice Institute (Queensland) Inc., Submission No. 28, page 10.
[270] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 46.
[271] Letter from the Department of Justice and Attorney-General, 24 April 2014, pages 46-47.
[272] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 47.
[273] Clause 4 of the Bill – Amendment to section 4 (Act's purposes).

integrity of misconduct in the public sector and to facilitate the Commission's involvement in the investigation of any confiscation related activity for the enforcement of the Confiscation Act.

Currently the CM Act has two (equivalent) main purposes – the first being the same as the new primary purpose; and the second being *'to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector'*.[274]

Issues raised in submissions

A number of submissions raised issues with the change to the CM Act's purposes.

The joint submission by the former part-time Commissioners of the CMC stated:

> *The decision to downgrade the identification and investigation of public corruption as a priority for the CMC is a political decision that at least provides a rationale for a series of other changes that otherwise appear to make no sense .*
>
> *The underlying drive to curtail the capacity of the CMC to identify and investigate public sector corruption ignores Queensland own past corruption and the levels of public sector corruption in Australia. We are apprehensive the government has placed a view of its own self-interest above the public interest.*[275]

The QLS queried where this amendment originated noting it had *'not been suggested in the Callinan/Aroney Report; nor is such prioritisation recommended in the Fitzgerald Report.'*

In relation to the corruption function, as contained in the Bill, the QLS considered it was:

> *…a fundamental check in our democratic system, operating to ensure appropriate oversight of our public institutions. Given this critical role, the reduction of corruption should continue to remain at least as important as the major crime function performed by the Commission. If legislatively enshrined as being of secondary importance, this function will always be a "poor cousin" for which resourcing will be limited.*[276]

The CMC itself, noted in its submission to the Committee:

- *Serious crime is usually accompanied by serious corruption.*
- *Should there be budgetary issues, preference would have to be given to the primary function.*
- *If the Bill is left unchanged, while recognising the wider role of the CMC compared to most other similar statutory bodies in Australia, Queensland will be the only State that does not have a primary function to deal with serious corruption.*[277]

Professor Brown considered the amendments went further than what was contemplated in the Callinan/Aroney Review, stating:

> *This amendment would in effect make the Commission a crime commission, tasked also with a secondary purpose of anti-corruption functions. This represents a major policy departure which is unique in Australia, carrying significant dangers, the reasons and implications of which have not been publicly debated.*
>
> *The Review Panel noted the competing considerations governing whether these functions should even be retained in the same body. Prominent among these is the inherent difficulty of an anti-corruption body being able to independently oversight the exercise of its own*

[274] Section 4, *Crime and Misconduct Act 2001*.
[275] Julie Cork, David Gow, Ann Gummow, Judith Bell and Philip Nase, Submission No. 33, page 9.
[276] Queensland Law Society, Submission No. 29, page 7.
[277] Crime and Misconduct Commission, Submission No. 30, page 2.

> *increasingly powerful anti-crime functions, in circumstances where these become a prime target for corruption. Such high level corruption has been proven to occur, not only in theory but practice, in the NSW Crime Commission.*
>
> *...*
>
> *In no way did* [the Review Panel] *support a model in which the State's primary anti-corruption institution has its functions reassigned to, or subsumed within, what will fundamentally become a Crime Commission.*
>
> *The Review Panel's recommendations for ensuring a rebalancing of the CMC's priorities for maximum public benefit were instead concerned with ensuring that it focused its resources on more serious official misconduct and corruption matters and risks, rather than having these consumed by an allegedly inefficient complaint-handling bureaucracy. This objective is more than satisfied by other amendments below, as well as the other administrative reforms already being pursued by the Commission.*[278]

Committee Comment

The amendment to section 4 of the CM Act makes it clear the new CCC has a primary purpose of combating major crime in Queensland. The Committee notes the Department's response to the above submissions which states:

> *The Government views the fight against corruption as important and because corruption is noted as a secondary importance does not mean it is not important. Since the enactment of the* Criminal Justice Act 1989*, Queensland has benefited from the creation of more oversight and integrity agencies and legislation, for example, the Information Commissioner, the Integrity Commissioner and the Public Interest Disclosure Act, which have dramatically improved the accountability frameworks for public sector agencies.*
>
> *The Government has had and will continue to have a well funded standing Royal Commission into corruption in the form of the CMC, to be known as the CCC.*[279]

The Committee is satisfied with the Government's approach and considers the CCC will be adequately equipped to fight the more serious cases of corruption as intended by the Bill.

Providing the Speaker with discretion to appoint an Acting Parliamentary Commissioner

Clause 72 of the Bill includes an amendment to section 308(1) of the CM Act to provide discretion to the Speaker when the Speaker is to appoint an acting Parliamentary Commissioner.

The example provided in the Explanatory Notes states:

> *Currently, the Speaker must appoint an acting parliamentary commissioner whenever the parliamentary commissioner is absent from Queensland (even when for example in Tweed Heads for a short period appearing in a criminal trial). In such circumstances the parliamentary commissioner is still able to perform his or her duties and it is not necessary for the Speaker to appoint an acting parliamentary commissioner.*[280]

[278] Professor AJ Brown, Submission No. 34, page 5.
[279] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 42.
[280] *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 8.

Committee Comment

This simple amendment does not appear to have been raised during the Callinan/Aroney Review however the Committee notes the amendment from 'must' to 'may' brings the Acting Commissioner provisions in line with similar provisions relating to other Parliamentary Officers.[281]

This is a sensible amendment which will reduce the need for acting appointments to be made by the Speaker when the Parliamentary Commissioner is clearly able to adequately perform his or her duties.

Consultation on appointments to the Crime Reference Committee

The Explanatory Notes set out the background to the Crime Reference Committee as:

> *The CM Act establishes a Crime Reference Committee (CRC) that is responsible for making the general and specific crime references to the commission. The general or specific crime references authorise the commission to conduct crime investigations. The CRC's membership includes two community representatives.*[282]

Under clause 63 of the Bill, the requirement for the Minister to consult with the Leader of the Opposition prior to the appointment of a community representative to the CRC is removed. The Explanatory Notes state:

> *…there is no perceived benefit in obtaining approval from the Leader of the Opposition for the appointment of community representative members to what is an internal approving authority for the crime and intelligence activities of the commission.*[283]

The QLS was the only stakeholder to raise concerns with this amendment, submitting to ensure independence and objectivity of the reference committee that an independent panel be tasked with membership, comprising of:

- *The Chief Justice or his/her nominee*
- *The Attorney-General or his/her nominee*
- *The leader of the Opposition or his/her nominee*
- *The President of the Bar Association of Queensland or his/her nominee*
- *The President of the Queensland Law Society or his/her nominee*
- *2 non-legal members chosen jointly by the Attorney-General and the leader of the Opposition.*[284]

This panel was similar to that which was proposed by the QLS in relation to the appointment of Commissioners.

Committee Comment

The Committee shares the view of the Department in its response to the QLS concerns – where it stated simply that there does not appear to be any concern that this committee lacks

[281] See section 65(1), *Ombudsman Act 2001*; section 84(1), *Integrity Act 2009*; section 152(1), *Information Privacy Act 2009*; section 143(1), *Right to Information Act 2009*.
[282] *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 8.
[283] *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 8.
[284] Queensland Law Society, Submission No. 29, page 22.

independence.[285] The Committee does not propose any amendment in relation to the appointment process of the Crime Reference Committee.

Renaming the 'Chairperson' as 'Chairman'

The Bill contains a number of amendments which change the title of the 'CMC Chairperson' to the 'CCC Chairman' throughout the CM Act and other associated legislation.

No basis for the policy change was provided in the Explanatory Notes as highlighted by Don Willis:

> *The original legislation, the* Criminal Justice Act 1989*, included the term "chairman". However, in 1993 the Parliament amended the legislation, inter alia, to replace the term "chairman" with what the relevant Explanatory Notes said was the more "gender-neutral" term "chairperson". And so it has remained for the last 20 years, until now.*
>
> *Exactly why the decision has been made to revert to the old terminology of "chairman" – which not only contradicts the justification accepted by Parliament in 1993 for changing it to "chairperson" but which is also out of step with the gender inclusive values and expectations of modern Queensland society – is unclear. This is because neither the Explanatory Notes[286] to the Bill nor the Minister's introductory speech to the Parliament make mention of the reasoning for the proposed reversal.*[287]

A number of submitters[288] raised issue with this change, including Dan McIntyre who submitted succinctly *'the proposed omission of chairperson and insertion of chairman is a needless, anachronistic step that does not have any place in 21st Century legislation'*[289] while George O'Farrell considered the amendment was simply *'petty'* and *'will achieve nothing more than aggravating a sector of the community.'*[290]

The QLS highlighted the *Reprints Act 1992* as being applicable in the circumstances.[291] That Act includes as one of its objects – *'modernising the law relating to reprints of Queensland legislation'*[292] and includes a specific provision relating to the use of non-gender specific wording.

Section 25(1) of *Reprints Act 1992* states:

> *If the name of an office established by a law uses a word indicating a gender or that could be taken to indicate a gender, the name of the office may be changed, and any reference in a law to the office may be changed or given, in a way that is consistent with current legislative drafting practice.*

That section is followed by three examples, the first of which states 'Chairperson' may replace 'Chairman'.[293] The QLS pointed out that despite the change, the Office of the Parliamentary Counsel may simply revert to using 'Chairperson' in a reprint of the CM Act to ensure consistency with the *Reprints Act 1992.*

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[285] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 52.
[286] The Committee addresses the lack of explanation in the Explanatory Notes at part 3 of this report.
[287] Mr Don Willis, Submission No. 1, page 1.
[288] See for example, Kate Galloway, Submission No. 11, page 1; Bar Association of Queensland, Submission No. 12, page 3.
[289] Dan McIntyre, Submission No. 18, page 1.
[290] George O'Farrell, Submission No. 20, page 2.
[291] Queensland Law Society, Submission No. 25, page 22.
[292] Section 2(2), *Reprints Act 1992.*
[293] Example 1 following section 25, *Reprints Act 1992.*

Committee Comment

The Committee notes the concerns of some submitters as to the change in the word 'Chairperson' to the word 'Chairman'. However, considers it is the prerogative of the Government of the day to use English words as is appropriate. It was government policy which changed the word 'Chairman' to 'Chairperson' notwithstanding that the *Criminal Justice Act 1989* used the word Chairman.

The Committee also notes the Oxford Dictionary definition of 'Chairman' is 'a person chosen to preside over a meeting'.[294] It is the view of the Committee that in modern Australia the use of language which is considered 'gendered' is read to apply to both men and women irrespective of the term or the bearer of the title. Again, gender specific words still exist in our language and yet there has not been a concerted effort by the speaking public to change words such as 'manhole', 'midwife' and many others. This Committee is reporting on a Bill which has important substantive provisions beside the matter or form of the use of words such as Chairman.

The Committee notes under section 32B of the *Acts Interpretation Act 1954*, any words indicating a gender include each other gender, and the term 'Chairman' would apply equally to both men and women. The Committee adopts substance over form and will not be recommending to the Attorney-General any amendment to revert to the neutral.

With respect to the application of the *Reprints Act 1992*, the Committee does not consider there are any issues with consistency as suggested by the QLS. It would not appear to be appropriate for the Parliamentary Counsel to revert to using another term under a discretionary power provided to that position under that Act, if, should the Bill be passed in its current form, the Parliament specifically chooses to use another term.

2.13 Improving the management of personal conduct and work performance of Queensland public service employees

Proposed changes

The Bill also aims to improve the management of personal conduct and work performance of Queensland public service employees. In this regard, in his Introductory Speech, the Attorney-General, made the following remarks:

> *The government's goal is for Queensland's Public Service to be the most responsive and respected public service in the nation. To achieve better outcomes for Queenslanders, it is important that Public Service managers are empowered and that staff under their management or supervision have a clear understanding of the Public Service work performance and personal conduct principles. These longstanding principles recognise that Public Service employment involves public trust. They state that Public Service employment must be directed towards matters such as achieving excellence in service delivery; ensuring the effective, efficient and appropriate use of public resources; and carrying out duties impartially and with integrity. Both the Callinan and Aroney report and the Commission of Audit recommended reforms to refocus responsibility for conduct in public sector agencies to line managers and, ultimately, CEOs to be dealt with promptly.*[295]

Against the background of the Callinan/Aroney Review and the Commission of Audit, the Government has included parts 3 and 4 of the Bill to amend the PS Act to make it clear that public service managers must take all reasonable steps to ensure each public service employee under their management is aware of these important work performance and personal conduct principles.

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[294] http://www.oxforddictionaries.com/definition/english/chairman?q=chairman

[295] *Record of Proceedings (Hansard)*, 19 March 2014, page 704.

The Explanatory Notes also sets out the following five ways in which the Bill proposed to achieve its objective of enabling improvement in the management of work performance in the Queensland public service:

1. *authorising the PSC to have functions of review in relation to departments' current or completed cases of conduct and performance matters;*
2. *enabling the CCE of the PSC to request certain information in relation to agency performance, workforce and disciplinary matters;*
3. *enabling the giving, receiving and recording of information between the PSC, commission and other agencies, and to ensure that the way any information is given, received or recorded occurs appropriately;*
4. *including provisions regarding confidentiality of information and protection from liability for giving information. These amendments will enable the CCE to enter into an agreement about giving and receiving information with certain external agencies; and*
5. *requiring agencies to maintain a complaints management system, to demonstrate Government's commitment to effective complaints management systems which are flexible and are managed at agency level.*[296]

Conduct and Performance Excellence (CaPE) service

In line with the recommendations from the Callinan/Arroney Review, the PSC has also developed a new conduct management model for the Queensland Public Service, which is known as the Conduct and Performance Excellence (CaPE) service.[297] As explained by the Attorney-General in his Introductory Speech*:*

> *The purpose of the CaPE is to promote and support excellence in the management of personal conduct and work performance in the Queensland public sector. It will: provide specialist advice and support to agencies, upon request, on the management of conduct and performance; set, and strategically monitor, benchmarks and standards for agencies' handling of these matters; and review individual cases as required, with the aim of building capability. The CaPE Service closely aligns to the Public Service Commission's main statutory functions which include: enhancing the Public Service's human resource management and capability; enhancing and promoting an ethical culture and ethical decision making across the Public Service; and enhancing the Public Service's leadership and management capabilities in relation to disciplinary matters. CaPE will contribute to the development of capability within agencies to ensure they have a high standard of human resource and managerial skill. It will also work closely with the Crime and Corruption Commission to ensure matters are addressed effectively within the appropriate jurisdiction.*[298]

In essence, CaPE is designed to complement the ongoing initiatives of the PSC to further enable capability development within agencies.[299]

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[296] *Explanatory Notes,* Crime and Misconduct and Other Legislation Amendment Bill 2014, page 9.
[297] *Record of Proceedings (Hansard)*, 19 March 2014, page 704.
[298] *Record of Proceedings (Hansard)*, 19 March 2014, page 704.
[299] Letter from the Department of Justice and Attorney-General Office, 26 March 2014, page 5. See also Transcript of Proceedings (Hansard), Public Hearing, Legal Affairs and Community Safety Committee, 16 April 2014, page 11.

Issues raised in submissions

A small number of the submissions received in relation to the Bill referred specifically to the proposed changes to the PS Act concerning the management of personal conduct and work performance of Queensland public service employees. The two key aspects mentioned in these submissions involved:

- the proposed amendments to section 26 of the PS Act - Work performance and personal conduct principles; and
- the proposed new section 219A of the PS Act - Complaints management system for customer complaints.

Proposed amendment to s26 of the PS Act – Work performance and personal conduct principles

Clause 84 of the Bill proposes an amendment to section 26 of the PS Act which relates to work performance and personal conduct. The proposed amendment requires public service managers to 'proactively manage' their employees' 'work performance' and 'personal conduct' and to take prompt and appropriate action in the case of 'unacceptable work performance' or 'unacceptable personal conduct'.[300]

The submission from the QNU indicated concern that a number of the new terms introduced in the Bill should also be defined in the Bill:

> *Currently, the Dictionary in Schedule 4 to the* Public Service Act 2008 *does not define 'work performance' or 'personal conduct'. Given the proposed amendment 'clearly attributes responsibility for managing work performance to line managers and ultimately CEOs' (Explanatory Notes, p. 33) we suggest that the Dictionary should now provide a clear definition for these terms.*
>
> *We also seek clarity around the meaning of 'pro-actively manage' and 'unacceptable work performance'. Both of these terms may attract some level of initial understanding, however, given Clause 85 of the Bill enables the Public Service Commission to conduct reviews under Part 6 about the handling by departments of work performance matters, managers need to understand their increased responsibility and accountability.*
>
> *We believe that staff affected by these new provisions will need information and training to raise their level of awareness and skills. Specifically, this should address the ways to 'pro-actively manage' work performance and personal conduct, the consequences of not doing so, and the process for dealing with 'unacceptable' work performance or personal conduct as it relates to current performance management schemes.*[301]

At the Public Hearing on the Bill, Ms Katie Holm, the Assistant Deputy Commissioner (Workforce Policy and Legal) of the PSC responded to the above concern of the QNU that there is no definition of 'work performance' or 'personal conduct' in the Bill:

> *The Public Service Commission's view is that section 26 in itself outlines what those work performance and conduct principles are. They are very explicit and very clear, I would suggest. They refer to specific items which I have just mentioned as well as the code of conduct and other responsibilities and obligations that public servants have under, for instance, the Public Sector Ethics Act.*[302]

[300] Clause 84 of the Bill which introduces proposed new sections 26(2) and (3) of the PS Act.
[301] Queensland Nurses' Union, Submission No. 15, page 3.
[302] *Transcript of Proceedings (Hansard)*, Public Hearing, Legal Affairs and Community Safety Committee, 16 April 2014, page 12.

Additionally, the Department provided the additional information in its response to the Committee after reviewing the submissions:

> *It is not proposed to further define the terms "work performance", "personal conduct", "pro-actively manage" or "unacceptable work performance". Not defining these terms will mean that they are given their ordinary, everyday, current meaning. If these terms were to be defined, it could potentially lead to some meanings unintentionally being either included or excluded from the terms. PSC's view is that the work performance and personal conduct principles contained in section 26 in effect define those terms by detailing what a public service employee's work performance and personal conduct must be directed towards.*[303]

Proposed new section 219A of the PS Act – Complaints management system for customer complaints

Clause 88 of the Bill proposes to introduce new section 219A headed '*Departments to have complaints management system for customer complaints*' to the PS Act. This section provides an obligation for departments to have in place a system for dealing with customer complaints. The Explanatory Notes elaborated as follows:

> *This clause confirms the existing expectation that agencies have a complaint system that allows for customers to raise concerns and provide feedback. Its inclusion recognises that a complaints system provides a valuable source of information, enabling the public service to be responsible and ultimately provide better service delivery outcomes for the people of Queensland.*[304]

The Queensland Ombudsman noted in his submission that, overall, he considered the requirement for the departments to have a complaints management system for customer complaints to be '*a welcome measure*'.[305] The Queensland Ombudsman also noted that this proposed new clause replaces the previous PSC Directive 13/06.[306] However, the Queensland Ombudsman did also raise the following concern:

> *...the new s.219A(4)(a) appears to unreasonably exclude public service employees of a department from complaining about the services they receive from that department. For example, it is not unreasonable that an employee of a hospital be able to complain about service delivery if that person was a patient of the hospital. There are many other examples where this situation is likely to arise across government. Additional clarification in the Bill is desirable to ensure that any citizen is able to make a customer complaint regardless of their employer.*
>
> *It is also desirable that, in situations where persons are not able to complain personally, a complaint is able to be made by a duly authorised third person, including family members or guardians, on their behalf.*[307]

Additionally, another submitter, Mr George O'Farrell, was concerned about whether proposed new section 219A in the PS Act was necessary at all:

> *The inclusion of new section 219A in the* Public Service Act 2008 *is, in my view, unnecessary; the equivalent of using a sledgehammer to crack a peanut. I acknowledge that others will disagree, but using legislation to achieve what could easily be done by administrative action is superfluous. Further the reliance on an unseen future Australian Standards is risky. Today's legislators have no way of knowing what future standards may*

[303] Letter from the Department of Justice and Attorney-General, 24 April 2014, page 58.
[304] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, pages 35-36.
[305] Queensland Ombudsman, Submission No. 19, page 2.
[306] Queensland Ombudsman, Submission No. 19, page 2.
[307] Queensland Ombudsman, Submission No. 19, page 2.

> *contain. I have experience in workplace health and safety where, from time to time, the need to comply with Australian Standards has imposed an unnecessary burden on business. The likely outcome of this amendment is that even more departmental staff will be distracted from the task of actually delivering services to the community.*[308]

The Department responded as follows on this issue:

> *The new provision reflects the existing systems that agencies have in place to manage complaints from customers. This requirement was previously directed by way of the (repealed) Directive 13/06: Complaints Management Systems, but is now more appropriately positioned in the Act.*
>
> *The PSC's view is that the amendments would still enable a public service employee to complain as a customer, and would also cover situations where persons are not able to complain personally.*[309]

Committee Comment

In relation to the proposed amendments to the PS Act, the Committee has reviewed the relevant submissions, background materials and the Department's response on the submissions and is satisfied, on the whole, that these changes are necessary to implement the whole suite of reforms contemplated by the Government stemming from the recommendations of the Callinan/Aroney Review.

2.14 Minor and Consequential Amendments to the *Crime and Misconduct Act 2001* and other Legislation

As set out in the Explanatory Notes, Schedules 1 and 2 of the Bill include amendments to the CM Act (Schedule 1) and a number of other Acts (Schedule 2) to implement the changes to the nomenclature used in the CM Act as amended by the Bill.[310]

Committee Comment

The Committee has reviewed the minor and consequential amendments contained in Schedules 1 and 2 of the Bill and is satisfied the relevant clauses in the schedules make appropriate amendments to legislation across the Statute Book to reflect the changes to the new Crime and Corruption Commission.

[308] George O'Farrell, Submission No. 20, page 2.
[309] Letter from the Department of Justice and Attorney-General, 24 April 2014, pages 55-56.
[310] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 9.

3 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals; and
- the institution of Parliament.

The Committee has examined the application of the fundamental legislative principles to the Bill. It is considered that clauses: 29, 58, 62, 76, 80, 81, 87 and 88 raise potential fundamental legislative principle issues which are brought to the attention of the House.

3.1 Rights and liberties of individuals

Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals.

Clause 29 – new section 216A (Other improper complaints)

As set out in part 2.5, clause 29 inserts new section 216A whereby a complainant to the CCC will commit an offence if it is deemed that the complaint is vexatious; not made in good faith; made primarily for a mischievous purpose; or made recklessly or maliciously; or a person counsels or procures another person to make a complaint to the commission.

Section 4(2)(a) of the *Legislative Standards Act 1992* provides that sufficient regard should be given to the rights and liberties of individuals. The former Scrutiny of the Legislation Committee (SLC) considered the reasonableness and fairness of treatment of individuals as relevant in deciding whether legislation has sufficient regard to rights and liberties of individuals. The Office of Queensland Parliamentary Council (OQPC) Notebook states that *'Provisions imposing liability should be fair and reasonable both in relation to the circumstances in which the liability is imposed, but also in relation to exemptions and defences'*.[311]

In this instance, new section 216A removes the defence provision at section 216(4) of the CM Act, yet the penalty remains and the scope of the section is wider. Whether a matter referred to the CCC is done maliciously, recklessly, for a mischievous purpose or not in good faith is likely to be assessed on a case by case basis however it may be the case that a person, particularly a person from a non-legal background, will genuinely believe they are referring a substantive matter to the CCC that meets the aforementioned elements in the provision. It is therefore arguable, that without a defence provision, new section 216A does not have sufficient regard for the rights and liberties of individuals.

Clause 29 introducing new section 216A also includes a penalty. The offence will impose a maximum penalty of 85 penalty units or one year imprisonment, which is the same penalty for the existing offence in section 216 of the CM Act. The OQPC provides a penalty should be proportionate to the offence.[312] It is arguable that in this instance the penalty for an offence is not commensurate in relation to a person who believes they have genuine information to provide to the CCC.

[311] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, page 133.

[312] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, page 120.

Further, the penalties contained in section 216A may also stop individuals from coming forward with genuine information for fear of being found guilty of an offence and spending up to a year in jail or fined a substantial amount.

Clause 62 – Disciplinary action for senior officers and commission staff

As set out in part 2.9, clause 62 of the Bill inserts new provisions into the CM Act in relation to the disciplinary action the Chief Executive Officer may take against commission staff, including senior officers, persons employed under section 254, persons seconded under section 255 and persons engaged under section 256.

New section 273F(1) provides that in disciplining a relevant commission officer or former relevant commission officer or suspending a relevant commission officer, the Chief Executive Officer must comply with the Act and the principles of natural justice. However, section 273F(2) provides that natural justice is not required if the suspension is on normal remuneration. This provision is consistent with section 190 of the PS Act.

Section 4(3)(b) *Legislative Standards Act 1992* provides that legislation should be consistent with the principles of natural justice which are developed by the common law and incorporate the following three principles: (1) something should not be done to a person that will deprive them of some right, interest, or legitimate expectation of a benefit without the person being given an adequate opportunity to present their case to the decision-maker; (2) the decision maker must be unbiased; (3) procedural fairness should be afforded to the person, meaning fair procedures that are appropriate and adapted to the circumstances of the particular case.[313]

It is arguable that proposed new section 273F(2) is inconsistent with the principle of natural justice. It could be argued that natural justice should apply equally to all persons who are the subject of disciplinary proceedings whether they are receiving full remuneration or not. However, this needs to be considered against the fact that this provision is applicable to all public servants under the PS Act and provides consistency.

Committee Comment

The Committee is satisfied that section 273F(2) is appropriate in the context of the commission's functions and the work carried out by its staff, especially given that a similar provision appears in the PS Act.

Clause 80 – Transitional arrangements for Commissioner and Acting Commissioner appointments

As detailed in part 2.10, clause 80 of the Bill inserts a new section 397 which has retrospective application in that it applies to the person holding the appointment of Acting Chairperson of the commission on the day the Bill was introduced. Under this section, the appointment of the Acting Chairperson will continue on the same terms and conditions (apart from the duration of the appointment) until the day, the remainder of the Bill commences. This will override section 24B(5) of the *Acts Interpretation Act 1954* which provides that an acting appointee must not act for more than one year during a vacancy in the office.

New section 398 (also in clause 80) applies to a person who holds a part-time Commissioner appointment (whether an acting or permanent appointment) on the day the Bill was introduced.

[313] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, page 25.

The appointment of the part-time Commissioner continues on the same terms and conditions (apart from the duration of the appointment) until the commencement of the remainder of the Bill.

The Explanatory Notes state:

> *Under these sections, the appointment of the existing acting chairperson, part-time commissioners and acting part-time commissioners will continue until, and only until, commencement of the new Part 11, divisions 3 to 7 (the commencement day). These provisions may affect the income of the persons concerned*.[314]

The Explanatory Notes go on to provide:

> *On commencement day the Government will have the option to either have in place new permanent or acting appointments.*[315]

As addressed in the Explanatory Notes,[316] the potential termination of the current Acting Chairperson, part-time Commissioners and acting part-time Commissioners upon commencement day will affect the income of the persons concerned. More specifically, pursuant to the proposed new section 398(4)(a), these provisions allow for the termination of a part-time Commissioner, who may have a legitimate expectation that their appointment tenure was to be realised in full.

In the context of a part-time Commissioner, this is arguably a potential FLP issue when considering the fairness of the provision to the person(s) who may be affected.

Section 4(1) of the *Legislative Standards Act 1992* provides that the FLPs are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. The Scrutiny of the Legislation Committee (SLC) considered the reasonableness and fairness of treatment of individuals as relevant in deciding whether legislation has sufficient regard to rights and liberties of individuals.

Section 4(3)(g) of the *Legislative Standards Act 1992* provides that legislation should not adversely affect rights and liberties, or impose obligations retrospectively. Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively. The Explanatory Notes provide that these provisions will allow the commission to facilitate a smooth transition into the new governance arrangements and implementation of the new complaints management system.[317]

Essentially, these provisions may adversely affect the rights and liberties of part-time Commissioners; and operate retrospectively, albeit, without adverse effect.

Committee Comment

Given the prime policy objective of the Bill is to re-structure the CMC this will affect the role played by the CMC's part-time Commissioners. It is most likely the case that the part-time Commissioners have other employment besides their role at the CMC, but they may also have a legitimate expectation that the duration of their appointment would be realised in full.

On balance, the Committee is satisfied with the justification provided in the Explanatory Notes that these provisions are appropriate in the circumstances especially given that they are designed to facilitate a smooth transition into new governance arrangements.[318]

[314] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 11.
[315] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 12.
[316] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 11.
[317] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 12.
[318] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 12.

Additionally, these provisions impose retrospective obligations on individuals; however, the Committee is satisfied that such obligations are not adverse, and are justified transitional arrangements.

Clause 81 – Additional transitional arrangement provisions

As set out in part 2.10, clause 81 of the Bill inserts new section 416 which provides that existing complaints made to the CMC are to be dealt with in accordance with the amendments, including whether the conduct comes within the new definition of 'corrupt conduct'. Where a complaint that was previously considered 'official misconduct' does not meet the new threshold of 'corrupt conduct', the CCC must take no further action in relation to that complaint. However, the public official of the agency that is the subject of the complaint is required to continue to deal with that complaint in accordance with the relevant law, policy or practice.

Accordingly, new section 416 will see complaints to the CMC considered 'official misconduct' referred back to a public agency if they are not considered to concern 'corrupt conduct'. As discussed above, the SLC considered the reasonableness and fairness of treatment of individuals as relevant in deciding whether legislation has sufficient regard to rights and liberties of individuals.

It is arguable that individuals who have made a complaint to the CMC will have an expectation that their current complaint will be dealt with by the CMC.

Committee Comment

Under the devolution principle in section 34 of the CM Act and the CMC's existing monitoring role of complaints, it would have been entirely possible for such a matter to referred back to an agency for consideration, subject to the CMC's monitoring role. For example, in 2012–13 the CMC retained 58 of the most serious complaint matters for investigation, including joint investigations with other agencies. This represented two per cent of overall complaints received. The majority of complaints assessed (81%) were referred to the originating agency or the QPS to deal with. Approximately 18 per cent of complaints required no further action.[319]

It will likely be the case that most of the complaints currently on foot are already with an agency or the QPS pursuant to the devolution principle. Given that the Bill provides for a corruption function, replacing the existing misconduct function, it would appear on balance that the new section is justified in the circumstances.

Clause 87 – Disclosure of Confidential Information (new section 88M)

Clause 87, new section 88M allows for the disclosure of confidential information about a person's affairs. It does not include information in the public domain unless further disclosure of the information is prohibited by law; or statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates.

The disclosure of private or confidential information has generally been identified by the former SLC as relevant to consideration of whether legislation has sufficient regard to an individual's rights and liberties.[320] The disclosure of confidential information provided for under clause 87 arguably does not take into account the rights and liberties of individuals pursuant to section 4(2)(a) of the *Legislative Standards Act 1992*.

[319] Crime and Misconduct Commission Annual Report 2012-13, page 26.

[320] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, page 113.

The Explanatory Notes have addressed this issue advising that the provision would only be used in limited circumstances.

> *Whilst the provision may impact on the rights and liberties of individuals, there is adequate justification for this provision. The information can only be disclosed in very limited circumstances, namely: for the purposes of administering the PS Act; to the extent necessary to perform the person's functions under an Act; for a proceeding in a court or tribunal; with the consent of the person to whom the confidential information relates; or if the disclosure is otherwise required or permitted under another Act or law.*
>
> *Additionally, the persons given protection by this provision are limited to only a person who is, or has been: the PSC CCE; a staff member of the PSC; or any other person to whom the function of conducting a review under section 88I has been delegated to by the CCE.*
>
> *This is considered justified because the State, as an employer, should ensure than an employee is not exposed to liability and the accompanying financial risk, for carrying out his or her duties. This risk has the potential to stifle innovation and inhibit changes in practices leading to improvements in service delivery in the public sector.*[321]

Committee Comment

The Committee is satisfied that the disclosure of an individual's confidential information and the instances which allow for the disclosure of confidential information as proposed by the Bill, are appropriate.

Clause 58 – Delegation of commission's functions

Section 4(3)(c) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether the legislation allows the delegation of administrative power only in appropriate cases and to appropriate persons.

Accordingly, powers should only be delegated to appropriately qualified officers or employees. The OQPC Notebook provides that the appropriateness of a limitation on delegation depends on all the circumstances including the nature of the power, its consequences and whether its use appears to require particular expertise or experience.[322] The SLC did not necessarily object to the sub-delegation of a function or power, provided it was done in appropriate circumstances.

New sections 269(3) and 269(5) allow for the sub-delegation of a function or power by the CEO and Chairman to an appropriately qualified person. As discussed earlier in this report at part 2.3, there are limitations on sub-delegation as provided by sections 269(4) and 269(6).

The *Acts Interpretation Act 1954*, section 27A contains extensive provisions dealing with delegations. At Schedule 1 it also defines *appropriately qualified person* in the following terms:

> ***appropriately qualified****—*
>
> *(a) for a function or power—means having the qualifications, experience or standing appropriate to perform the function or exercise the power; or*
>
> *(b) for appointment to an office—means having the qualifications, experience or standing appropriate to perform the functions of the office.*
>
> *Example of standing — a person's classification level in the public service.*

[321] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 13.

[322] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, page 33.

Committee Comment

The Committee is satisfied that the sub-delegation of a function or power proposed under clause 58 is appropriate in the circumstances.

Clause 76 – Use of parliamentary committee report in disciplinary action etc.

Clause 76 allows a report by the Parliamentary Commissioner to be used in disciplinary action against a commission officer; however parliamentary privilege will no longer apply to a Parliamentary Commissioner's report. The Explanatory Notes advise:

> *Clause 76 inserts a new section 323A to allow the Minister or chief executive officer to use a report provided by the parliamentary commissioner or parliamentary committee for: deciding whether (and what) disciplinary action is to be taken against a commission officer; and any disciplinary proceeding relating to a commission officer. The report may be so used by the Minister or chief executive officer despite parliamentary privilege applying to the report. This section therefore abrogates parliamentary privilege to the extent that the report is used in subsequent disciplinary action or proceedings against the commission officer the subject of the report.*[323]

With the removal of parliamentary privilege, clause 79 amends section 336 to include additional protections for the Parliamentary Commissioner and Parliamentary Commissioner officers modelled on the protections given to commission officers in sections 335(3) and (4) of the CM Act. This includes a defence of absolute privilege in defamation proceedings in relation to a publication to or by the Parliamentary Commissioner.

Legislation should not confer immunity from proceeding or prosecution without adequate justification.[324] The OQPC Notebook states:

> *…a person who commits a wrong when acting without authority should not be granted immunity. Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees. The preferred provision provides immunity for action done honestly and without negligence and if liability is removed it is usually shifted to the State.*[325]

The SLC states that one of the fundamental principles of law is that everyone is equal before the law, and each person should therefore be fully liable for their acts or omissions. Notwithstanding that position, the SLC also recognised that conferral of immunity is appropriate in certain situations.[326]

In this instance, the Parliamentary Commissioner is provided significant protection pursuant to section 336 of the CM Act in addition to the amendments contained in clause 79.

[323] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 28.
[324] *Legislative Standards Act 1992*, section 4(3)(h).
[325] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, page 64.
[326] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, page 64; Alert Digest 1998/1, page 5.

Committee Comment

The Committee notes that the protection afforded to the Parliamentary Commissioner will include a defence of absolute privilege for a defamation proceeding. The new 'own motion' powers provided to the Parliamentary Commissioner pursuant to clause 73 of the Bill are significant. However, the Committee is satisfied that the protections afforded to the Parliamentary Commissioner are warranted in the circumstances.

Clause 87 – Protection from liability for giving information (new section 88L)

Clause 87 introduces new section 88L which creates protection from liability for public officials who disclose information to the new CEO and immunity from proceedings or prosecution for the disclosure. The person is not liable, civilly, criminally or under an administrative process for giving the information. This includes administrative processes, defamation proceedings and breaches of professional and ethical codes.

As discussed in relation to clause 76 above, legislation should not confer immunity from proceeding or prosecution without adequate justification.[327] In relation to the justification for the proposed new section, the Explanatory Notes advise:

> *Whilst the Bill confers immunity from a proceeding, there is adequate justification for this immunity (s4(3)(h) of the* Legislative Standards Act 1992*). The Bill provides that if a person, acting honestly on reasonable grounds, gives the information to the CCE, the person is not liable, civilly, criminally or under an administrative process, for giving the information.*
>
> *This is considered justified because the State, as an employer, should ensure than an employee is not exposed to liability and the accompanying financial risk, for carrying out his or her duties. This risk has the potential to stifle innovation and inhibit changes in practices leading to improvements in service delivery in the public sector. A clear statement that State and Queensland Public Service employees will be supported will lay a strong foundation for better engagement with risk in the public sector, leading to better service delivery outcomes for the people of Queensland.*
>
> *The immunity only relates to an employee – it does not extend to the State itself and it does not alter the position that the State may be vicariously liable for the actions of its employees. The amendments will apply equally and consistently across the public service.*[328]

Committee Comment

The new provision protects public sector employees who disclose information. However, this protection does not extend to the State.

As noted in the OQPC Handbook, an entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees. Given the proposed new section relates to the disclosure of information only, the Committee is of the view that the protections afforded would appear justified in the circumstances.

[327] *Legislative Standards Act 1992*, section 4(3)(h).
[328] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 15.

Clause 87 – Exchange of information with external agency (new section 88K)

Under clause 87 which introduces new section 88K, the CEO may enter into an information exchange agreement with the Chief Executive Officer of an external agency. The Explanatory Notes advise that, '*as part of the management of a work performance matter an agency may refer a matter to an external agency (e.g. the Queensland Police Service or the commission)'*.[329] A list of these external agencies will be provided for later in the Public Service Regulation 2008.

In this instance, an agency may refer a matter to an external agency. However, at present, a comprehensive list of external agencies is unknown and will be prescribed by regulation.

Section 4(4)(a) of the *Legislative Standards Act 1992* provides that a Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons. As noted in the Office of the Queensland Parliamentary Counsel FLP Notebook, this matter is concerned with the level at which delegated legislative power is used.

Generally, the greater the level of political interference with individual rights and liberties, or the institution of Parliament, the greater the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament.

The Explanatory Notes state:

> *However, there will be sufficient regard to the rights and liberties of individuals, and the delegation of legislative power will occur only in appropriate cases and to appropriate persons.*[330]

In relation to the exchange agreement between the CEO and the CEO of an external agency, the Explanatory Notes advise:

> *The agreement will clearly set out the way information is given or received. The information that will be given by the PSC to external agencies will be only what is necessary for the purpose of obtaining information from the external agency (e.g. giving personal details in order to obtain information about the action the external agency is taking in relation to the person). There is no intent to disclose information solely for the external agency's benefit (i.e. to enable the external agency to take action against the* person concerned).[331]

Committee Comment

After due consideration, the Committee is satisfied that the referral to an external agency pursuant to section 88K is appropriate in the circumstances. However, the Committee notes that given the importance of this provision, it would be preferable that the list of external agencies be in the Act rather than in a regulation, notwithstanding the flexibility that this provides. However, the Committee acknowledges that regulations are subject to disallowance, and therefore will be subject to parliamentary scrutiny at the relevant time.

[329] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 34.
[330] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 14.
[331] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 14.

3.2 Institution of Parliament

Section 4(2)(b) of the Legislative Standards Act 1992 requires legislation to have sufficient regard to the institution of Parliament.

Clause 88 – Departments to have complaints management system for customer complaints (new section 219A

Clause 88 provides that a department must establish and implement a system for dealing with customer complaints. Under this new system, a department must take responsibility for managing the receipt, processing and the outcome of a customer complaint. The definition of a customer complaint includes a complaint about the service or action of a department, or its staff, by a person (other than a public service employee of the department) who is apparently directly affected by the service or action.

Examples of complaints include: a decision made, or a failure to make a decision, by a public service employee of a department; an act, or failure to act, of the department; the formulation of a proposal or intention by the department; the making of a recommendation by the department; the customer service provided by a public service employee of the department.

The Explanatory Notes advise that the complaints system must comply with the Australian Standard developed by Standards Australia as to the handling of customer complaints that '*is in effect from time to time*'.[332] By 30 September after each financial year, the chief executive of the department must publish on the department website the number of customer complaints received by the department; the number of complaints resulting in further action; and the number of complaints resulting in no further action.

As discussed in relation to clause 76, section 4(4)(a) of the *Legislative Standards Act 1992* provides that a Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons.

In this instance, clause 88 potentially breaches section 4(4)(a) of the *Legislative Standards Act 1992* as not having sufficient regard for the institution of Parliament as it requires the complaints system to be delegated to a non-legislative body.

The Explanatory Notes address this issue as follows:

> *The clause has been drafted to give departments flexibility to design a process appropriate for their size, customer base, frequency and nature of interactions with customers and other relevant administrative and staffing arrangements. This approach confirms the Government's continuing commitment to the maintenance of effective complaints management systems which are flexible and are managed at agency level.*[333]

3.3 Explanatory Notes

Part 4 of the *Legislative Standards Act 1992* relates to Explanatory Notes. It requires that an explanatory note be circulated when a bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

The Explanatory Notes circulated with the Bill are fairly detailed and generally contain the information required by part 4 in that a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins are included.

[332] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, page 16.
[333] *Explanatory Notes*, Crime and Misconduct and Other Legislation Amendment Bill 2014, pages 15-16.

However, the submission from Mr Don Willis is noted by the Committee in which Mr Willis states:

> *Section 23(1)(h) of the* Legislative Standards Act 1992 *(Qld) requires explanatory notes to include '*a simple explanation of the purpose and intended operation of each clause of the Bill.*' By not providing the rationale for the decision to reverse the 1993 enactment and resume using the previous title of "chairman", the Explanatory Notes to the Crime and Misconduct and Other Legislation Amendment Bill 2014 may be non-compliant with section 23(1)(h) on this point.*[334]

Mr Willis raises the same issue of non-compliance with the *Legislative Standards Act 1992* in relation to the removal of the requirement to obtain the bipartisan support of the parliamentary committee for appointments of Commissioners.[335]

The Committee agrees the Explanatory Notes are lacking in that regard.

Consultation

The Explanatory Notes also do not comply with section 23(1)(g) of the *Legislative Standards Act 1992* relating to consultation. The Guidelines for the preparation of explanatory notes published on the website[336] of the Department of Premier and Cabinet state, in relation to consultation:

> *When preparing this statement:*
>
> - *consider that, in principle, consultation should occur with affected key stakeholders at all stages of the regulatory cycle – the explanatory notes should explain how consultation has occurred and if not, why not;*
> - *the groups or persons consulted should be suitably identified (preferably by means of a list); and*
> - *additional information about the consultation process may be required depending on the nature and importance of the bill (emphasis added) – this might include:*
>   - *the form of consultation;*
>   - *a summary of the views expressed;*
>   - *the resultant impact of the consultative process on the content of the bill; and*
>   - *if no consultation occurred, the reasons for that.*[337]

The Explanatory Notes simply state who was consulted and on which matters consultation occurred with them.

It is considered this Bill of sufficient importance and nature that the Explanatory Notes would set out in greater detail - a summary of the views expressed by those consulted and the resultant impact of the consultative process on the content of the Bill.

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[334] Mr Don Willis, Submission No.1, footnote 2.

[335] Mr Don Willis, Submission No.1, footnote 7.

[336] http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/drafting-process/assets/guidelines-preparation-of-explanatory-notes.pdf accessed March 2014.

[337] http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/drafting-process/assets/guidelines-preparation-of-explanatory-notes.pdf accessed March 2014, page 5.

For example, the Explanatory Notes state consultation occurred with both the Parliamentary Commissioner and the Queensland Ombudsman on parts of the Bill relevant to their offices. However no details are provided on the views that were expressed by those officer and the resultant impact on the content of the Bill.

The Committee considers that more details ought to have been provided in relation to consultation given the matters being dealt with in this Bill.

Appendix A – List of Submissions

Sub #	Submitter
001	Don Willis
002	Hon. Cr Tony McGrady AM
003	Grant Wilson
004	Hon .Tony Fitzgerald AC, QC
005	Craig Myatt
006	Russell Wattie
007	Robert Needham
008	Prof. Tim Prenzler, Australian Research Council Centre of Excellence in Policing & Security
009	Hon. Martin James Tenni
010	Lyle Schuntner
011	Kate Galloway, School of Law, James Cook University
012	Bar Association of Queensland
013	Betty Taylor
014	Kevin Lindeberg
015	Queensland Nurses' Union
016	Hon. Douglas Drummond Qc
017	JD Ketwick
018	Dan McIntyre
019	Queensland Ombudsman
020	George O'Farrell
021	Whistleblowers Action Group
022	Australian Lawyers for Human Rights
023	Australian Lawyers Alliance
024	Lockyer Valley Regional Council

Sub #	Submitter
025	Professor Ross Martin QC
026	The Hon. Tim Smith QC, Accountability Round Table
027	Women Lawyers Association of Queensland Inc.
028	Law and Justice Institute (Queensland) Inc.
029	Queensland Law Society
030	Crime and Misconduct Commission
031	Submission not accepted
032	Professor Charles Sampford, Griffith University
033	Julie Cork, David Gow, Ann Gummow, Judith Bell, Philip Nase
034	Professor AJ Brown, Griffith University
035	Quilpie Shire Council
036	Whistleblowers Australia
037	Alex McKean
038	Queensland Police Union of Employees

.

Appendix B – List of witnesses at Public Hearing

Department of Justice and Attorney-General • Mr John Sosso, Director-General • Ms Jenny Lang, Assistant Director-General, Strategic Policy and Legal Services • Ms Leanne Robertson, Director, Strategic Policy • Ms Susan Masotti, Acting Principal Legal Officer, Strategic Policy **Public Services Commission** • Ms Katie Holm, Assistant Deputy-Commissioner, Workforce Policy and Legal
Crime and Misconduct Commission • Dr Ken Levy, Acting Chairperson • Ms Dianne McFarlane, Acting Executive General Manager
Professor Ross Martin QC
Dr David J Gow
Bar Association of Queensland • Mr Stephen Keim SC
Queensland Law Society • Mr Ian Brown, President • Mr Glenn Cranny, Chair, Criminal Law Committee
Mr Kevin Lindeberg
Centre for Governance and Public Policy, Griffith University • Dr AJ Brown, Program Leader, Public Integrity and Anti-Corruption
The Institute for Ethics, Governance and Law, Griffith University • Professor Charles Sampford
Accountability Round Table • The Honourable Stephen Charles QC, Executive Member
Whistleblowers Action Group Queensland Incorporated • Mr Greg McMahon, Secretary • Dr Pam Swepson, Whistleblower
Queensland Council for Civil Liberties • Mr Terry O'Gorman, Vice-President
Law and Justice Institute Queensland Inc. • Mr Peter Callaghan SC • Mr Mark McCarthy

Queensland Police Union of Employees • Mr Ian Leavers, General President & CEO • Mr Calvin Gnech, Legal Group
Department of Justice and Attorney-General • Mr John Sosso, Director-General • Ms Jenny Lang, Assistant Director-General, Strategic Policy and Legal Services • Ms Leanne Robertson, Director, Strategic Policy • Ms Susan Masotti, Acting Principal Legal Officer, Strategic Policy **Public Services Commission** • Ms Katie Holm, Assistant Deputy-Commissioner, Workforce Policy and Legal

Dissenting Report

29 April, 2014

Mr Brook Hastie
Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Hastie

Re: *Crime and Misconduct and Other Legislation Amendment Bill 2014* - Dissenting Report

Given the extensive nature of the Report and the considerable subject matter that is covered in the *Crime and Misconduct and Other Legislation Amendment Bill 2014,* it has been impossible to consider the Report in full and for the Non-government members of the Committee to provide any meaningful response to the draft Report to allow the Committee to Report within the timeframes designated by the Parliament.

The Non-government members have therefore submitted a dissenting report based on the Draft of the Bill, rather than on the Chair's draft Committee Report.

The Non-government members of the Committee strongly oppose the *Crime and Misconduct and Other Legislation Amendment Bill 2014* and do not support the recommendation of the Legal Affairs and Community Safety Committee that the legislation should be passed.

Since the inception of the Criminal Justice Commission (CJC) in 1989, and the transfer of its functions to the Crime and Misconduct Commission (CMC) in 2001, the Borbidge Liberal National Party coalition government, and now the Newman LNP Government, have sustained an attack on the very body that has been charged with tackling serious crime and corruption in this State.

Since the election of the Newman Government, its agenda in respect of the CMC has been clear. It has wanted to dismantle the Fitzgerald anti-corruption architecture, and unwind 25 years of reform. This commenced with the appointment, then reappointment, of an acting Chairperson without the bipartisan support of the all-party Parliamentary Crime and Misconduct Committee (PCMC). We then saw amendments rushed through the Parliament to allow for the appointment of acting part-time commissioners, again without bipartisan support of the PCMC.

Then, when unhappy with the actions of the PCMC, the Parliament passed a resolution sacking the entire committee, and replaced the independent Chair with a Government member.

This Bill completes the trashing of the Fitzgerald legacy by removing totally the requirement for any of the Commissioners to be appointed with bipartisan support of the Committee. It allows the CMC to conduct research on matters only with the prior approval of the Attorney-General, and divides the powers of the Commission between the government-appointed Chief Executive Officer (CEO) and the government-appointed Chairperson.

It removes the requirement for the Chairperson to act 'subject to' the commission, and whilst removing the commission's preventative function altogether with respect to misconduct, also reduces misconduct to a secondary purpose under the Act.

These changes undermine the independence of the commission. They draw the Commission and the Commissioners into the public and political debate, which is unfortunate.

The public cannot have confidence in an organisation that does not have the appearance of transparency and openness, even if that is exactly how it operates. This Bill is a signal to Queenslanders that the Newman Government is prepared to let Queensland return to the bad old days of the Bjelke-Petersen Government, where corruption and misconduct were able to flourish.

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The Non-government members of the Committee have outlined many concerns with the Bill in this dissenting report, and will address these and other concerns with this legislation during the second reading debate on the Bill.

Yours sincerely

Bill Byrne MP
Member for Rockhampton

Yours sincerely

Peter Wellington MP
Member for Nicklin

Contents

Recommendations

1. Introduction

1.1 Background and Consultation

Following the screening of the Moonlight State on the Four Corners television program on ABC TV in 1987, the then National Party Government commissioned Tony Fitzgerald QC to conduct a Commission of Inquiry into possible illegal activities and possible police misconduct. The Inquiry exposed corruption at the highest levels of Government and the Police, and saw many senior politicians and police officers face trial for bribery and other corruption charges.

One of the recommendations that flowed out of the Inquiry was the establishment of a standing commission of inquiry that would have as its function the investigation of serious crime and corruption in Queensland, to ensure that the State would never again descend to the levels of crime and corruption exposed by the Inquiry.

Since the inception of the Criminal Justice Commission (CJC) in 1989, and the transfer of its functions to the Crime and Misconduct Commission (CMC) in 2001, the Borbidge Liberal National Party coalition government, and now the Newman LNP Government, have sustained an attack on the very body that has been charged with tackling serious crime and corruption in this State.

Hon Tony Fitzgerald AC QC has made a submission to the Committee which has a comprehensive summary of the history of the CJC and the CMC, and the actions of the Borbidge Government to attempt to undermine its authority.

Since the election of the Newman Government, its agenda in respect of the CMC has been clear. It has wanted to dismantle the Fitzgerald anti-corruption architecture, and unwind 25 years of reform. This commenced with the appointment, then reappointment, of an acting Chairperson without the bipartisan support of the all-party Parliamentary Crime and Misconduct Committee (PCMC). We then saw amendments rushed through the Parliament to allow for the appointment of acting Part-time Commissioners, again without bipartisan support of the PCMC.

Then, when unhappy with the actions of the PCMC, the Parliament passed a resolution sacking the entire committee, and replacing the independent Chair with a Government member.

This Bill completes the trashing of the Fitzgerald legacy by removing totally the requirement for any of the Commissioners to be appointed with bipartisan support of the Committee. It allows the CMC to conduct research on matters only with the prior approval of the Attorney-General, and divides the powers of the Commission between the government-appointed Chief Executive Officer (CEO) and the government-appointed Chairperson.

It removes the requirement for the Chairperson to act 'subject to' the commission, and whilst removing the commission's preventative function altogether with respect to misconduct, also reduces misconduct to a secondary purpose under the Act.

These changes undermine the independence of the commission. They draw the Commission and the Commissioners into the public and political debate, which is unfortunate. The public cannot have confidence in an organisation that does not have the appearance of transparency and openness, even if that is exactly how it operates. This Bill is a signal to Queenslanders that the Newman Government is prepared to let Queensland return to the bad old days of the Bjelke-Petersen Government, where corruption and misconduct were able to flourish.

The Submissions received by the Committee were extensive, and the committee also had the benefit of hearing evidence from quite a large number of stakeholders during its public hearing. The Non-government members are indebted to those persons who have taken the time to express their views on the contents of the Bill. They have been invaluable to our deliberations.

1.2 Policy objectives of the Crime and Misconduct and Other Legislation Amendment Bill 2014

The Explanatory Notes to the Bill set out the Policy Objectives of the Bill and the reasons for them. The Notes state:

> *'On 3 July 2013, the Queensland Government tabled its response in the Legislative Assembly to the two recent reviews of the Crime and Misconduct Commission (CMC): the review by the Independent Advisory Panel (constituted by the Honourable Ian Callinan AC and Professor Nicholas Aroney (Callinan/Aroney)) of the Crime and Misconduct Act 2001 (CM Act) and related matters; and the inquiry by the Parliamentary Crime and Misconduct Committee into the CMC's release and destruction of Fitzgerald Commission of Inquiry documents. Implementation of the accepted recommendations will lead to an improvement in:*
>
> - *public confidence in the CMC;*
> - *timeliness of the investigation of complaints;*
> - *operational and corporate governance structures within the CMC;*
> - *the current culture within the CMC;*
> - *CMC internal complaints management systems for misconduct matters;*
> - *internal processes and practices in the CMC; and*
> - *management of personal conduct and work performance of Queensland public service employees*[1]*.*

Unfortunately, many of the matters being implemented by this Bill were not recommended by either the Callinan/Aroney Report or the Report No. 90 of the PCMC into the release and destruction of the Fitzgerald Inquiry Documents. Many of these changes are being made purely at the whim of the Government, designed to undermine the independence and transparency of the Commission. They are not, as the Explanatory Notes state, an 'implementation of the accepted recommendations'.

The Notes state they will lead to an improvement in public confidence in the CMC. By stating this will be the case will not make it so. Many of the changes proposed undermine public confidence in the independence of the CMC. The removal of the requirement for bipartisan support of the PCMC for the appointment of Commissioners is one such change.

As Robert Needham, former Parliamentary Crime and Misconduct Commissioner and Former Chairperson of the CMC said in his submission to the Committee:

> '*The only attempt at a rationale that I have heard was in a statement by Mr Bleijie in a television interview where he stated words to the effect that the removal would "take politics out" of the appointment process. This statement is either naive or disingenuous.*
>
> *Rather than taking politics out of the appointment process, the removal of the requirement for bipartisan political approval will ensure that the appointment is seen as political.'*

[1] Explanatory Notes to the *Crime and Misconduct and Other Legislation Amendment Bill 2014* at page 1

Another such change is the change to the governance structure of the CMC. Transferring the powers of the Commission to the government-appointed Chairperson and Chief Executive Officer (CEO), and by not requiring that they exercise those functions 'subject to' the commission, gives an inordinate amount of power to those two persons.

Reducing misconduct to a secondary purpose under the Act is a clear signal that the Government places less importance on the fight against corruption in this State. The current Acting Chairperson of the CMC does not support this change. In his submission to the Committee he pointed out three shortcomings in this proposal:

- *Serious crime is usually accompanied by serious corruption.*
- *Should there be budgetary issues, preference would have to be given to the primary function.*
- *If the Bill is left unchanged, while recognising the wider role of the CMC compared to most other similar statutory bodies in Australia, Queensland will be the only State that does not have a primary function to deal with serious corruption*[2].

The introduction of a requirement for complaints to the CMC to be made by way of statutory declaration will be more likely to discourage legitimate complaints which will lead to the investigation of instances of serious corruption, than it is to discourage frivolous or vexatious complaints.

Many of the Policy Objectives stated in the Bill will not have the policy objective ascribed to them. It is disappointing that so many of the provisions in the Bill have no explanation for their inclusion. They are not recommended by any of the inquiries, including the Callinan/Aroney, PCMC or Keelty reviews, nor is there any explanation in the Explanatory Notes or the Attorney-General's introductory speech. It is difficult to expect people to support a proposal when no explanation for it is offered.

1.3 Should the Bill be passed?

Standing Order 132(1) requires the Committee to recommend whether the Bill should be passed. The Non-government members of the Committee do not support the policy objectives of the Bill.

After examination of the Bill and consideration of submissions and the further information provided from the Department, the Non-government members of the Committee are not satisfied the Bill should be passed. The Non-government members of the Committee have made further specific recommendations in relation to the Bill throughout this Report.

Recommendation 1
The Non-government members of the Committee recommend the *Crime and Misconduct and Other Legislation Amendment Bill 2014* not be passed.

2. Examination of the Crime and Misconduct and Other Legislation Amendment Bill 2014

This section discusses issues raised during the Committee's examination of the Bill. These issues are grouped under 'Part A –' and 'Part B –'.

2.1 Part A – Attacks on the Independence of the Commission

[2] Crime and Misconduct Commission, Submission No. 30 at page 2

2.1.1 Changing purposes of the Act

The Bill proposes omitting the current purposes of the Act as contained in the *Crime and Misconduct Act 2001*, and replacing them with a primary purpose and a secondary purpose. The Act currently provides that the main purposes are:

(a) to combat and reduce the incidence of major crime; and
(b) to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector[3].

By providing that the main purpose of the Act is to combat and reduce the incidence of major crime, the Bill relegates the misconduct or corruption functions of the Commission to a secondary purpose. This purpose is further diluted by removing the function of continuously improving the integrity of the public sector, and by changing the focus to corruption, rather than misconduct, in the public sector.

The Callinan Aroney Review of the Crime and Misconduct Commission recommended that 'the CMC must focus on the most important matters and deploy its resources accordingly'. *We referred in Chapter l of this Report to the development of a culture of complaint making, in which office disputes can become elevated to a level which they do not warrant, integrity bodies become inundated with complaints, the times within which the complaints are dealt with become longer, and, ultimately, the integrity bodies become lost in a sea of complaints. We referred also to a loss of perspective, where every complaint is treated as serious or potentially so, with the inevitable consequence of a lack of proportionality in the treatment of them[4].*

The Non-government members of the Committee agree with the views of the Bar Association of Queensland in relation to this matter. As they submitted, *'The use of the Commission's resources where they will be most effective in achieving integrity in the public sector is a laudable objective.'*[5]

However, the Bar Association of Queensland's support is conditional. It has expressed concern about these changes. In its submission to the Committee it says*, 'the Association is concerned that the Bill may send signals that promoting integrity and prevention of misconduct or corruption in the public sector are of reduced importance both in the mind of the government and in the law as it is written. In this regard, the Association is concerned by the following proposed changes:*
(a) The amendment to s. 4 of the Act by which continuous improvement of integrity and reduction of misconduct is changed to simply the reduction of the incidence of corruption and;
(b) The expression of the amended objective, now in the new subs. 4(1A), as a secondary (rather than a main) objective of the Act.[6]

The Non-government members of the Committee are firmly of the view that 'continuous improvement of integrity' should be retained in the Act's purposes, and the corruption function should not be reduced to a secondary purpose.

Recommendation 2
The Non-government members of the Committee recommend that the Bill be amended to include 'continuous improvement of integrity' in the Act's Purposes.

[3] Section 4 of the Crime and Misconduct Act 2001
[4] Independent Advisory Panel's Review of the Crime and Misconduct Act 2001 at page 114
[5] Bar Association of Queensland, Submission No. 12, page 2
[6] Bar Association of Queensland, Submission No. 12, page 2

Recommendation 3
The Non-government members of the Committee recommend that the Bill be amended to remove reference to primary and secondary purpose in the Act's purposes, and replace this with two 'main purposes'.

2.1.2 Removal of misconduct from the commission's prevention function

The Act currently provides that the Commission has a prevention function which is to help prevent major crime and misconduct[7]. The Bill removes 'helping to prevent' misconduct from this function[8]. This could be in line with the change of definition of the Act from misconduct to corruption, however, the Non-government members of the Committee holds grave concerns over removal of this provision, without replacing it with the function of preventing corruption.

The new definition of corrupt conduct in the Bill includes much of what was previously considered misconduct under the Act. It is important that there be an ongoing commitment to preventing misconduct and corruption within units of public administration.

The Callinan Aroney Report identified that, in the view of the authors, the prevention functions were 'too broad and ill-defined'. They recommended 'that they be replaced by a more specific provision to this effect:

> *When, in the course of carrying out its functions under this Act, it comes to the notice of the Commission that conduct in the public sector may be improved, the Chairperson may notify the appropriate manager in the relevant part of the public sector of the possibility of improvement and ways and means of improvement[9].*

Recommendation 4 of the Callinan Aroney report is also very clear in its recommendation of removal of misconduct (or corruption) from the prevention functions of the Commission. As the Report says, *'The CMC's preventative function should cease, except for such advice and education as may be appropriate and incidental to matters uncovered or found by the CMC in the course of an investigation[10].'*

The PCMC, in its response to the Callinan Aroney report, accepted this proposal with reservation. It said, *'The Committee's reservation stems from a lack of understanding of the implications of such a transfer to the Public Service Commission. The Committee notes that the Panel's recommendation does not contemplate the CMC's application of those prevention functions to universities, and more importantly, to local government. The Committee is aware that a large proportion of complaints to the CMC concern local government and consider that prevention advice in this area should continue[11].'*

There is a concern about the impact that this amendment will have on the CMC's capacity to provide preventive advice to local government and universities. As these bodies do not come within the jurisdiction of the Public Service Commission (PSC), the transfer of these duties to the PSC will not cover these important units of public administration.

[7] Section 23 of the Crime and Misconduct Act 2001
[8] Clauses 10 and 11 of the *Crime and Misconduct and Other Legislation Amendment Bill 2014*
[9] Independent Advisory Panel's Review of the Crime and Misconduct Act 2001 (Qld) at page 156
[10] Independent Advisory Panel's Review of the Crime and Misconduct Act 2001 (Qld) at page 215
[11] PCMC comments on the recommendations in the report on the Independent Advisory Panel's review of the Crime and Misconduct Act and related matters thereto at page 3

This is an issue that has not been covered in the additional material provided with the Bill. The explanatory notes do not provide any reason for the amendment other than that 'Callinan/Aroney recommended' it. There is also no further explanation provided in the Attorney-General's introductory speech.

Without any further provisions to allay the reservations expressed by the PCMC in its response to the Review, the Non-government members of the committee cannot support these amendments.

This is supported by the submission made by the Bar Association of Queensland. As it said: *'the Association is concerned by the following proposed changes: The amendment to s. 23 where the preventive function of the commission now only relates to major crime and no longer relates to misconduct or corruption, as such, in the public sector*[12]*.*

The non-government members of the Committee support the views of the Bar Association in this respect, and does not support the removal of 'misconduct' without replacing it with 'corruption' as one of the prevention functions of the Commission.

Attachment 1 to the correspondence dated 26 March 2014 received by the Committee from the Director-General of the DJAG advises that almost all other integrity bodies within Australia contain a provision that they have a 'preventive' role in relation to corruption.

The Non-government members of the Committee are also concerned about the impact this amendment will have in relation to the CMC's capacity to provide preventive advice to local government and universities, as these bodies do not come within the jurisdiction of the Public Service Commission (PSC).

Recommendation 4
The Non-government members of the Committee recommend the *Bill* be amended to include 'corruption' within the prevention functions of the Commission.

2.1.3 Change to the principles for performing misconduct functions

The Act as it currently stands sets out the principles for the commission to perform its misconduct functions[13]. The Bill amends this to refer to corruption functions, which the Non-government members of the Committee do not oppose. However, other changes to this provision are opposed.

Amongst the Principles set out in this section is Cooperation, which sets out a number of dot points including:
• *to the greatest extent practicable, the commission and units of public administration should work cooperatively to prevent misconduct.*

The Bill removes this dot point. This is in line with the Government's stated policy to remove the prevention of misconduct (or corruption) from the functions of the Commission. The Non-government members of the Committee oppose this move, and see it as a retrograde step in the ongoing maintenance of the highest standards of integrity in public office in Queensland.

The Non-government members of the Committee oppose this policy position, which is not recommended by the Callinan Aroney Report. That Report recognised the need for the Commission

[12] Bar Association of Queensland, Submission No. 12, page 2
[13] Section 34 of the Crime and Misconduct Act 2001

to have some ongoing advisory role where it comes to the notice of the Commission that conduct in the public sector could be improved.

Similarly, the removal of 'prevention' from the devolution principle, and the watering down of the overriding responsibility of the commission to promote public confidence in the integrity of units of public administration to merely promoting public confidence in the way corruption within a unit of public administration is dealt with, are further evidence of the diminution of the promotion of integrity and prevention of corruption by the Newman Government.

The Bar Association of Queensland holds similar concerns about the changes made to this section by the Bill[14]. It has expressed concern about *'the amendment to s. 34 where paragraph (b) which deals with capacity building to prevent and deal with misconduct is deleted and changes to paragraphs (c) and (d) where the prevention of misconduct/corruption is similarly downgraded'*.

Recommendation 5
The Non-government members of the Committee oppose the removal of the first dot point from section 34(a) of the Act, the change from 'prevent and deal' to merely 'deal' in section 34(c) and removal of the overriding responsibility of the Commission to promote public confidence in the integrity of units of public administration from section 34(d).

2.1.4 Directions by CEO about Commission's Corruption Function

Clause 14 of the Bill inserts a new sub-section into section 35, requiring that the commission, in performing its corruption function, must focus on more serious cases of corrupt conduct and cases of systemic corrupt conduct within a unit of public administration.

Clause 15 of the Bill then inserts new sections 35A and 35B into the Act. New section 35A allows the CEO, subject to the direction and control of the Chairman, to issue a direction about how commission officers are to decide whether a complaint involves, or may involve, a more serious case of corrupt conduct or a case of systemic corrupt conduct within a unit of public administration.

The Non-government members of the Committee hold some concerns about the restriction that could be placed on officers of the Commission as to how they exercise their duties and responsibilities under the Act. Many of the Commission's officers are lawyers and police officers. They have duties and responsibilities under legislation to carry out their duties in a certain way. These amendments do not require that the directions take into account those obligations.

Nor do they have regard to the importance of independent Commission officers being able to carry out their duties independently. Commission officers are obliged to comply with the direction pursuant to sub-section (3), whether or not they are of the view that the direction would require them to be in breach of other professional or ethical obligations.

In its submission, the Bar Association of Queensland has described this provision as *'tend(ing) to limit the independence of staff of the Commission in going about their role either as lawyers providing advice or police officers exercising the discretions of a constable at common law.*[15]*'*

A further concerning aspect of these provisions is that there does not appear to be any method of ensuring transparency of any directions so issued by the CEO of the Commission. New section 35B

[14] Bar Association of Queensland, Submission No. 12, page 2
[15] Bar Association of Queensland, Submission No. 12, page 4

requires the CEO to publish '*on a publicly accessible website of the commission, information about the commission's systems and procedures for dealing with complaints about corruption'.*

Various matters are prescribed in the section as being required to be so published, including '*the standard procedures adopted by the commission for assessing and investigating complaints about corruption.*[16]' What is not included is the requirement to publish the directions issued by the CEO as to how '*commission officers are to decide whether a complaint involves, or may involve, a more serious case of corrupt conduct or a case of systemic corrupt conduct within a unit of public administration.'*

Any action by the commission to limit or restrict the capacity or the manner in which complaints are to be made about corrupt conduct should be transparent, and the Non-government members of the Committee recommend that a clause be inserted in this section to require the publication of any directions so issued by the CEO.

Recommendation 6 The Non-government members of the Committee recommend that Clause 15 be amended to delete new section 35A from the Bill.

Recommendation 7 If recommendation 6 is not adopted, the Non-government members of the Committee recommend that a new sub-section be inserted into new section 35B to require the publication on the official website of the directions issued by the CEO as to how commission officers are to decide whether a complaint involves, or may involve, a more serious case of corrupt conduct or a case of systemic corrupt conduct within a unit of public administration.

2.1.5 Requirement for complaint to be made by way of statutory declaration

Clause 16 of the Bill amends the Act by requiring a complaint about corruption to be made by way of statutory declaration unless the Commission decides, because of exceptional circumstances, that it need not be made by statutory declaration.

This is in response to Recommendation 3B of the Callinan Aroney Report, which recommended '*that the Crime and Misconduct Act should be amended to require all complaints to be accompanied by a statutory declaration (or, in case of urgency, within 7 days of a complaint) to the effect that:*
a. the complainant has read and understands the relevant sections (setting them out in the declaration) of the Crime and Misconduct Act;
b. that the complaint is not a baseless one; and
c. that the complainant will keep the matters the subject of the complaint (and its making) confidential for all purposes unless and until a decision is made upon it that results in a criminal prosecution or proceedings in respect of it in QCAT.

We emphasise that the statutory declaration should quote the definitions of "official misconduct" and "baseless complaint"[17]*.'*

The Non-government members of the Committee do not support the requirement for a statutory declaration to accompany all complaints.

In April 2013, the Attorney-General invited the Parliamentary Crime and Misconduct Committee to comment on the recommendations contained in the report of the Independent Advisory Panel's

[16] New section 35B(2)(b) contained in Clause 15 of the Bill
[17] Independent Advisory Panel's Review of the Crime and Misconduct Act 2001 at pages 213-214

review of the Crime and Misconduct Act and related matters thereto. In its response to the Attorney-General, the PCMC made the following submission:

> *The Committee considers that this recommendation, if it proceeds with the definition as set out in recommendation 3D, could lead to the CMC not accepting anonymous complaints. The Committee considers that a complainant should not be required to submit a statutory declaration with a complaint to the CMC.*
>
> *The Committee does not consider that the requirements for a complaint to be accompanied by a statutory declaration will reduce vexatious or intractable complaints. In the experience of this Committee, some who feel that they have a genuine complaint to make to the CMC, despite that complaint being baseless, will not be deterred by the requirement of providing a Statutory Declaration. Nor will it deter those persons who for a range of reasons do not have the requisite understanding of the requirements.*
>
> *Conversely, the Committee considers that this requirement may deter a person who holds a genuine complaint which could expose corruption but feels vulnerable in making that complaint due to the requirement to sign a Statutory Declaration and disclose their name*[18].

The Non-government members of the Committee endorse this view. This response represented the unanimous view of the PCMC, and was supported by both Government and non-Government members of the Committee. The reasons given are salient. It is unlikely that the requirement will have the desired effect. Persons who genuinely believe that theirs is a legitimate complaint, will be of that view regardless of whether the Commission holds the same view, and will not be deterred from making a complaint by the requirement for it to be accompanied by a statutory declaration.

This proposal is also opposed by the CMC itself. In its submission to the Committee, Dr Levy, on behalf of the Commission, said:

> *The CCC also receives anonymous complaints. For example, in 2012-13 seven percent of complaints received were from anonymous sources. Examples of important investigations resulting from an anonymous complaint have included the $16 million Health fraud matter, the investigation into the alleged misuse of public monies and a former ministerial adviser, and the investigation and prosecution of Gordon Nuttall.*
>
> *Based on its experience, the Commission believes that the strict wording of this clause may inhibit the CCC's ability to effectively investigate some complaints of serious corruption and that it would be prudent for it to retain some flexibility in this area*[19].

A person with a genuine complaint, however, who might be afraid of retaliation for having made a complaint, or who, as a lay person, is not confident of their capacity to fully comprehend the requirement for making a complaint, may be deterred from making what could in fact be a very well-founded complaint about a very serious issue of corrupt conduct.

The Bill sets out examples of exceptional circumstances, which includes fear of retaliation for making the complaint in relation to the person's employment, property, personal safety or well being[20]. However, it only refers to 'the person' and doesn't include retaliation against a family member or

[18] PCMC comments on the recommendations in the report on the Independent Advisory Panel's review of the Crime and Misconduct Act and related matters thereto at pages 1-2

[19] Crime and Misconduct Commission, Submission No. 30 at pages 2-3

[20] Clause 16 of the Crime and Misconduct and Other Legislation Amendment Bill 2014

other person. It also requires the Commission to determine whether the complaint needs to be made by statutory declaration.

It is difficult to imagine how one might make an approach to the Commission for the purpose of having the determination made as to whether a statutory declaration is required without exposing oneself to risk of the exact dangers that one fears. The approach cannot be made anonymously, or there would be no way of the commission communicating their decision on the issue.

In the view of the Non-government members of the Committee, the likelihood of the perceived ill being negated is far outweighed by the likelihood that legitimate complainants might be discouraged, and therefore this requirement is not supported. Additionally, in no other state or territory, or in the Commonwealth, is a complaint to an integrity body such as the CMC required to be made by statutory declaration[21].

Recommendation 8 The Non-government members of the Committee oppose the requirement for a complaint to be accompanied by a statutory declaration and recommends that the amendment to that effect contained in clause 16 of the Bill not be supported.

2.1.6 Expansion of grounds on which Commission may decide to take no action or discontinue action

The Act as it currently stands provides that the Commission may decide to take no action or to discontinue action where, amongst other things, the complaint is frivolous or vexatious or lacks substance or credibility[22]. The Callinan Aroney Report recommended measures to reduce the number of baseless complaints, and recommended that baseless complaints should be defined in the Act to mean complaints that are malicious, vexatious, reckless or exclusively vindictive[23].

The Bill seeks to expand the grounds on which the commission may decide to take no action or discontinue action to include a complaint that:

- is not made in good faith; or
- is made primarily for a mischievous purpose; or
- is made recklessly or maliciously[24].

The Callinan Aroney Inquiry investigated the reporting thresholds of various investigative bodies such as the ICAC in NSW and the CCC in Western Australia, and noted that both are required to consider whether the allegation not only is ''frivolous or vexatious" but also whether it is "made in good faith". Similarly, the CCC legislation contains an offence to make such a report "maliciously'' or "recklessly". It should be noted, however, that those provisions do not guide the CCC in any decision of how to deal with the matter.

In making such a decision under the expanded grounds, the commission is not required to consider the merits of the complaint, or whether in fact the complaint discloses evidence of serious corruption or systemic corruption.

[21] Correspondence dated 26 March 2014 from the Director-General, Department of Justice and Attorney-General to the Chair providing the Department's initial written briefing on the Crime and Misconduct and Other Legislation Amendment Bill 2014 – Attachment 1: Integrity Commissions – Cross-jurisdictional comparison

[22] Section 38(2)(g)(i) of the Crime and Misconduct Act 2001

[23] Recommendation 3D of the Independent Advisory Panel's Review of the Crime and Misconduct Act 2001 at page 214

[24] Clause 19 of the *Crime and Misconduct and Other Legislation Amendment Bill 2014*

Whilst there is merit in reducing the number of baseless or less serious complaints being made to the Commission, it would be wrong if serious cases of corruption were being swept under the carpet and not being investigated merely because of the mala fides, or lack of bona fides, of the complainant. This is a position which was supported by the Government in its response to the Recommendations of the Callinan Aroney Report. As was stated: "*The Government is concerned the proposed definition of 'baseless complaint' may prevent the CMC from investigating matters that may reveal serious misconduct or corruption.*[25]*"*

The Non-government members of the Committee oppose this amendment. In forming this position, the Non-government members of the Committee adopt the reasoning of the PCMC, which unanimously opposed recommendation 3D of the Callinan Aroney Report. In its letter to the Attorney-General responding to that Report, the PCMC said, *'The Committee considers that the intent of this provision, the reduction of vexatious or frivolous complaints being considered by the CMC, can be achieved with a better focus on triage of complaints rather than limiting the complaints that can be received by the CMC. The CMC already has a system in place to quickly identify and resolve these complaints.*[26]*'*

Recommendation 9 The Non-government members of the Committee recommend that the part of Clause 19 by which new sub-sections (C) - (E) are proposed to be inserted into section 46(2)(g)(i) of the Act not be supported.

2.1.7 Requirement for Executive Approval for Exercise of the Research Functions of the Commission

The Report of a Commission of Inquiry Pursuant to Orders in Council (the Fitzgerald Report) recommended that a Research and Co-Ordination Division be established within the CJC (the precursor of the CMC). One of the roles of the Division was to provide information to the Parliament, Judiciary, law enforcement and prosecution agencies in relation to criminal justice matters[27]. Nowhere did the Fitzgerald Report envisage that the converse would occur, and that the executive would direct the Division in the exercise of its functions.

In fact, the Report stated: '*The administration of criminal justice should be independent of Executive controls. It is an apolitical, vital public function. However, it should be open to public review and accountable to Parliament. One mechanism which satisfies these requirements is an all party parliamentary committee.'*

Attachment 1 to the correspondence dated 26 March 2014 received by the Committee from the Director-General of the DJAG sets out a comparative analysis of the research functions of each of the integrity bodies within Australia. Whilst there are not specific research functions prescribed in all legislation, each body has a general provision which envisages that research should be undertaken by the body. Nowhere else in Australia is there a capacity for the Executive to direct how that function should be exercised.

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[25] Parliamentary Crime and Misconduct Committee – Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Commission of Inquiry documents; and
The Honourable Ian Callinan AC and Professor Nicholas Aroney - Review of the *Crime and Misconduct Act 2001* and related matters;
Queensland Government Response at page 26

[26] PCMC comments on the recommendations in the report on the Independent Advisory Panel's review of the Crime and Misconduct Act and related matters thereto at page 2

[27] Report of a Commission of Inquiry Pursuant to Orders in Council at page 375.

The restriction contained in clause 21 of the Bill, which amends section 52 of the Act, that limits the Commission to undertake research in accordance with a research plan approved by the Minister is a further attempt to hamper the ability of the Commission to exercise its functions independently. This is in accordance with the repeated and discernible intent of the Government to interfere with the operations of the Commission, and to whittle down its independence.

The Callinan Aroney Report recommended that the CMC be largely divested of its research function. Recommendation 12 of the Report recommended: '*The undertaking of non-specific research by the CMC is a distraction, and not such as to justify the expense and resources needed for it. The research undertaken by the CMC should be limited to that which is referred to the CMC by government, with the qualification that it should be at liberty to make submissions to the Attorney-General that it be permitted to research particular issues or matters on the ground that they are emergent, impo1tant and not able to be addressed by other bodies, or is research incidental to an investigation of a specific matter. No such research should be undertaken without the approval in advance from the Attorney-General.'*

The PCMC, in its response to the recommendations contained in the Callinan Aroney Report, did not support this recommendation. It stated: '*The Committee received advice from the CMC that it recently restricted its research activities to matters relevant to current investigations and matters before it. The Committee notes the high regard in which the CMC research is held by the wider law enforcement community. The Committee also understands that the research of the CMC has driven policy change in a number of areas including recent Taser reforms*

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On the basis of the CMC's own refocus of its research activities, the Committee does not support this recommendation which would require the CMC, an independent statutory body, to seek the advance permission from a Minister of the Executive Government before conducting broader research.'

The Bar Association of Queensland also opposed this measure in its submission to the Committee.

> '*The research function of the Commission has been an important part of its role providing an independent expert voice on matters going to law enforcement. The new S. 52 now requires that the Commission's research plan must be approved by the Minister. This is a significant loss of independence.*
>
> *lt is noted that Callinan Aroney was critical of the Commission's research performance in recent years. Such a view affords no justification, however, for subjecting this function to ministerial veto.*
>
> *The Association considers that some statutory indicators as to matters that should be covered in the Commission's research may have been appropriate. The requirement of ministerial approval is not supported.*[28]'

The Non-government members of the Committee are also opposed to this attack on the independence of the CMC. As was evidenced in the Estimates hearing held on 11 October 2012, there was some conflict between the then Chair of the CMC, Mr Ross Martin SC, and the Attorney-General in relation to research being conducted by the Commission in relation to political donations. In response to a question from the Leader of the Opposition, the Attorney made it very clear that, whilst he recognised that he had no 'overriding responsibility to tell the CMC not to do the review' he considered that it wasn't a priority. He went so far as to point out that '*I have to have a look at this because my department funds the CMC to the tune of $50 million a year. It would be*

[28] Bar Association of Queensland, Submission No. 12, pages 4-5

irresponsible for me not to look at the budget in all its context and when we are spending $50 million of taxpayers money.

I simply make the point that I do not think it is a priority for political donations to be reviewed in Queensland, particularly on the back of the clearing and, as I say, no case to answer.[29]*'*

The Attorney-General then went on to say, '*At the same time that I am having discussions with the CMC about funding and how it is going to contribute to the efficiency targets set by the government, I just say perhaps some resources could be reprioritised.*[30]*'*

The amendments contained in clause 19 to section 52 have the effect of giving to the Attorney-General the power to 'tell the CMC not to do (a) review'; the very thing the Attorney-General was lamenting the lack of capacity to do in 2012. This measure strikes at the very independence of the CMC, and is not supported by the Non-government members of the Committee.

This view is reflected in the submission to the Committee made by the former Chair of the CMC, Ross Martin QC. He said,

> '*Research outcomes on politically sensitive matters may from time to time conflict with the view of the executive. Should the executive have the power to shut down or prevent ab initio such research from taking place? Such a power is completely inconsistent with the independence of the CMC*[31]*.'*

Mr Martin has also expressed concern about the lack of transparency in the method of the exercise of this power. Not only can the Attorney-General refuse an application by the CCC to undertake research on a particular topic, the Attorney is not required to provide reasons for that refusal. Nor is the fact of the refusal or the grounds for that refusal ever required to be made public. This allows the Attorney-General to exercise this power in a capricious manner, without ever having to be called on to defend those actions. Any unfettered power must be exercised in a transparent manner so that the electors of Queensland can make their own judgment on whether the power was exercised appropriately or not. They cannot make that judgment if they do not even know that power has been exercised. As Mr Martin said in his submission'

> *'I note that there is no provision in the Bill for the Attorney-General's refusal of applications for research to be publicised (so that they can be politically defended) nor is there any provision requiring the Attorney-General to furnish reasons*[32]*.'*

Another former Chairperson of the CMC, Mr Robert Needham QC, made a comprehensive submission to the Committee in relation to this amendment, and made a number of salient points which reinforce the observation made here in relation to electoral donations and other politically sensitive research subjects:

> *'The effect of this can perhaps be best described by an example. At present, if the Commission was concerned from its own observations and perhaps from public and media disquiet at some possible misuse of police powers, eg. Tasers, it could conduct a research project into their use by the QPS. This would be under the present s.52 (2) which gives a wide research function to the CMC with respect to police use of powers.*

[29] Queensland Parliament *Record of Proceedings*, Estimates Hearing of the Legal Affairs and Community Safety Committee held on 11 October 2012 at page 12.
[30] Queensland Parliament *Record of Proceedings*, Estimates Hearing of the Legal Affairs and Community Safety Committee held on 11 October 2012 at page 12
[31] Ross Martin QC, Submission No. 25 at page 3
[32] Ross Martin QC, Submission No. 25 at page 3

S.52(2) is proposed to be removed so very arguably the Commission would then have no research function at all with respect to police use of powers. Even if it could be argued that this function still came within the catch-all phrase of "research to support the proper performance of its functions" (proposed amended S.52(1)), which I doubt, the Commission still could not carry it out without the approval of the Attorney-General.

If the government of the day saw such research as contrary to its interests or potentially politically damaging, such approval would not be forthcoming.

Any provision requiring the Commission to obtain governmental approval before it carries out any of its functions should be rejected. The decision as to what research should be carried out by the Commission should be made by the Chairman and Commissioners. If it is thought that some further external oversight is required, then that oversight should be through the Parliamentary Committee, not the Executive, whose political interests might conflict with the proper carrying out of the Commission function[33].'

Recommendation 10 The Non-government members of the Committee recommend the amendment to section 52 of the Act contained in Clause 19 not be supported.

Currently, section 216 of the Act provides a mechanism whereby the Commission may provide a notice to a complainant who has made a complaint which appears to the commission to concern 'frivolous matter' or 'has been given or made vexatiously' that they will not further investigate the matter, and that if they again make the same or substantially the same complaint to the commission they commit an offence. The Bill amends this section to remove reference to 'vexatious' so that this scheme operates only in relation to 'frivolous' matters[34]. Vexatious matters are dealt with in the new criminal provisions of section 216A.

The Non-government members of the Committee do not support this measure. Not all persons have the same capacity to understand what constitutes serious cases of corrupt conduct or systemic corrupt conduct. It would not be appropriate to prosecute those persons for a misunderstanding of the provisions that resulted in what the Commission found was a vexatious complaint.

By providing a certificate, the Commission can be assured that a person is left in no doubt that their complaint will not be entertained by the commission, and any further attempt to prosecute their argument could result in criminal proceedings.

In its response to the Callinan Aroney Report, both Government and non-Government members of the PCMC unanimously rejected this proposal. It stated in very clear terms: '*The Committee does support the strengthening of the section 216 of the Crime and Misconduct Act 2001 to remove provisions 216(2) and 216(3) which require the CMC to provide a notice to a vexatious complainant and then requires that complainant to re-submit a further complaint in the same or similar terms[35].'*

The Callinan Aroney Report recommended the creation of a criminal offence where a complaint is 'malicious, vexatious, reckless or exclusively vindictive'. Clause 29 of the Bill inserts new section 216A, which provides that a person commits an offence if they make a complaint to the commission-

- vexatiously; or

[33] Robert Needham, Submission No. 7, at pages 3-4
[34] Clause 28 of the *Crime and Misconduct and Other Legislation Amendment Bill 2014*
[35] PCMC comments on the recommendations in the report on the Independent Advisory Panel's review of the Crime and Misconduct Act and related matters thereto at page 2

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

This amendment goes much further than the recommendation of the Callinan Aroney Report. The Non-government members of the Committee are of the view that the stated purpose of the amendment, which is to reduce the number of 'baseless' allegations being investigated by the commission, could be achieved without such a heavy-handed and draconian approach.

The Bar Association of Queensland has also expressed concern about these provisions. In its submission, it states:

> *'The Bill seeks to reinforce this by deleting vexatious from s. 216 and including it in the new offence provision, s. 217A (sic). Section 217A (sic) makes it an offence to make a complaint in any of the following manners: vexatiously; not in good faith; for a mischievous purpose; recklessly; or maliciously.*
>
> *The Association is concerned that this is a heavy handed means of saving Commission resources. The Association is concerned that the provision in this form may intimidate potential complainants a number of whom may be able to provide some evidence of serious corruption. Non-lawyers, in the Association's experience, do have knowledge of matters that are very useful to law enforcement agencies. Laypersons with such information may not always be able to conduct the analysis as to how far their information goes in proving the matters about which their suspicions have been raised.*
>
> *If the public generally have the perception that a mistake on their part may land them a year in jail, many may choose to keep silent. Some of these are likely to have important information that may have triggered successful corruption investigations.*[36]*'*

There are existing offence provisions in the Act relating to statements made or documents given to the commission which are false or misleading[37]. These existing provisions, in the view of the Non-government members of the Committee, strike the right balance between allowing genuine complaints to be made to the Commission, and deterring truly 'baseless' allegations or complaints.

The Bar Association of Queensland concluded its submission on this amendment by saying, '*The Association is strengthened in its view that the new s.216A is too heavy handed by the terms of the existing ss. 217 and 218 which criminalise the provision of material that is false or misleading to the Commission as part of a complaint.'*

The Non-government members of the Committee support this view, and recommends that the amendments contained in Clause 18 not be supported.

Recommendation 11 The Non-government members of the Committee recommend that the amendments contained in Clause 18 of the Bill not be supported.

2.1.8 Change to the Governance Structure of the Commission

[36] Bar Association of Queensland, Submission No. 12, page 2
[37] Sections 217 and 218 of the Crime and Misconduct Act 2001

The present governance structure of the CMC places the Commissioner in a position of leadership over the Commission itself and the entire organisation. The role of the Chairperson is outlined in section 251 of the CM Act, and provides that the chairperson is the chief executive officer of the commission and responsible for the administration of the commission and the proper performance of the commission's functions.

The Fitzgerald Report acknowledges the need for a competent secretariat for the CJC. It recommended that *'(a)n Executive Director should be appointed to control the CJC's Secretariat and to co-ordinate the CJC's operational functions.*

The Executive Director will not be a member of the CJC, but will be responsible to the Chairman for administration and direction of its functions[38]*.'*

In 2010, Justice Moynihan commissioned a review of the corporate governance structure of the CMC. The Jameson Report recommended the appointment of a Deputy CEO, which became the position of Executive General Manager. In its Report No. 90 of its Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Inquiry documents, the PCMC found that the appointment of the Executive General Manager '*has not fulfilled the needs identified by the report in terms of corporate management and corporate governance. This is because the Executive General Manager position is, in reality, a Director of Corporate Services*.[39]'

This informed the Committee in making recommendation 19 of that Inquiry. This recommendation stated:

> *The Committee recommends that the Crime and Misconduct Act 2001 be amended before the appointment of the next Chairperson to cause structural separation of the role of Chairperson and CEO.*
> *Under this new model, the CEO (akin to a Director-General) will report directly to the Commission ("the board")*[40]*.*

Recommendation 1 of the Callinan Aroney Report was that: '(t)here should be an administrative re-structure of the CMC to be conducted by the Public Service Commissioner.'

The PCMC, in its response to the Callinan Aroney Report endorsed this recommendation. *'The Committee supports this recommendation and notes it is consistent with its findings and recommendations in its report no 90, Inquiry into the CMC's release and destruction of Fitzgerald Inquiry documents.'*

Clause 34 of the Bill replaces section 223 which sets out the membership of the commission. Under the Bill, the Commission shall consist of:

- a full-time commissioner who is the chairman;
- a part-time commissioner who is the deputy chairman;
- a full-time commissioner who is the chief executive officer;
- 2 part-time commissioners who are ordinary commissioners.

[38] Report of a Commission of Inquiry Pursuant to Orders in Council at page 310

[39] PCMC Report No. 90, *Inquiry into the CMC's release and destruction of Fitzgerald Inquiry documents at page 79*

[40] PCMC Report No. 90, *Inquiry into the CMC's release and destruction of Fitzgerald Inquiry documents at page 80*

This means that the Chief Executive Officer shall be a full-time commissioner. This is contrary to the recommendation of the Fitzgerald Inquiry, which expressly stated that the CEO, or Executive Director, 'will not be a member of the CJC[41]'.

Neither the Callinan Aroney Report, nor the PCMC Report No. 90, recommended that the CEO be a Commissioner. In fact, the recommendations, whilst not expressly ruling that out, certainly impliedly did so by recommending a '*structural separation of the role of Chairperson and CEO*'.

In its submission to the Committee, the Queensland Law Society also expressed its disquiet with this amendment. It said:

> '*QLS is concerned that the role of CEO and commissioner may be confused by that individual holding two positions. From a corporate governance perspective it is not best practice to have a CEO who is charged with operational management and is responsible to the Commission, as a member of the body that oversees their conduct[42]'.*

Whilst acknowledging that there are, in industry, people who perform the dual role of managing director, the Society went on:

> '*The Society is well aware that there are in industry managing directors of private companies, but those positions are subject to significant external regulatory regimes through the Corporations Act 2001 (Cwth) and the Australian Securities and Investment Commission, the courts and a well-established body or law relating to conflict of interest and fiduciary duty.*
>
> *The role of CEO of the Commission appears to be inconsistent with being a full time commissioner[43].'*

The Bar Association of Queensland also does not support the CEO being a member of the Commission. It says in its submission:

> '*The Association supports the creation of a statutory CEO position for the Commission to share the Chairperson's workload and to deal with human resources and budgetary matters in the first instance. However, the inclusion of that position in the Commission as a voting member at the expense of a community position is not supported[44].'*

Whilst supporting the restructure of the CMC, and in particular the structural separation of the role of Chairperson and CEO, the Non-government members of the Committee do not support the CEO being a Commissioner, particularly a full-time Commissioner.

Recommendation 12 The Non-government members of the Committee recommend that the amendment to section 223 of the Act contained in Clause 34 of the Bill not be supported insofar as it makes the Chief Executive Officer a Member of the Commission.

[41] Report of a Commission of Inquiry Pursuant to Orders in Council at page 310
[42] Queensland Law Society, Submission No. 29, at page 20
[43] Queensland Law Society, Submission No. 29, at page 20
[44] Bar Association of Queensland, Submission No. 12 at page 4

2.1.9 Change to the qualifications for membership of the commission and consultation prior to nomination

Under the Bill, the qualifications for the appointment of the Chairman have not changed. The new position of Deputy Chairman has the same requirements for appointment as the Chairman. However the method of appointment has changed dramatically.

The requirement for national advertisement remains. However, the consultation process currently prescribed by section 228 of the Act has been repealed by the Bill. It is replaced with a new section 228, by which all that will be required before nominating a person for appointment as the Chairman is for the Minister to first consult with the parliamentary committee.

The method of consultation is not prescribed. All that would be required is for the Minister to advise the committee who they intend to appoint prior to nomination.

Currently, the requirement is for consultation with the committee or, if there is no parliamentary committee at the relevant time, the Leader of the Opposition and the Leader in the Legislative Assembly of any other political party represented in the Assembly by at least 5 members.

The Australian Lawyers' Alliance has made observations in its submission to the Committee about this change. It says, *'The removal of this procedural safeguard is concerning particularly given the government's majority on the current parliamentary committee. The current majority was achieved through the sacking of the previous committee under allegations that opposition and independent members demonstrated bias and partisanship.*[45]*'*

At the time of the sacking of the PCMC in November 2013, the final sitting day for 2013, the motion voted on by the Parliament included a specific provision that the appointment of the new members to the Ethics Committee '*shall be by the Leader of the House and the Leader of the Opposition writing to the Clerk with their appointments*[46]*'.* Had this clause not been included in the motion, the standing orders would have prevailed, which means that no new committee could have been appointed until the Parliament resumed in the New Year, a period of approximately 12 weeks.

Should such a situation arise again, during the period where no PCMC was in existence the Government could make appointments to the CMC without consulting with anyone under the new amendments. The Non-government members of the Committee therefore recommend that the safeguard presently contained in the Act remains.

Recommendation 13 The Non-government members of the Committee recommend that clause 38 of the Bill be amended to include in the new section 228 a provision identical to the existing s.228 (1)(b).

The most significant change, however, is the removal of the requirement for the bipartisan support of the parliamentary committee. Currently, section 228(3) provides that '*If the Minister consults the parliamentary committee about a proposed appointment, the Minister may nominate a person for appointment as a commissioner only if the nomination is made with the bipartisan support of the parliamentary committee.'*

[45] Australian Lawyers' Alliance, Submission No. 23, at page 6

[46] Mr Ray Stevens MP, Queensland Parliament *Record of Proceedings*, 21 November 2013 at page 4263

Clause 38 of the Bill totally removes that requirement. This is the aspect of the Bill that has attracted the most attention since it was introduced. It is not recommended by any of the multitudinous reports that have been commissioned by the Newman Government in relation to the CMC. The requirement for bipartisan support for the appointment of Commissioners has been in existence since the introduction of the first legislation following the Fitzgerald Report, the *Criminal Justice Act 1989*.

Section 11 of that Act required that '*a person shall not be appointed as chairman unless the person's appointment is supported by the members of the committee, unanimously or by a majority of the members, other than a majority consisting wholly of members of the political party or parties in Government in the Assembly'.*

Similar provisions have existed in the various equivalent pieces of legislation since this time. The removal of the requirement for bipartisan support is a very deliberate policy move by the Newman Government.

A submission by another former Chairperson of the CMC also expressed clear opposition to the proposal. Robert Needham gave his view that '*In my opinion, this is a most retrograde proposal which should not be implemented.*

> *'The Commission can only operate effectively as a corruption fighting body if it enjoys public confidence that it is an impartial body free of any political interference. This public confidence must extend to the Commission as a body and to its Chairman and Commissioners.*
>
> *…. The proposal to do away with the requirement for bipartisan approval of the Parliamentary Committee for these appointments will destroy public confidence in the Commission[47].'*

As the Bar Association of Queensland submitted, '*Of most concern to the Association is the removal of the requirement that the appointment of all commissioners must be with the bipartisan support of the parliamentary committee. This requirement was both the symbol that the Queensland Parliament was committed to a Commission that was independent of partisan opinion and the single most effective means of achieving that independence[48]'.*

The Queensland Law Society has expressed its concern about the proposal. Its submission points out that the Explanatory Notes to the Bill do not justify or explain the need for the change[49]. It then goes on to point out that the Callinan/Aroney Report does not propose that the requirements for the appointment of commissioners be changed, and that the Attorney, in introducing the Bill to Parliament, proffers no explanation for the proposed change[50].

> *'The Society's strong view is that the Commission must be an independent and apolitical anticorruption institution and that to be otherwise is to detract from Queensland's democratic institutions*
> *The Society is significantly concerned about the effect of this proposed change, as it has the potential for the senior positions in the Commission to become:*
> *• at worst - overtly politicised, or*
> *• at the least - open to the suggestion of political interference.'*

[47] Robert Needham, Submission No. 7, at page 2
[48] Bar Association of Queensland, Submission No. 12, at page 4.
[49] Queensland Law Society, Submission No. 29, at page 16
[50] Queensland Law Society, Submission No. 29, at page 17

The Non-government members of the Committee are totally opposed to the removal of the requirement for bipartisan support for the appointment of commissioners in the same way that it has been opposed to the appointment and then reappointment of the acting Chairperson on this basis. The Non-government members of the Committee have repeatedly called for an appointment to be made in the long term on an appropriate basis, including with the bipartisan support of the PCMC.

The Act provides for the appointment of an Acting Chairperson in section 237. Such appointment can occur during a vacancy in the office. Whilst not required by the legislation, any proposal to appoint a person to act as Chairperson in the long-term should also be undertaken with the bipartisan support of the PCMC to remove any suggestion that the appointment is not independent, or is not seen to be independent by the public. To ensure this protection, it should be included in the Act.

Much has been made of the fact that the Fitzgerald Report did not recommend that the appointment of the Chairperson must be with the bipartisan support of the parliamentary oversight committee. This was pointed out by both the Queensland Law Society[51] and by the former Chairperson of the CMC, Ross Martin QC[52], in their submissions to the Committee.

The Fitzgerald Report stated that the *'Premier as the Minister responsible for the Commission should be obliged to consult the members of the Parliamentary Committee about any appointments to the Commission. It may also be desirable for the leader of the Opposition party or parties to be consulted about the appointment of persons to the Commission.[53]'*

Recommendation 5(c) of the Fitzgerald Report then gave effect to this view when it stated*, 'The Chairman's position be widely advertised and filled only after evaluation of and report upon all applicants by independent consultants and consultation with the Criminal Justice Committee'.*

There is no support, in any of the submissions to the Committee, for the requirement for the bipartisan support of the PCMC for the appointment of Commissioners, to be removed. This is the aspect of the Bill that has received the most scrutiny, both in terms of submissions made and in the public commentary. There is no-one in Queensland, other than members of the Government, who are prepared to put their names to support for this proposal.

The Non-government members of the Committee cannot support the removal of this safeguard, and recommend that this requirement be reinstated in the Bill.

Recommendation 14 The Non-government members of the Committee recommend that Clause 38 of the Bill be amended by inserting into new section 228 of the Act the requirement for bipartisan support of the PCMC before a person can be nominated as a Commissioner, currently contained in s.228(3) of the Act.

The Bill also changes the qualifications for the part-time commissioners. Under the current Act, a person is qualified to be a part-time commissioner if the person:

(a) is an Australian lawyer who—

(i) has engaged in legal practice for a period of, or periods totalling at least, 5 years; and

[51] Queensland Law Society, Submission No. 29, at page 17

[52] Ross Martin QC, Submission No. 25 at page 2

[53] Report of a Commission of Inquiry Pursuant to Orders in Council at page 145

(ii) has a demonstrated interest in civil liberties; or
(b) has 1 or more of the following—
(i) qualifications or expertise in—
(A) public sector management and review; or
(B) criminology; or
(C) sociology; or
(D) research related to crime or crime prevention;
(ii) community service experience, or experience of community standards and expectations, relating to public sector officials and public sector administration.

Clause 36 of the Bill repeals section 225 of the Act, which contains those requirements, and replaces it with a simple requirement that states that a person is qualified for appointment as an ordinary commissioner (a part-time commissioner who is not the Deputy Chairman) if the person has qualifications, experience or standing appropriate to assist the commission to perform its functions.

The Act also requires one of the commissioners to have a demonstrated interest in civil liberties, and one of the part-time commissioners to be a woman. Both of these requirements have been removed by Clause 38, which repeals section 230 which contains those requirements.

The Non-government members of the Committee are opposed to the removal of these requirements. The requirement for one of the part-time commissioners to be a lawyer with an interest in civil liberties has been in place since the inception of the Criminal Justice Commission in 1989[54]. The requirement for at least one of the part-time commissioners to be a woman has been included in the Crime and Misconduct Act since it was introduced in 2001[55].

The Queensland Law Society noted the omission of these requirements. In its submission, it pointed out that '*The Society notes that the position of the civil liberties commissioner has been omitted. This position was proposed in the original Fitzgerald Report as a means of ensuring that the significant powers of the CJC (as it was then called) would be oversighted by a lawyer with the interests of the civil liberties of Queenslanders in mind[56]'.*

The Queensland Law Society also commented on the removal of the requirement that at least one of the part-time commissioners be a woman. '*The Society is concerned with the removal of the requirement in current s230 for at least 1 of the part-time commissioners to be female without adequate justification being provided in the Bill materials. We suggest an amendment to proposed s223 dealing with the membership of the Commission to include a subsection stating that "at least 1 of the commissioners must be a woman."[57]'*

The Women Lawyers' Association of Queensland pointed out, in its submission to the committee, that '*there does not appear to be any explanation or reason for this change in the Explanatory Notes accompanying the Bill or in the First Reading Speech of the Attorney-General and Minister for Justice[58]'.*

The Non-government members of the Committee endorse this proposal, and recommends that the requirements be reinstated in the Bill.

[54] Section 9(2)(a) of the Criminal Justice Act 1989
[55] Clause 230 Crime and Misconduct Bill 2001
[56] Queensland Law Society, Submission No. 29 at page 18
[57] Queensland Law Society, Submission No. 29 at page 19
[58] Women Lawyers' Association of Qld, Submission No. 27, at page 4

Recommendation 15 The Non-government members of the Committee recommend that Clause 30, which omits section 230 of the Act be amended to remove the reference to the omission of section 230.

2.1.10 Duration of Appointment

The Act currently prescribes a maximum term of appointment for any Commissioner of five years' duration[59]. Terms of appointment were of considerable prominence in the recent reviews conducted into the CMC, and also featured in the recommendations of the Fitzgerald Report. Clause 39 inserts new section 231(2), which extends the maximum duration of the appointment of a commissioner from 5 years to ten years, provided no single term of appointment exceeds five years.

The Fitzgerald Report recommended that no Chairman should be eligible to serve any term or terms of office which aggregate to more than five years[60].

This is in keeping with the first recommendation of the Keelty review, which was for the CMC/CCC to identify an optimal period of employment for key staff such as 3 to 5 years to protect the organisation from entrenched or dated work practices[61].

Quite curiously, then, the Bill extends the maximum duration of the term of the Chairperson and the Commissioners from five years to ten years[62]. This amendment was the subject of considerable comment in the submissions made to the committee.

The Queensland Law Society, in its submission, was opposed to this amendment. It said,

> *'The Society notes that proposed new s231(2) provides that a commissioner may be reappointed for a further term of up to five years, but no longer than 10 years in aggregate[63].'*

It went on to say,

> *'The Society has often raised concern that reappointment can create a potential tension and opportunity for political influence of appointed individuals. Under the proposals in the Bill, there is a significant risk of a perception if not the reality that a commissioner could be inclined to take action favourable to an incumbent Government in order to maximise chances of reappointment[64].'*

The Australian Lawyers' Alliance also made a comment about this amendment in its submission. It said, '*In this context, the extension of a Commissioner's maximum period of service from five to ten years is particularly concerning. The ALA notes that this change is contrary to the findings of the Callinan Aroney Review and the Keelty Review. The authors noted that long appointments negatively impact a public authority's integrity and efficiency respectively[65].'*

[59] Section 231(2) Crime and Misconduct Act 2001
[60] Report of a Commission of Inquiry Pursuant to Orders in Council at page 310
[61] M.J. Keelty AO, Report outlining suggestions regarding reform of the Crime and Misconduct Commission Queensland following the Review of the *Crime and Misconduct Act 2001* and related Matters at page 2
[62] Clause 39 Crime and Misconduct and Other Legislation Amendment Bill 2014
[63] Queensland Law Society, Submission No. 29 at page 18
[64] Queensland Law Society, Submission No. 29 at page 18
[65] Australian Lawyers' Alliance, Submission No. 23 at page 6

The Non-government members of the committee do not support the proposal to extend the maximum duration for the appointment of the Chairperson and Commissioners. The true independence of these positions is underwritten by the fact that persons who hold the position of Chairperson or Commissioner cannot be beholden to anyone for reappointment past the five-year period of their appointment.

Recommendation 16 The Non-government members of the Committee recommend that Clause 39, which omits the current s.231 (2) and (3) from the Act, and inserting new sub-sections 231 (2) (3) and (4), not be supported.

2.1.11 Appointment of Acting Commissioners

Clause 43 of the Bill provides for the appointment of Acting Commissioners. As discussed earlier in this report, the insertion in the Act of provision for the appointment of acting part-time Commissioners was opposed in the Parliament by 13 of the then 14 Non-government members in November last year[66].

This clause provides that for the appointment of Acting Commissioners, new sections 227 and 228 do not apply. The Non-Government members have recommended, in recommendation 14 of this Report, that a provision similar to existing section 228(3) be retained. If this provision is retained, it should apply to the appointment of an Acting Chairperson and an Acting Commissioner appointed for more than a designated period, say one month.

Should this recommendation not be supported, the Non-government members strongly support at least the requirement that, for Acting Commissioners appointed during a vacancy in the relevant commissioner's office, or when the relevant commissioner is absent from duty or from the State or, for another reason, cannot perform the duties of the office, and such appointment is for a period of more than a certain designated period, say one month, the provisions of new section 228 should apply.

The arguments that apply for the requirement for bipartisan support of the Chairperson and commissioners apply equally to the appointment of Acting Commissioners who will hold that position for any more than a short period of time. One month seems an appropriate period at which to require this safeguard to apply. Consultation with the Committee within this time period should be possible in a practical sense.

Independence of the CMC is paramount. The perception of independence is imperative for this to occur. During her contribution to the debate on the Bill in November last year that allowed for the appointment of Acting Part-time Commissioners, the former chairperson of the PCMC, the Member for Gladstone, spoke of the request that had been made of the Attorney-General by the PCMC for at least '*consideration of consultation between the CMC and the PCMC in relation to these part-time appointments*[67].'

If proper bipartisan support for these appointments is not supported, the Non-government members of the committee are of the view that at least the cursory level of consultation required by new section 228 should apply. The requirement contained in new section 237(4) for consultation by the Attorney-General with the chairperson does not amount to real consultation, and is opposed by

[66] Queensland Parliament *Record of Proceedings*, 21 November 2013 at page 4261
[67] Mrs Liz Cunningham MP, Queensland Parliament *Record of Proceedings*, 21 November 2013 at page 4252

the Non-government members of the committee in favour of more substantial consultation with the PCMC.

Recommendation 17 The Non-government members of the Committee recommend that bipartisan support of the PCMC be required for the appointment of an Acting Commissioner for a period greater than one month.

Recommendation 18 If recommendation 17 is not adopted, the Non-government members of the Committee recommend that new section 228 apply to the appointment of an Acting Commissioner for a period greater than one month.

2.1.12 Appointment of Sessional Commissioners

Clause 44 of the Bill inserts new chapter 6, part 1, division 2A, which provides for a whole new class of commissioner, the Sessional Commissioner. These appointments are to be made on a sessional basis, to assist the Chairperson as and when required.

There is nothing in the Bill or explanatory notes to indicate whether the Clause envisages a situation where persons are appointed to the position for a certain period of time, say yearly or bi-yearly, and that appointment is enlivened for a particular time when their services are required. That would, in the view of the Non-government members, be the most practical method of appointment. However, the explanatory notes state that '*The chairman may appoint as many sessional commissioners as are required to help the chairman to perform the commission's functions or exercise the commission's powers by conducting a commission hearing, examining witnesses or conducting a specific investigation*[68]*'.*

The Bill makes no provision for any particular method of appointment of sessional commissioners. The Explanatory Notes provide that '*New section 242 states a sessional commissioner is appointed on a sessional basis and holds office for the period, and on the terms and conditions, stated in the commissioner's instrument of appointment*[69]*.'*

The appointment of sessional commissioners appears to be solely within the purview of the Chairperson, without the need for advertisement for the position, for assessment of applications by an independent body, or for the bipartisan support of, or at least consultation with, the PCMC.

This is a measure which will, in the view of the Non-government members of the Committee, further undermine the independence of the CMC. The proposed amendments so far allow the Government of the day to appoint a Chairperson of their choosing, without the bipartisan support of the PCMC. They can also appoint a CEO on the same basis. Those appointments could be of persons who are politically partisan, and those appointments could be for a maximum duration of ten years.

The other commissioners are also able to be appointed on the same basis, again without bipartisan support. Acting Commissioners can also be appointed without so much as consultation with the PCMC.

[68] Explanatory Notes to the *Crime and Misconduct and Other Legislation Amendment Bill 2014* at page 22
[69] Explanatory Notes to the *Crime and Misconduct and Other Legislation Amendment Bill 2014* at page 23

This amendment goes even further and allows the Government-appointed Chairperson to appoint such sessional commissioners as the chairperson deems fit, again without any advertisement, proper scrutiny or consultation with the PCMC.

The Non-government members are of the view that the appointment of sessional members should be similar in nature to the appointment of acting magistrates. This would mean that a panel of persons is appointed at any given time, and those persons are rotated for appointment in accordance with the proper rules of natural justice, so that persons who make decisions 'approved of' by the Chairperson can be favoured in any way. Those appointments would be for a specified period, and the appointment is only enlivened when the sessional commissioners are appointed to perform the functions of the Commission on a particular occasion.

However, there should also be a requirement that the positions be advertised, that the applications be independently assessed, and consultation should occur with the PCMC.

Recommendation 19 The Non-government members of the Committee recommend that Clause 44 of the Bill be amended to insert requirements for advertising and consultation for the appointment of sessional commissioners similar to the provisions contained in sections 227(3) and 228(a).

2.1.13 Assistant Commissioners and Senior Officers

The Act currently provides for Assistant Commissioners for Crime and Misconduct. The qualification for appointment is the same as for the Chairperson[70] and there is a process for appointment set out in the Act. This involves national advertising for the positions[71], as well as consultation with both the Leader of the Opposition and the Chairperson[72] and appointment by Governor-in-Council[73].

These positions are abolished in the Bill by the omission of sections 239 to 244[74]. As the Explanatory Notes to the Bill explain[75], '*The Bill intends to remove these positions as Governor in Council appointments and the current role and powers of Assistant Commissioners in the Act will be performed by the senior executive officer (crime) and senior executive officer (corruption) respectively.'*

The role of Assistant Commissioner in the Act is an important one. Pursuant to section 146ZU of the Act, the Chairperson may delegate a number of powers and functions to an Assistant Commissioner such as:

- the granting, variation and cancellation of authorities;
- conducting reviews under section 146X;
- authorising the making of an application to the independent member for a birth certificate approval for an assumed identity;
- making requests under section 146ZB (Request for evidence of assumed identity).

No more than four delegations under this section are allowed at any time.

[70] Section 240 *Crime and Misconduct Act 2001*
[71] Section 242 *Crime and Misconduct Act 2001*
[72] Section 243 *Crime and Misconduct Act 2001*
[73] Section 244 *Crime and Misconduct Act 2001*
[74] Clause 46 *Crime and Misconduct and Other Legislation Amendment Bill 2014*
[75] Explanatory Notes to the *Crime and Misconduct and Other Legislation Amendment Bill 2014 a*t page 23

Clause 25 amends section 146ZU to provide the chairman may delegate the chairman's powers under this part to the chief executive officer or a senior executive officer[76]. Clause 47 of the Bill amends section 245 to provide for the appointment of a Senior Executive Officer (Crime) and a Senior Executive Officer (Misconduct), whose are responsible to the chairperson for the proper performance of the commission's crime and misconduct functions. New sub-section 245(4) provides that *'(i)n the performance of the commission's functions or exercise of the commission's powers, senior officers are subject to the direction and control of the chairman*.'

Further, currently the Chairperson may authorise an Assistant Commissioner to conduct a public hearing pursuant to section 178(1) of the Act. Section 178(3) makes similar provision in relation to a closed hearing. This section is amended by Clause 26 of the Bill to provide that the Chairperson may determine that a public hearing may be conducted by a sessional commissioner or senior executive officer, who may also be authorised to conduct closed hearings.

The Non-government members believe that the specific provisions relating to the appointment of Assistant Commissioners should apply to the officers to whom their role and powers have been transferred under the Bill. This is particularly so given the fact that the roles and powers they are authorised under the Act are so important, and that their performance of the commission's functions or exercise of the commission's powers are subject to the direction and control of the chairperson who is appointed without the bipartisan support of the Commission, and are not subject to the direction and control of the Commission.

The Queensland Law Society, in its submission to the committee, was opposed to the performance of these important roles and functions by persons who are 'staff appointments' by the Chairperson.

> *'The Society is concerned with the proposal to permit senior executive officers to conduct hearings, as contemplated by clause 26. These roles are essentially staff appointments by the chairperson that do not require any further approvals by persons who are external to the Commission.*
>
> *The appointment of staff to conduct hearings is a significant change which, in our view, may diminish the accountability and independence of these hearings and will certainly have the potential to impact upon public perceptions in this regard. This is especially concerning due to the nature of closed hearings and the expansive powers that may be used against people who appear before the Commission. The Society does not support the proposed amendment.[77]'*

The submission later says:

> '*The Society considers that, given the importance of this role, a process is required to ensure scrutiny of the appointment. We recommend that this should remain an appointment made by the Governor in Council, with the qualifications and appointment process outlined in the legislation'[78].*

Recommendation 20 The Non-government members of the Committee recommend that the qualification and appointment provisions currently contained in sections 240 to 244 of the Act be inserted into Clause 46 of the Bill so that new section 245 requires the same advertisement, consultation and appointment process for Senior Officers as existed previously for Assistant Commissioners.

[76] [76] Explanatory Notes to the *Crime and Misconduct and Other Legislation Amendment Bill 2014 a*t page 20

[77] Queensland Law Society, Submission No. 29 at pages 15-16

[78] Queensland Law Society, Submission No. 29 at page 20

2.1.14 Governance Structure

The governance structure that is currently in place at the CMC is similar to the corporate governance structure that is common in both the public and private sector. The Chairperson is the Commission's Chief Executive Officer, and is responsible for the administration of the commission and the proper performance of the commission's functions[79]. However, those responsibilities, functions and powers are subject to the commission[80], which is an appropriate method of ensuring those powers are exercised appropriately.

The role of the Commission is described in the Submission of Mr David Gow written on behalf of five former part-time Commissioners of the CMC:

> '*The two key components of its role, like any board of directors, are to give high-level and effective guidance to the organisation's activities and to effectively supervise and monitor the performance of management. Those functions imply a separation between management and its overseer and guiding angel (the commission). In the case of the CMC the separation between the five-person commission and high-level management is blurred because the chairperson is both the chair of the board (the commission) and the CEO*[81].

Both the PCMC[82] and the Callinan Aroney Report[83] recommended that there should be an administrative restructure of the CMC, with the role of Chairperson being split into both a Chairperson and a Chief Executive Officer. This view was enforced by the Keelty Review[84].

The PCMC also recommended that *'(u)nder this new model, the CEO (akin to a Director-General) will report directly to the Commission ("the board")*[85]*.'* It also recommended that *'(t)he CMC needs to continually remind all staff of the CMC that the "CMC" is constituted by the Chairperson and all four part-time Commissioners. The internal culture that simply regards the Chairperson as a proxy for the entire Commission must change*[86]*.'*

Clause 52 of the Bill inserts Division 4 into the Act, which prescribes the roles of the Commission, the Chairman and the Chief Executive Officer. New section 251 sets out the roles of the Commission. Sections 252 and 253 set out the roles of the Chairperson and Chief Executive Officer respectively.

The provision that is a significant departure from the current arrangement is that contained in new section 252(3), which provides that the chairman is to report to the commission on the performance of the commission's functions, but is not subject to the direction of the commission in the

[79] Section 251 of the *Crime and Misconduct Act 2001*
[80] Section 251(2) of the *Crime and Misconduct Act 2001*
[81] Dr David Gow, Submission No. 33 at pages 8 and 9
[82] Recommendation 19 of PCMC Report No. 90, *Inquiry into the CMC's release and destruction of Fitzgerald Inquiry documents at page 80*
[83] Recommendation 1 of the Independent Advisory Panel's Review of the Crime and Misconduct Act 2001 at page 212
[84] Recommendation #2 of M.J. Keelty AO, Report outlining suggestions regarding reform of the Crime and Misconduct Commission Queensland following the Review of the *Crime and Misconduct Act 2001* and related Matters at page 3
[85] Recommendation 19 of PCMC Report No. 90, *Inquiry into the CMC's release and destruction of Fitzgerald Inquiry documents at page 80*
[86] Recommendation 18 of PCMC Report No. 90, *Inquiry into the CMC's release and destruction of Fitzgerald Inquiry documents at page 68*

performance of a function or exercise of a power in an investigation, hearing, operation or other proceeding under the Act or another Act.

However, what is more disturbing is the division of the majority of the existing powers of the Commission between the Chairperson and the Chief Executive Officer. This is not in keeping with the usual model of corporate governance common in both the public and private sector. The only functions retained by the Commission are those contained in sections 234, 251(1) and (2) and 259[87]. All other functions are statutorily delegated to the chairperson[88] and CEO[89].

Dr David Gow, in his submission on behalf of former Commissioners Julie Cork, Anne Gummow, Judith Bell and Philip Nase, is highly critical of this measure:

> *'The first observation to be made is that the commission will become little more than an empty shell. The core function of any board of supervising and monitoring the performance of management is no part of the commission's role as it is set out in the Bill. Those functions have been substantially stripped from the commission. While it is true the commission retains the legal capacity to give directions to the CEO on 'administration' the statement of the commission's role (new s. 251) does not include any of the functions of supervision or performance management it possesses under the current governance arrangements. Apart from receiving reports from the chairman and CEO, there will be little for the commission to do once the internal governance committees are established. We anticipate that over time the commission will meet less and less frequently and become less and less relevant[90].'*

The Bar Association of Queensland is also highly critical of these provisions, and fears they could be used as a vehicle for a return to corruption in Queensland.

> *'The handing of increased power within the Commission to the chairman is brought about by changes to ss. 251 and 269 of the Act. The new s.69 (sic) delegates the bulk of the Commission's functions to the Chairman and a number to the chief executive officer. Section 251 gives the Commission a strategic leadership role and responsibility for certain planning and reporting documents.*
>
> *Cumulatively, these provisions provide for a more authoritarian structure of the Commission. Combined with the government's ability to appoint Commissioners as it seems fit without the need to obtain bipartisan support through the Committee, the changes identified create the danger that a future government might appoint pliable supporters to key positions on the Commission and be able to control the way in which the extraordinary powers of the Commission are to be exercised. In those circumstances, the danger of corruption, may return[91].'*

The Non-government members of the Committee support the appointment of a Chief Executive Officer to carry out the operational functions that are more appropriately the purview of such a position, but are strongly opposed to the statutory delegation of the powers of the Commission to the Chairperson and CEO. This is particularly so when we consider the method of appointment to these positions and the lack of the any substantive scrutiny.

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[87] Clause 58, (new section 269(1)) of the *Crime and Misconduct and Other Legislation Amendment Bill 2014*
[88] Clause 58, (new section 269(1)(a)) of the *Crime and Misconduct and Other Legislation Amendment Bill 2014*
[89] Clause 58, (new section 269(1)(b)) of the *Crime and Misconduct and Other Legislation Amendment Bill 2014*
[90] Dr David Gow, Submission No. 33 at page 8
[91] Bar Association of Queensland, Submission No. 12 at page 5

Another issue raised in the submissions is the fact that the Chief Executive Officer and the Chairperson may sub-delegate powers the subject of a statutory delegation under sub-section 269(1) and (2) respectively, to an appropriately qualified commission officer. For many of the powers, this includes to a Senior Executive Officer. There has been discussion about the process for appointment of Senior Executive Officers, and the removal of the existing advertising, consultation and appointment processes.

The Queensland Law Society, in its submission, expressed its reservation about these delegations. It said:

> *'The Society notes that proposed s269(5) provides that:*
> *(5) The chairman may sub-delegate a function or power of the commission delegated to the chairman under subsection (1) to an appropriately qualified commission officer.*
>
> *The powers of the Chair which may be delegated include most powers of the Commission. The Society is concerned that such delegation can take place without the ratification or agreement of the commission as a whole. We suggest this be reconsidered*[92]*.'*

Recommendation 21 The Non-government members of the Committee recommend that Clause 58 of the Bill be amended to remove the statutory delegation of the powers of the Commission to the Chairperson and the Chief Executive Officer. Consideration should be given to whether some of the powers could be the subject of a discretionary delegation power from the commission.

2.1.15 Disciplinary action for senior officers and commission staff and agents etc

Clause 62 of the Bill inserts a new Division 9, which deals with disciplinary action for senior officers, commission staff, agents and other officers. A number of the Submissions made reference to the fact that these wide powers have been given to the Chief Executive Officer to be exercised exclusively by him or her.

The Queensland Law Society said, in its submission, '*We note that clause 62 prescribes wide powers for the chief executive officer to discipline a current or former commission officer*[93]*.'*

The Queensland Bar Association said, '*A wholly new division 9 of part 1 of chapter 6 of the Act14 hands full disciplinary powers of commission staff to the chief executive officer*[94]*'.*

The Queensland Law Society then went on to point out some aspects of the proposed new section 273B, which sets out the grounds for discipline, might have some unintended consequences. For example, section 273B(1)(e) deals with use of substances. It provides*: 'The chief executive officer may discipline a relevant commission officer if the chief executive officer is reasonably satisfied the officer has used, without reasonable excuse, a substance to an extent that has adversely affected the competent performance of the officer's duties'.*

The Society is concerned about the wording of the Bill as it currently stands. It submitted, '*There may be many legal substances a person may use that may adversely affect their performance, for example:*
• The use of antihistamines may make a person drowsy

[92] Queensland Law Society, Submission No. 29 at page 20
[93] Queensland Law Society, Submission No. 29 at page 21
[94] Bar Association of Queensland, Submission No. 12 at page 4

• The use of headache medication for migraines
• A glass of wine at a work function.

We recommend that the clause give an example of the types of substances which if used, may invoke this section[95]*.'*

The Society is also concerned about proposed new section 273B(4)(b), which relates to matters which occur in a private capacity for which the chief executive officer may discipline a commission officer. It has said in its submission to the Committee:

> '*Proposed s237B(4)(b) of the Bill defines misconduct as "… inappropriate conduct in a private capacity that reflects seriously and adversely on the commission." Similarly we recommend that the Bill set out examples of the types of conduct which takes place in a private capacity that reflects seriously and adversely on the Commission. For example:*
>
> *• being convicted of a criminal offence?*
> *• defaming the commission on social media?*[96]*'*

Whilst these provisions are virtually identical to the discipline provisions contained in the *Public Service Act 2008*, the Bar Association has pointed out that *'there seems to be no equivalent to the appeal provisions in ss. 193-194 of the PSA*[97]*'.*

Given the lack of an appeal mechanism, it is perhaps even more important for there to be clarity around the grounds for discipline. The Non-government members of the Committee recommend that an appeal mechanism similar to that contained in the *Public Service Act 2008* be inserted into the Bill. However, if that recommendation is not supported, consideration should be given to including examples at to the type of conduct intended to be captured, as recommended by the Queensland Law Society.

Recommendation 22 The Non-government members of the Committee recommend that an appeal mechanism similar to that contained in sections 193 to 214 of the *Public Service Act 2008* be inserted into the Bill.

Recommendation 23 If recommendation 22 is not supported, the Non-government members of the Committee recommend that consideration should be given to including examples at to the type of conduct intended to be captured in proposed new sections section 273B(1)(e) and 273B(4)(b) contained in clause 62 of the Bill, as recommended by the Queensland Law Society.

Another issue that arises in relation to the division concerning Disciplinary Action is the requirement in new section 273B(1) for the Chairperson to be 'reasonably satisfied'. The section provides:

> *'The chief executive officer may discipline a relevant commission officer if the chief executive officer is reasonably satisfied the officer has-'*

The meaning of 'reasonably satisfied' is very different from the meaning of 'is satisfied on reasonable grounds'. The Non-government members are of the view that, at the very least, if the CEO is to take disciplinary action against a Commission officer, they should be satisfied of the alleged breach on reasonable grounds. This imports a degree of objectivity into the test.

[95] Queensland Law Society, Submission No. 29 at page 21
[96] Queensland Law Society, Submission No. 29 at page 21
[97] Bar Association of Queensland, Submission No. 12 at page 4

As the proposed new section currently stands, the requirement to be 'reasonably satisfied' proposes a much lower standard, and has no requirement of objectivity. Fairness to the person under investigation should be an integral part of the process. This is particularly so when there is no appeal process contained in the Bill for disciplinary action.

The wording of the equivalent section in the Public Service Act 2008 is identical to the proposed new section contained in the Bill, but the Public Service Act 2008 contains an appeal mechanism. As this is missing from this Bill, the consequence of an adverse finding by the chief executive officer is greater.

The chief executive officer is required to comply with the principles of natural justice in exercising these powers[98]. The Queensland Law Society has expressed some concern that proposed s273F(2) provides that natural justice is not required if a person is suspended on normal remuneration. This provision is identical to section 190(2) of the *Public Service Act 2008*. Again, because there is no appeal mechanism, it is imperative that persons being investigated are subject to a process that has the highest level of probity. The Non-government members recommend that, if no appeal mechanism is to be provided, that, even where the chief executive officer is to suspend an officer on full remuneration, the chief executive officer should comply with the principles of natural justice.

Recommendation 24 If recommendation 22 is not supported, the Non-government members of the Committee recommend that new section 273B(1) of the Bill, which is inserted by Clause 62, be amended to delete 'reasonably satisfied' and replace it with 'satisfied on reasonable grounds'.

Recommendation 25 If recommendation 22 is not supported, the Non-government members of the Committee recommend that proposed new s273F(2) be deleted from Clause 62 of the Bill.

2.1.16 Membership of Reference Committee

Clause 63 of the Bill amends section 278 of the Act, which pertains to membership of the reference committee. That section provides that the Committee consists of certain members, which includes two persons appointed by the Governor in Council as community representatives[99].

Section 278(4) of the Act requires the Attorney-General to consult with the Leader of the Opposition before nominating a person to the Governor in Council for appointment as a community representative. Clause 63(4) omits this sub-section from the Act. This is yet another instance in the Bill where consultation and bipartisanship has been watered down or removed, and the Non-government members of the Committee are opposed to this proposed amendment.

Neither the Explanatory Notes to the Bill nor the Attorney-General's Introductory Speech provides any explanation for the proposed amendment. Curiously, the Explanatory Notes are silent as to this change. The explanation for Clause 63 makes no reference whatsoever to the removal of the requirement for consultation with the Leader of the Opposition[100].

Recommendation 26 The Non-government members of the Committee recommend that Clause 63(4), which omits section 278(4) of the Act, be removed from the Bill.

[98] Clause 62 (new section 237F) of the of the *Crime and Misconduct and Other Legislation Amendment Bill 2014*
[99] Section 278(1)(f) of the *Crime and Misconduct Act 2001*
[100] Explanatory Notes to the *Crime and Misconduct and Other Legislation Amendment Bill 2014 at page 26*

2.1.17 Report by Parliamentary Committee of CMC

Section 291 of the Act provides for the establishment of a committee of the Legislative Assembly called the Parliamentary Crime and Misconduct Committee. Section 292 then prescribes certain functions of that committee. One of the prescribed functions of the committee is 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 the Act or the functions, powers and operations of the commission[101].

Clause 67 of the Bill amends this section by removing the requirement for the review to be conducted three-yearly, and replacing it with a requirement for five-yearly reviews. The first review is, according to the amendment, to be conducted by 30 June 2016. The last review was announced on 20 May 2011, and the Report[102] was tabled in the Parliament on 11 May 2012.
This means that, under the proposed amendment, the next review will take place five years from the commencement of the last review.

In Queensland, a parliamentary term is of three years' duration[103]. It is the usual practice for Committees of the Parliament to be reconstituted after each general election. The requirement for a review to be conducted every three years was sensible in light of the three-year electoral cycle.

Changing the requirement to every five years extends the period of time before a review will be required to be conducted by the PCMC, and puts the review requirement out of sync with the electoral and committee cycle.

The Queensland Law Society had this to say about the proposal in its submission to the Committee:

> '*Clause 67 sets out that the activities of the Commission are to be reviewed by 30 June 2016 and then at the end of each five-year period. The Society submits that as there have been substantial changes to the Act, a 3-year review period will be more appropriate in analysing the changes. We therefore recommend the 5-year period in clause 67 be revised to a 3 year period[104].'*

The Bar Association of Queensland, in its submission to the Committee, was similarly opposed to the proposed amendment:

> '*Changes to the timing of reviews by the parliamentary committee of the activities of the Commission are effected by amendments to paragraph 292(1)(f} of the Act.24 The changes appear both to push out the next review and make reviews, thereafter, less frequent. These changes are not supported[105].'*

Australian Lawyers for Human Rights also referred to this amendment in their submission:

> '*Clause 67 has the effect of extending the interval at which the PCMC reviews the CMC's activities from the current 3 years to every 5 years.*

[101] Section 291(f) of the *Crime and Misconduct Act 2001*
[102] Parliamentary Crime and Misconduct Committee, *Report - No. 86 - Three Yearly Review of Crime and Misconduct Commission*, 10 May 2012
[103] Section 16 of the *Constitution of Queensland 2001*
[104] Queensland Law Society, Submission No. 29 at page 22
[105] Bar Association of Queensland, Submission No. 12 at page 5

> *The PCMC reviews are a mechanism that assists with transparency and accountability in relation to the CMC. The resulting reports facilitate public scrutiny and discussion.*[106]*'*

Again, no explanation for the proposed amendment is provided in either the Explanatory Notes to the Bill or Attorney's Introductory Speech. This is in keeping with a philosophy which has prevailed throughout the drafting of this Bill on restricting, curtailing and diminishing any of the provisions of the Bill that provide for scrutiny of the CMC. Without any compelling argument even being put forward for this proposed amendment, the Non-government members of the committee oppose any change to the current arrangements for the PCMC to conduct reviews.

Recommendation 27 The Non-government members of the Committee recommend that Clause 67 of the Bill be amended to delete Clause 67(1).

2.1.18 Meetings of parliamentary committee generally to be held in public

The Callinan Aroney Report recommended that:

> '*We recommend that the Crime and Misconduct Act be amended to require that the Parliamentary Committee's hearings be public, subject only to the retention of the principle of confidentiality with which we deal elsewhere in this Report, the necessity not to compromise uncompleted investigations or convert functions, and non-disclosure of the making of complaints*[107]*.'*

The Attorney-General had spoken, in Parliament, of his desire for more openness in the PCMC proceedings. On 7 April 2012, during the motion establishing the Terms of Reference for the PCMC's Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Inquiry documents, the Attorney said:

> *'I think this is important because, as I raised this morning, the secretive way in which the CMC and the PCMC operate has to be changed. We have to have reform in regard to this issue so that the public knows and is aware of the issues and the public then will have confidence in the process. The public cannot have confidence in these processes if they do not know what is going on*[108]*.'*

This was acknowledged in the Report of the Parliamentary Crime and Misconduct Committee:

> '*The Committee took on board the Attorney-General's constructive criticism of the Committee's closed proceedings in his speech to introduce the motion for this Inquiry terms of reference*[109]*.'*

The Committee then went on to consider the question of how to make the meetings of the PCMC more accessible to the public. It advised in the report:

[106] Australian Lawyers for Human Rights, Submission No. 22 at page 8
[107] Independent Advisory Panel's Review of the *Crime and Misconduct Act 2001* at page219
[108] Hon Jarrod Bleijie MP, Queensland Parliament *Record of Proceedings*, 7 March 2013, page 617
[109] PCMC Report No. 90, *Inquiry into the CMC's release and destruction of Fitzgerald Inquiry documents at page 87*

> *'At its meeting on 8 March 2013, the Committee resolved to look at how it can open its proceedings to the public. The Committee has continued to deliberate on how best to open its proceedings during the course of this inquiry.*
>
> *It is important to note that some information should not be in the public domain, including current CMC operations and intelligence information which could jeopardise operations. However, the Committee considers that it can, and it should, open some of its oversight functions to the public.*
>
> *To this end, the Committee will move forward with a presumption that all joint meetings with the CMC and with the Parliamentary Crime and Misconduct Commissioner will be open to the public unless the Committee accepts that there are justifiable reasons provided by the CMC or the Parliamentary Commissioner for part of those proceedings to be closed to the public[110].'*

The PCMC also provided a written response to the Callinan Aroney recommendations. The response to recommendation 16 stated:

> *'The Committee does not support this recommendation as it is an unnecessary interference with the powers and rights of the Parliament and of a Parliamentary Committee to determine its own proceedings.*
>
> *In Report No. 90, the Committee undertook to open its proceedings. The Committee followed up on that undertaking on 3 May when it held a public hearing with the CMC. The Committee is working on processes to support these public hearings with the CMC, including requiring the CMC to produce a report to the Committee which the Committee published on its website, and to justify why certain matters are excluded from the public report. There is no need to enshrine this undertaking in legislation[111].'*

Clause 69 of the Bill inserts new section 302A into the Act, which provides that a meeting of the parliamentary committee must be held in public. However, the section does allow the parliamentary committee to decide to hold a meeting in private if the committee considers it is necessary to avoid the disclosure of information that should be kept confidential[112].

The Bar Association of Queensland, in its submission to the Committee, has said:

> *'The new s.302A provides that the meetings of the parliamentary committee should be in public unless the Committee, for cause set out in the section, decides otherwise.*
> *Although this maintains in practice the status quo, the Association supports the principle that the Committee's hearings and deliberations should be, as far as possible, in public[113].'*

The Clause in the Bill applies to all meetings of the parliamentary committee. The PCMC, in Report 90, conceded that it would move forward with a presumption that all joint meetings with the CMC and with the Parliamentary Crime and Misconduct Commissioner will be open to the public unless the Committee accepts that there are justifiable reasons provided by the CMC or the Parliamentary Commissioner for part of those proceedings to be closed to the public.

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[110] PCMC Report No. 90, *Inquiry into the CMC's release and destruction of Fitzgerald Inquiry documents at page 87*

[111] PCMC comments on the recommendations in the report on the Independent Advisory Panel's review of the Crime and Misconduct Act and related matters thereto at page 7

[112] Clause 69 (new section 302A) of the *Crime and Misconduct and Other Legislation Amendment Bill 2014*

[113] Bar Association of Queensland, Submission No. 12 at page 5

The Non-government members of the Committee support the meetings of the parliamentary committee being held in public, but believe this should be restricted to the joint meetings with the CMC and the Parliamentary Commissioner, as flagged by the PCMC in its Report No. 90[114].

Recommendation 28 The Non-government members of the Committee recommend that Clause 69 of the Bill be amended to specify that only joint meetings of the parliamentary committee with the CMC and with the Parliamentary Commissioner be required generally to be held in public.

2.1.19 Appointment of Acting Parliamentary Commissioner

Currently, section 308 of the Act provides that the Speaker must appoint an acting Parliamentary Commissioner in certain circumstances which are specified in the section:

- during a vacancy in the office; or
- during any period, or all periods, when the parliamentary commissioner is absent from duty or from the State or, for another reason, cannot perform the duties of the office.

Clause 72 amends section 308 to provide the Speaker of the Legislative Assembly with discretion as to when he or she is to appoint an acting parliamentary commissioner. This is achieved by replacing the word 'must' with 'may'[115]. This amendment will mean that, even when there is a vacancy in the office, or the Parliamentary Commissioner is unable or unavailable to perform the duties of office, the Speaker will not be required to appoint an acting Commissioner.

Again, neither the Explanatory Notes nor the Attorney-General's introductory speech provides us with any guidance as to why this amendment is considered necessary.

The Queensland Law Society considered this amendment in its submission to the Committee, and said:

> *'Clause 72 sets out that it is the discretion of the Speaker to appoint an acting parliamentary commissioner. For consistency we recommend that the same requirements for appointing a parliamentary commissioner apply for appointing an acting parliamentary commissioner. We recommend reconsidering clause 72.'*

The Parliamentary Commissioner is appointed by the Speaker[116] after the Speaker advertises nationally for the position[117]. The appointment can only be made with the bipartisan support of the parliamentary committee[118]. The only difference between the qualifications and appointment process for an acting part-time commissioner is the absence of the requirement for national advertising. Given the haste with which such an appointment might have to be made, this absence is reasonable, and therefore the Non-government members of the Committee do not support the recommendation of the Queensland law Society on this matter.

However, in the absence of any compelling argument having been provided by any of the three reviews recently conducted into the CMC, or in the report of the three yearly review of the CMC by the PCMC in 2012, or in the explanatory notes or the Attorney-General's introductory speech, the

[114] PCMC Report No. 90, *Inquiry into the CMC's release and destruction of Fitzgerald Inquiry documents at page 87*
[115] Explanatory Notes to the *Crime and Misconduct and Other Legislation Amendment Bill 2014* at page 27
[116] Section 307(1) of the *Crime and Misconduct Act 2001*
[117] Section 306(1) of the *Crime and Misconduct Act 2001*
[118] Section 306(3) of the *Crime and Misconduct Act 2001*

Non-government members of the Committee cannot see any reason to change the current provisions relating to the appointment of an acting parliamentary commissioner.

Recommendation 29 The Non-government members of the Committee recommend that Clause 72 of the Bill not be supported.

2.1.20 Change to functions of parliamentary commissioner

The parliamentary commissioner must be appointed by the Speaker as an officer of the parliamentary service under the *Parliamentary Service Act 1988*[119]*.* The functions of the parliamentary commissioner are set out in section 314 of the *Crime and Misconduct Act 2001.* Some of the functions of the commissioner, which may be exercised at the direction of the committee, are to:

- investigate, including by accessing operational files of the commission to which the parliamentary committee is denied access, complaints made against, or concerns expressed about, the conduct or activities of—
  - (i) the commission; or
  - (ii) a commission officer;
- independently investigate allegations of possible unauthorised disclosure of information or other material that, under this Act, is confidential[120].

Section 329 of the Act further provides that 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.

Clause 73 of the Bill amends section 314 to allow the parliamentary commissioner to initiate an investigation on his or her own motion[121] in respect of these matters. The question of whether the Parliamentary Commissioner should have power to commence 'own motion' investigations is a vexed one.

Under the Act as it currently stands, the Parliamentary Commissioner can only act upon direction from the Committee. The Committee undertakes primary responsibility for the handling of complaints against the CMC, and can determine to ask the Parliamentary Commissioner to investigate and report to the Committee. This is in contrast to the NSW and WA Inspectors, who can act on their own motion or upon complaints received directly by them[122].

The Queensland Law Society made representations on this proposed amendment in its submission to the committee. It said:

> '*The Society has long advocated for this to be the position, and commends this proposed change. The parliamentary commissioner's role should involve an independent discretion to investigate, and not be bound by only those matters referred to it by the parliamentary committee. The Society considers that all investigations undertaken by the parliamentary commissioner should adhere to the principles of natural justice and furthermore that all*

[119] Section 307(1) of the *Crime and Misconduct Act 2001*
[120] Sub-sections 314(2)(b) and (c) of the *Crime and Misconduct Act 2001*
[121] Explanatory Notes to the *Crime and Misconduct and Other Legislation Amendment Bill 2014* at page 27
[122] Mr Geoff Wilson MP, *Parliamentary Oversight from the Parliament's Perspective - Overview of Parliamentary Oversight of the Crime and Misconduct Commission*, Paper presented at the Australasian Study Of Parliament Group 2005 Annual Conference, Sydney, October 2005, at page 3

> *decisions made by the parliamentary commissioner be subject to judicial review. This will ensure that the parliamentary commissioner remains independent and transparent*[123]*.'*

Whilst the submission is enthusiastic in its support for an 'own motion' power for the Commissioner, as it points out, it is also of the view that all investigations undertaken by the parliamentary commissioner should be required to adhere to the principles of natural justice, and that all decisions made by the parliamentary commissioner should be subject to judicial review. Neither of these requirements is contained in the Bill.

Mr Robert Needham, a former Chairperson of the CMC who acted as Parliamentary Commissioner for three years from 2002 also has very strong views on the subject. His submission to the Committee contained a very brief history of the role of the Committee with respect to the CMC:

> *The oversight role over the Commission was properly given by the Criminal Justice Act to the Parliamentary Committee and maintained ever since. It was found that some practical difficulties, confidentiality, etc, necessitated the appointment of a person to act as the agent of the Committee to look more closely into matters within the Commission and report to the Committee. This included any necessary investigations of allegations of misconduct involving the Commission or its officers*[124]*.*

He then set out his understanding of the history of 'own motion' investigation powers of the parliamentary commissioner in Queensland.

> '*Originally, the Parliamentary Commissioner was given the power to hold hearings at his/her own discretion. With the enactment of the Crime and Misconduct Act 2000, this own discretion in the Commissioner was removed and the approval of the Parliamentary Committee was required for a hearing. Additionally the Parliamentary Commissioner could only investigate matters as referred by the Committee*[125]*.'*

Part 4A relating to the Parliamentary Criminal Justice Commissioner was inserted into the *Criminal Justice Act 1989* by the *Criminal Justice Legislation Amendment Bill 1997.* Section 118T(2)(c) of the *Criminal Justice Act 1989* authorised the parliamentary commissioner to require the chairperson or another commissioner or officer of the commission to appear before the parliamentary commissioner for examination on oath or affirmation.

When the *Crime and Misconduct Act 2001* was introduced, it only allowed the parliamentary commissioner to conduct hearings in limited circumstances[126], including where:

- the parliamentary commissioner has used all reasonable means to obtain information about a matter without success;
- the parliamentary committee has authorise the parliamentary commissioner to hold a hearing to obtain the information[127]; and
- that authorisation has received the bipartisan support of the parliamentary committee[128].

Clause 75 of the Bill removes the requirement for the bipartisan authorisation of the committee, and permits the commissioner to conduct a hearing if *'the parliamentary commissioner considers it appropriate to hold a hearing to obtain the information*[129]*'.*

[123] Queensland Law Society, Submission No. 29 at page 22
[124] Mr Robert Needham, Submission No. 7 at page 4
[125] Mr Robert Needham, Submission No. 7 at page 4
[126] Section 318 of the *Crime and Misconduct Act 2001*
[127] Section 318(1) of the *Crime and Misconduct Act 2001*
[128] Section 318(2) of the *Crime and Misconduct Act 2001*

To understand the relative roles of the Committee and the Commissioner, it might be helpful to consider the history of the commissioner's position. The position of the parliamentary commissioner was created by the *Criminal Justice Legislation Amendment Bill 1997.* The explanatory notes to that Bill made it very clear that the Commissioner's role was to act subject to the instruction of and under the direction of the parliamentary committee. As they explained:

> *'The Parliamentary Commissioner is a creature of Parliament and is subject to the instruction of the parliamentary committee. The Parliamentary Commissioner will report only to the parliamentary committee and, subject to special provisions for the withholding of confidential information, will act under the direction of the parliamentary committee[130].'*

As was explained by Mr Geoff Wilson MP[131] and by Mr Robert Needham[132], and as is clear from the Explanatory Notes, the role of the parliamentary commissioner is to act as an 'agent' of the parliamentary committee in circumstances where (i)*t was found that some practical difficulties, confidentiality, etc, necessitated the appointment of a person to act as the agent of the Committee to look more closely into matters within the Commission and report to the Committee[133].*

In fact, this has been also found to be the case by the Court of Appeal in Queensland when considering section 118R(2) of the *Criminal Justice Act 1989*[134]. It found:

> *'Without attempting to identify in detail all of the functions and duties of the PCJC, it is fair to describe that Committee as Parliament's watchdog over the CJC itself, and to regard the Parliamentary Commissioner as the independent agent of that Committee[135].'*

The Non-government members of the committee are firmly of the view that the parliamentary committee, and through it the parliament, has primary responsibility for the performance of the CMC. It is contrary to this role for the Commissioner to have 'own motion' powers of investigation and hearing powers. The commissioner should act at all times subject to the committee.

As Mr Needham said in his submission to the Committee:

> *'It is appropriate that the Committee should determine when and how its investigations are to be carried out. It is the Committee that is responsible for the carrying out of its functions to the Parliament and ultimately, through Parliament, to the people.*
>
> *The role of the Parliamentary Commissioner is not amenable to judicial review by the courts, as being covered by parliamentary privilege. The proposed amendment would mean that the Parliamentary Commissioner could carry out investigations and hold hearings and merely advise the Committee of what he is doing. The Committee would be unable to control or direct the Commissioner in these matters.*

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[129] Clause 75 (new section 318(1)(b)) of the *Crime and Misconduct and Other Legislation Amendment Bill 2014*
[130] Explanatory Notes to *the Criminal Justice Legislation Amendment Bill 1997* at page 2.
[131] Mr Geoff Wilson MP, *Parliamentary Oversight from the Parliament's Perspective - Overview of Parliamentary Oversight of the Crime and Misconduct Commission*, Paper presented at the Australasian Study Of Parliament Group 2005 Annual Conference, Sydney, October 2005, at page 3
[132] Mr Robert Needham, Submission No. 7 at page 4
[133] Mr Robert Needham, Submission No. 7 at page 4
[134] *Criminal Justice Commission and Ors v Parliamentary Criminal Justice Commissioner* [2001] QCA 218
[135] Per McPherson JA at page 8

> *In effect, the unelected Parliamentary Commissioner in this role would be above any form of control, parliamentary or judicial. This would be a situation totally contrary to all the usual standards of public administration and should not be allowed*[136]*.'*

The issue of whether the actions of the parliamentary commissioner acting on an 'own motion' investigation or hearing would be subject to judicial review and the rules of natural justice has also to be considered. If, as an officer of the Parliamentary service[137], and acting at the direction of the parliamentary committee, there is no doubt that the actions of the commissioner would be subject to parliamentary privilege. This is enshrined in Article 9 of the Bill of Rights 1688 (or 1689 depending on whether the Julian or Gregorian calendar is used), which says that: *"the freedom of speech and debates or proceedings in parliament ought not be impeached or questioned in any court or place out of parliament".*

The Court of Appeal in Queensland has considered whether an investigation undertaken by the parliamentary commissioner at the direction of the Committee pursuant to section 118R(2) of the *Criminal Justice Act 1989* (the equivalent of section 314(2) of the *Crime and Misconduct Act 2001*) is amenable to judicial review[138]. In acknowledging that Article 9 of the Bill of Rights applies, the court unanimously found that the court had no jurisdiction to review whether the commissioner had afforded the applicants procedural fairness.

However, this decision related to an investigation conducted at the direction of the committee pursuant to sub-section 118R(2) of the Act. The court was very clear to point out that parliamentary privilege attached to the actions of the parliamentary commissioner because she was appointed as an officer of the parliamentary service and was acting, on that occasion, 'as required by the parliamentary committee'[139].

However, whether this would pertain to the parliamentary commissioner acting on an 'own motion' initiative is open to question. The parliamentary commissioner is still appointed as an officer of the parliamentary service[140], however it is arguable whether the investigation or report thereof is a 'proceeding in Parliament' for the purposes of Article 9. As Chesterman J found, '*That privilege only extends to proceedings in parliament. In the present context that means providing a report to the Committee in response to a request from it*[141]*.'* Whether the privilege extended to a report provided to the committee that had not been requested by the Committee falls to be seen. This is further complicated by the fact that, under the proposed amendment, the Commissioner who undertakes an 'own motion' investigation is obliged to report to the parliamentary committee on the results of the investigation[142].

In *R* v *Parliamentary Commissioner for Standards; ex parte Mohamed Al Fayed*[143]the Court of Appeal in the UK found that the Parliamentary Commissioner for Standards was not subject to the Courts by way of judicial review. The Commissioner is appointed, with oversight by the Parliamentary Committee. It has no coercive powers, so relies on the powers of the committee to call for documents and witnesses. However, it does have power to institute its own proceedings and initiate its own investigations.

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[136] Mr Robert Needham, Submission No. 7 at pages 4and 5
[137] Section 307(1) of the *Crime and Misconduct Act 2001*
[138] *Criminal Justice Commission and Ors v Parliamentary Criminal Justice Commissioner* [2001] QCA 218
[139] Per McPherson JA at page 8
[140] Section 307(1) of the *Crime and Misconduct Act 2001*
[141] *Criminal Justice Commission and Ors v Parliamentary Criminal Justice Commissioner* [2001] QCA 218
[142] Clause 74 (new section 314B(2)) of the *Crime and Misconduct and Other Legislation Amendment Bill 2014*
[143] [1998] WLR 669

However, distinction was drawn between the Parliamentary Commissioner for Standards and the Ombudsman, who is subject to judicial review, because the Ombudsman is not an officer of Parliament and deals with matter external to Parliament, whereas the focus of the Parliamentary Commissioner for Standards is on the propriety of the workings and the activities of those engaged within Parliament. He is one of the means by which the Select Committee set up by the House carries out its functions, which are accepted to be part of the proceedings of the House[144].

There is no requirement in the amendments to the Bill for the Parliamentary Commissioner, when conducting an 'own motion' investigation or hearing, to observe the principles of natural justice, or for the actions to be open to judicial review by the courts.

Another issue of concern raised by Dr Levy in the submission by the CMC is that which occurred in Western Australia. As he said:

> '*The Commission notes the experience of the Western Australian Corruption and Crime Commission, when an impasse developed between the Commission and the Western Australian Parliamentary Inspector (the equivalent of the Parliamentary Commissioner). The process of engagement between the two offices over a disagreement about findings of the Commission resulted in the Commission devoting 992 hours in responding to issues directly arising out of the Parliamentary Inspector's inquiries in a period of just over two months, including almost 90 hours of the Chair's time.*
> *Such a situation could be avoided if the current provisions, by which the Parliamentary Commissioner requires a referral from the Parliamentary Committee, are retained.*[145]'

Given the uncertainty of the law in this respect, and given the reservations expressed by both the Queensland Law Society and Mr Needham in their submissions to the committee, and in the absence of any compelling argument having been proffered by the Government for including this change in the Bill, the Non-government members are not satisfied that there is a need for the change, or that sufficient protections have been provided in the Bill to ensure any action undertaken pursuant to these new sections will be subject to appropriate oversight.

Recommendation 30 The Non-government members of the Committee recommend that Clauses 73, 74 and 75 of the Bill not be supported.

2.1.21 Extension of Chairperson, Part-time Commissioners and Acting Part-time Commissioners

As mentioned previously, three of the five persons appointed to positions of Commissioner have been appointed on an acting basis[146]. All were appointed until 22 May 2014. This means that they were appointed solely on the nomination of the Attorney-General. There was not so much as consultation with the PCMC on their appointments, let alone did the Attorney-General seek the bipartisan support of the Committee.

By making the appointments in this manner, the Attorney-General leaves open the question, at least in the minds of the public, of why he did not seek the bipartisan support of the Committee. One of

[144] Per Lord Woolfe, Master of the Rolls,
[145] Crime and Misconduct Commission, Submission No. 30 at page 3
[146] Dr Levy in Queensland Government Gazette No. 15, 17 May 2013, at page 64 and Queensland Government Gazette No. 56, 8 November 2013, at page 389 and Mr Williams and Mr Keelty in Queensland Government Gazette no. 79, 6 December 2013, at page583

the possible answers that members of the public might speculate on was that the Attorney-General did not believe he would receive the bipartisan support of the committee.

Clause 80 of the Bill inserts new sections 397 and 398 into the Act, which are transitional provisions extending the appointments of the acting chairperson, and part-time commissioners and acting part-time commissioners, respectively until commencement of the Act.

Clause 81 then inserts new sections 402 and 403 to extend those appointments from the commencement date until 31 October 2014 if no alternative appointments are made under the provisions of the Act. This means that, as at 31 October 2014, Dr Levy will have been appointed acting Chair, without the bipartisan support of the PCMC, for a period of almost 18 months.

Sub-section 24B(5) of the *Acts Interpretation Act 1954* provides that when a person is appointed to act during a vacancy in a position, that appointee cannot act in that position for more than 12 months. This Bill statutorily extends the appointment of the current Chairperson of the CMC beyond what is the accepted maximum period for an acting appointment.

All of the other part-time commissioners and acting part-time commissioners are not statutorily barred from having their appointments extended, and could be appointed using the usual processes, so the amendments in respect of those positions are not required unless the Bill is not likely to be considered by the Parliament before December 2014.

There have been quite a number of submissions which have questioned the appropriateness of the statutory extension of the appointment of the acting chairperson.

The Queensland Bar Association referred to the Dr Levy Clause, and said:

> *'The Association considers that, since certain aspects of Dr Levy's conduct while in office, including his evidence to the Parliamentary Committee, are under scrutiny, this legislative appointment guarantee is inappropriate. The Association urges that a fresh acting chairperson be appointed with bi-partisan support of the Parliamentary Committee and that the Dr Levy transitional clauses be deleted from the Bill*[147]*.'*

Mr Stephen Keim SC gave evidence on behalf of the Queensland Bar Association at the Public Hearing to the Bill held by the Legal Affairs and Community Safety Committee and he expanded on this matter. Whilst acknowledging the high personal regard he has for Dr Levy and the considerable good work he has done over many years, he said:

> *'Can I say that I am on public record, and would like to repeat it, that I am a great admirer of Dr Levy and I have a great deal of respect for him and for the public work that he has done over many years, but as the submission points out, there is the concern that it is a part-time appointment which has been made in a non-partisan manner and it is now being continued in the legislation and, you have done the maths, that adds up to a considerable period of time. The association does have a concern with regard to that. The other matter, and these are matters before another committee and I do not want to buy into them in any way, nor does the association, is the concern that Dr Levy's account to the previous committee has been called into account and he has acknowledged that it was in error in some circumstances. I think that adds to the difficulty of his position, and the association refers to that in the submission and that is another reason why, notwithstanding the respect that I*

[147] Bar Association of Queensland, Submission No. 12 at page 6

personally hold and the association holds for Dr Levy, that that Dr Levy clause is not appropriate and should be removed from the bill[148]*.'*

The Australian Lawyers' Alliance supports the view of the Bar Association of Queensland in respect of this issue:

'Dr Levy remains the acting Chair of the Commission and will continue in this position under the new section 397. The ALA agrees with the Bar Association in its assessment of Dr Levy's appointment as inappropriate[149]*.'*

The Australian Lawyers for Human Rights has expressed very strong views about the statutory extension of the appointment of the Acting Chairperson. It said in its submission to the Committee:

'The Government has twice circumvented the statutory requirement to obtain the bipartisan support of the Parliamentary Crime and Misconduct Committee by appointing Dr Levy as Acting Chairperson, rather than seeking to nominate Dr Levy for appointment to the office of Chairperson.

Tony Fitzgerald QC has commented in relation to the acting appointment of Dr Levy claiming "The Crime and Misconduct Commission will have outlived its usefulness if it loses its independence."

Continued public confidence in the independence of the CMC and Clause 80 are incompatible[150]*.'*

It therefore recommended that sections 397 and 402 be deleted from the Bill and that a new acting chairperson be appointed pursuant to section 228.

Prof Marilyn McMeniman AM was appointed as a part-time commissioner on 8 April 2011 for a three-year term, expiring on 7 April 2014[151]. Mr George Fox was appointed on 23 September 2011 for a three-year term, expiring on 22 September 2014[152]. Both of these appointments, the only existing appointments made with the bipartisan support of the PCMC, will expire before 31 October 2014. Prof McMeniman's appointment has already expired, and should have been remade already for a further two years using the ordinary process, rather than using statutory reappointment provisions.

It is of concern to the Non-government members of the Committee that the existing part-time commissioners will not be reappointed, so that the Government can appoint their hand-picked appointees to replace them, without the bipartisan support of the PCMC. This will mean they can appoint the full complement of the Commission under the new amended Act, without bipartisan support.

For these reasons, the Non-government members do not support a statutory extension of the terms of the Acting Chairperson, the Part-time Commissioners and the Acting Part-time Commissioners.

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[148] Legal Affairs and community Safety Committee, *Public Hearing—Examination of the Crime and Misconduct and Other Legislation Amendment Bill 2014* Transcript of Proceedings, Wednesday, 16 April 2014 at page 32

[149] Australian Lawyers' Alliance, Submission No. 23 at page 6

[150] Australian Lawyers for Human Rights, Submission No. 22 at page 6

[151] Queensland Government Gazette, Volume 356 No 85, 8 April 2011 at page 575

[152] Queensland Government Gazette, Volume 358 No29, 23 September 2011 at page 179

Recommendation 31 The Non-government members of the Committee recommend that clause 80 not be supported, and that clause 81 not be supported insofar as it inserts new sections 402, 403 and 404 in the Act.

2.2 Part B – Use of Gender-specific language

The policy of 'masculine rule' in English-language legislative texts, whereby it was assumed 'he' would subsume 'she', and that the norm of humanity is male, was a relative newcomer to legislative drafting. In fact, it first appeared in British legislation in 1827, thanks largely to the influence of Jeremy Bentham, who advocated 'letting the masculine singular comprehend both genders and numbers' as an antidote against the 'evil of longwindedness[153]'.

While sexism probably played a large part in the emergence of the policy of masculine rule, it was in the early 19th century that the separate legal entity of the corporation also emerged, so this can probably be explained, in part, by the need to express masculine, feminine and the separate corporate entity in legislation[154]. However, for three hundred years previously, emerging in the Elizabethan period, female terms had been used in legislation to represent females[155].

It was enshrined in legislation in the Interpretation Act 1850, which provided that the masculine shall include the feminine.

However, when it came to interpretation by the courts, the masculine was not always taken to mean the feminine. Even gender-neutral terms such as 'person' were held not to include women. In *Nairn v University of St Andrews*[156], women graduates of St Andrews and Edinburgh Universities, who, as graduates, were members of the general council of their university, sought a declaration that they were entitled to vote pursuant to section 27 of the *Representation of the People (Scotland) Act, 1868.* At the date of the legislation, women were not admitted to graduation in any of the Scottish Universities, but they were afterwards admitted under the *Universities (Scotland) Act of 1889*.

The section provided that "every person" whose name was on the register of the general council, if of full age "and not subject to any legal incapacity", was to be entitled to vote for the member of Parliament for the university. The House of Lords held that the section did not confer a right to vote on women graduates.

Similarly, in *Bebb v Law Society*[157], the Court held that the appellant was not a 'person' for the purposes of the Solicitors Act 1843, despite section 48 of the Act, which provided that 'words importing the masculine gender shall extend to a female'.

The policy of masculine rule lasted about 150 years. However, by the 1970s, it was starting to be challenged. Australia and New Zealand were the first English-speaking countries to adopt gender-neutral legislative drafting as part of a plain-language approach to legislative drafting.

Non-English-speaking nations were well ahead. In Sweden, the first guidelines for clear language in laws appeared as early as 1967. The *Language in acts and other statutes* Guidebook stated that "if

[153] Peterssen, Sandra, *Gender Neutral Drafting: Historical Perspective* (1998) Statute Law Review, 19, 93-112
[154] Christopher Williams, *The End of the 'Masculine Rule'? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland,* (2008) Statute Law Review, 29(3), 139-153, 139
[155] Williams: 2008 at 140
[156] [1909] AC 147
[157] (1914) 1 Ch. D. 286

the language in acts and other statutes is simple and clear, this will have an impact on the language used in other official texts". In 1979, a supplement was published, *More guidelines for the language of legislation.* This supplement offered principles on, amongst other things, how to make the language gender-neutral[158].

In New South Wales, the Parliamentary Counsel's Office adopted a gender-neutral drafting policy in 1983. And such a policy was adopted on a national level in 1988 by the Australian Office of Parliamentary Counsel.

The *Interpretation Act 1978* (UK) came into force on 1 January 1979, and provided that:
In any Act, unless the contrary intention appears,—
(a)words importing the masculine gender include the feminine;
(b)words importing the feminine gender include the masculine;
(c)words in the singular include the plural and words in the plural include the singular[159].

In Queensland in 1991, a similar provision, section 32B, was inserted into the *Acts Interpretation Act 1954*, which provided that, *'(i)n an Act, words indicating a gender include each other gender'*.

This is referred to as the 'two-way rule' and while notionally the masculine can include the feminine and the feminine can include the masculine, in practice the feminine never includes the masculine. The Non-government members of the Committee have never encountered a provision in Queensland legislation where the female is taken to denote the masculine, although we would be pleased to be corrected.

In 1992, the *Reprints Act* was passed, which included **Division 4 – Updated way of expression**. This included section 24, which provided that If a provision of a law uses a word indicating a gender or that could be taken to indicate a gender, the provision may be expressed in a different way that is consistent with current legislative drafting practice. Section 25 goes on to provide that if the name of an office established by a law uses a word indicating a gender or that could be taken to indicate a gender, the name of the office may be changed, and any reference in a law to the office may be changed or given, in a way that is consistent with current legislative drafting practice.
Example 1—
'chairperson' may replace 'chairman'.

This Bill seeks to replace the term Chairperson, a term that has been used in the legislation since 1993, when it replaced Chairman[160]. It seeks to replace it with the term 'Chairman', a term that has not been considered appropriate terminology in Queensland legislation for over twenty years.

There are many submissions to the Committee which addressed this issue. The Queensland Law Society submitted:

> *'We consider that the references to "chairman" should be omitted from the Bill and the current reference to "chairperson" should remain. If the references to "chairman" remain in the Bill, the Office of Parliamentary Counsel may revert to using "chairperson" to ensure consistency with the Reprints Act 1992 Act.[161]'*

[158] Barbro Ehrenberg-Sundin, *The Quality of legislation. The Swedish view,* Speech to be given to legal revisers in the EU institutions on the 27th of September 2002 available at http://ec.europa.eu/dgs/legal_service/seminars/sv_sundin.pdf
[159] Section 6
[160] *Criminal Justice Amendment Bill 1993*, Clause 4 of Schedule 1
[161] Queensland Law Society, Submission No. 29 at page 24

The Bar Association of Queensland expressed its puzzlement at the change of terminology:

> *'The Association has a strong policy and important track record in promoting equal opportunities within the bar, itself; within the Association; and in government appointments to institutions that are of importance to administration of the law and the maintenance of the rule of law.*
>
> *The use of non-gender-specific language in legislation and in government publications is important in both reflecting and promoting a mind set in favour of equal opportunity values. The use of such language has been a bi-partisan policy at most levels of government in Australia for several decades. The Association perceives it to have very wide support in the community not just but particularly among women.*
>
> *The Association strongly recommends that the use of gender specific language be removed from the amending Bill.*[162]'

The Explanatory Notes provide little by way of explanation for the change. In relation to Schedule 1, which are described as Minor and consequential amendments of the *Crime and Misconduct Act 2001,* the Notes provide: '*Clause 3 lists each of the provisions in the CM Act to be amended by omitting 'chairperson' or 'chairperson's' and inserting 'chairman' or 'chairman's'.* Nowhere else is any explanation provided for this reversion to an outdated terminology.

Some members of the Committee have expressed views that section 32B of the Acts Interpretation Act 1954 makes it all OK because words indicating a gender include each other gender. Applying the same logic, we could use the term, 'Chairwoman' and it would include any male who held the position.

On 9 April 2014, the Chair of the Legal Affairs and Community Safety Committee, Mr Ian Berry MP, participated in an interview on ABC 612 radio program with Terri Begley. He explained the change by saying that a chairman could be a person who mans the chair, and is not necessarily gender specific. This shows a clear lack of understanding of the terminology. To 'man' the chair is an inherently gender-specific term.

The Non-government members of the Committee can only conclude that no coherent reason for changing the terminology has been provided because no coherent reason exists. It is an offensive, retrograde, unacceptable, outdated mode of expression, and should not be part of modern Queensland legislation. We cannot support such a move.

We note, however, that without any amendment to the *Reprints Act 1992*, should these amendments be passed, it is open to the Parliamentary Counsel to change any reference in the Act from 'Chairman' to 'Chairperson' next time the Act is reprinted.

Recommendation 32 The Non-government members of the committee recommend that Clause 3 of Schedule 1 be removed from the Bill, and that every reference in the Bill to 'Chairman' be replaced with 'Chairperson.'

[162] Bar Association of Queensland, Submission No. 12, page 3