Parliamentary Committees

Review of the Crime and Corruption Commission

Report No. 97
Parliamentary Crime and Corruption Committee
June 2016

Parliamentary Committees

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Report No. 97, 55th Parliament

Parliamentary Crime and Corruption Committee

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Parliamentary Crime and Corruption Committee

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Abbreviations and glossary

Callinan and Aroney review	Review of the Crime and Misconduct Act and related matters by the Independent Advisory Panel (Hon Ian Callinan AC and Professor Nicholas Aroney)
CC Act	*Crime and Corruption Act 2001*
CCC or Commission	Crime and Corruption Commission
CJ Act	*Criminal Justice Act 1989*
CJC	Criminal Justice Commission
CM Act	*Crime and Misconduct Act 2001*
CMC	Crime and Misconduct Commission
CO Act	*Criminal Organisation Act 2009*
COI	Queensland Organised Crime Commission of Inquiry
CPCA	*Criminal Proceeds Confiscation Act 2002*
CRC	Crime Reference Committee
ESC	Ethical Standards Command of the Queensland Police Service
Fitzgerald Report	The Report on the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report of a Commission of Inquiry Pursuant to Orders in Council*, (Commissioner G E Fitzgerald QC), 1989
ICAC	Independent Commission Against Corruption
ODPP	Office of the Director of Public Prosecutions
Parliamentary Commissioner	Parliamentary Crime and Corruption Commissioner
PCCC or Committee	Parliamentary Crime and Corruption Committee
PCJC	Parliamentary Criminal Justice Committee
PCMC	Parliamentary Crime and Misconduct Committee
PIM	Public Interest Monitor
PPRA	*Police Powers and Responsibilities Act 2000*
QCAT	Queensland Civil and Administration Tribunal
QCC	Queensland Crime Commission
QPS	Queensland Police Service
Taskforce	Taskforce on Organised Crime Legislation
UPA	Unit of public administration

Chair's Foreword

On behalf of the Parliamentary Crime and Corruption Committee, I am pleased to present this report on the Review of the Crime and Corruption Commission.

The review has been carried out as required under section 292(f) of the *Crime and Corruption Act 2001*. Past reviews have been conducted three yearly or once each parliamentary term. This review is the first of what will in future be five yearly reviews.

This report follows an extensive review process which began in June 2015.

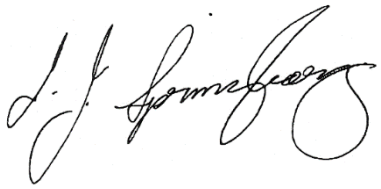
The Committee received submissions from a range of stakeholders and the majority of those submissions have been published on the Committee's webpage. The Committee has had regard to all submissions received, regardless of whether they were appropriate for publication.

The Committee heard from invited participants at four public hearings. The Committee also held a public meeting with the Commission in relation to the review. Additional information was received from a number of participants following the public hearings.

On behalf of the Committee, I thank the Commission for its assistance throughout the course of the review. The Committee also greatly appreciated the assistance provided by the Parliamentary Crime and Corruption Commissioner. The contributions from all individuals, agencies and organisations have been important and helpful to the Committee's deliberations.

The membership of the Committee changed significantly during the review period. I thank all Committee members, past and present, for their contribution to the review process.

I commend the Committee's report and recommendations to the House.



Mr Lawrence Springborg MP

Chair

Recommendations

1. Introduction

1.1 Background

The Parliamentary Crime and Corruption Committee (PCCC or Committee) is an all-party committee of the Queensland Legislative Assembly established under the *Crime and Corruption Act 2001* (CC Act).[1]

The Committee has a range of functions. A key function is to monitor and review the performance of the Crime and Corruption Commission (CCC or Commission).[2] In this way the Commission is accountable to the Queensland Parliament and the people of Queensland.

The Committee has a statutory duty to conduct a review of the activities of the Commission and table a report about any further action that should be taken in relation to the CC Act or the functions, powers and operations of the Commission.[3]

In the past such reviews were conducted three yearly or once during each parliamentary term. Reviews undertaken by past Committees are set out in Appendix 3 of this report.

This Committee's predecessor, the Parliamentary Crime and Misconduct Committee (PCMC) recommended on several occasions that such reviews be conducted five yearly.[4] These recommendations were finally implemented through amendments made in 2014.[5] The first review was required to be completed by 30 June 2016, with five yearly reviews after that date.[6] This report is the first review.

1.2 The review process

This review began in June 2015 when the Committee issued a media release and placed advertisements in *The Courier-Mail* and regional newspapers announcing the review and inviting written submissions from interested Queenslanders.

The Committee also wrote to a range of stakeholders including the Commission, ministers, directors-general, members of Parliament and numerous other agencies, organisations and individuals inviting submissions to assist in the review.

Submissions closed on 27 July 2015.

The Committee authorised the publication of the majority of submissions received. A list of submissions is provided at Appendix 1. Published submissions are available on the Committee's webpage.[7]

The Committee also received evidence through four public hearings held in October and November 2015. The Committee received further evidence from the Commission at a public meeting on 13 June 2016. A list of witnesses who appeared before the Committee is provided at Appendix 2. Transcripts of the public hearings and meeting are available on the Committee's webpage.[8]

The Commission provided the Committee with additional material throughout the review period.

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[1] *Crime and Corruption Act 2001*, s 291.
[2] *Crime and Corruption Act 2001*, s 292(a).
[3] *Crime and Corruption Act 2001*, s 292(f).
[4] Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, p 167; Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Commission*, April 2009, p 112.
[5] *Crime and Misconduct and Other Legislation Amendment Act 2014*, s 67.
[6] *Crime and Corruption Act 2001*, s 292(f).
[7] www.parliament.qld.gov.au/pccc.
[8] www.parliament.qld.gov.au/pccc.

1.3 Other inquiries and reviews

Since the report on the last review was tabled in May 2012, a number of other inquiries and reviews have been conducted which have impacted on the activities of the Commission including:

- the PCMC Inquiry into the (then) CMC's release and destruction of Fitzgerald Inquiry documents;[9]
- the review of the Crime and Misconduct Act and related matters by the Independent Advisory Panel (Hon Ian Callinan AC and Professor Nicholas Aroney) (Callinan and Aroney review);[10] and
- an administrative review of the CMC by Mick Keelty AO.[11]

The *Crime and Misconduct and Other Legislation Amendment Act 2014* (the 2014 amendments) implemented a range of recommendations following the above reviews. Key changes included:

- reforming the upper governance structure of the Commission;
- changing the name and redefining 'official misconduct' to 'corrupt conduct', including raising the threshold for matters captured within that definition;
- renaming the 'misconduct' function to the 'corruption' function, and consequential amendments resulting 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';
- improving the complaints management system to refocus the Commission on more serious cases of corruption and reducing the number of complaints the commission deals with and investigates;
- requiring complaints to generally be made by way of statutory declaration;
- removing the Commission's function for the prevention of corruption in units of public administration;
- modifying the Commission's research function, including a requirement for the Commission's research plan to be approved by the Minister;
- strengthening the transparency and accountability of the Commission, including expanding the role of the Parliamentary Commissioner; formalising the Committee's practice of holding public meetings with the Commission; and requiring the Commission to notify the Parliamentary Commissioner, along with the Committee, of conduct by a Commission officer that involves or may involve improper conduct, and expanding the definition of improper conduct;
- clarifying the grounds for discipline and disciplinary action that may be taken by the Commission regarding the conduct of Commission officers.[12]

In May 2016, the *Crime and Corruption Amendment Act 2016* (the 2016 amendments) commenced. This amendment Act implemented a range of the government's election commitments and addressed a number of concerns raised by submitters to the Committee's current review. Key changes included:

- removing the Chief Executive Officer as a member of the Commission, but retaining a five member commission by adding another part-time commissioner;

[9] 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.
[10] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013.
[11] Keelty AO, M.J., correspondence dated 19 November 2013 to Mr John Sosso, Director-General, Department of Justice and Attorney-General, attaching a report regarding reform of the Crime and Misconduct Commission.
[12] Crime and Misconduct and Other Legislation Amendment Bill 2014, explanatory notes.

- requiring bipartisan support of the Committee, rather than a power of veto, for the appointment of the CEO;
- limiting temporary appointments for the Chairperson, commissioners and CEO to three months, unless there is bipartisan support of the Committee;
- reinstating the Commission's corruption prevention function;
- restoring the Commission's research function, including removing the requirement for the Minister to approve its research plan;
- allowing complaints to be made anonymously to the Commission by removing the requirement for complaints to be made by way of statutory declaration; and
- removing the prohibition on the CEO sub-delegating the financial accountability functions under the *Financial Accountability Act 2009*.[13]

During the period of this review, a number of other inquiries and reviews were underway or in the process of being finalised, which may impact on the activities of the Commission, including:

- the Queensland Organised Crime Commission of Inquiry;
- the Taskforce on Organised Crime Legislation;
- the Review of the *Criminal Organisation Act 2009*;
- the Department of Justice and Attorney-General's public consultation on the definition of corrupt conduct;[14]
- the Independent review of councillor complaints process;[15] and
- the Commission's public consultation on confidentiality of complaints.[16]

Where relevant to the Committee's current review, the above inquiries, reviews, recommendations and legislative amendments are discussed.

The significant changes in the Committee's membership during the course of this review also impacted on the Committee's ability to consider wider reforms at this time. The Committee intends to consider the need for any further reform as part of its ongoing role in monitoring and reviewing the performance of the Commission's functions. The Committee also intends to commence a periodic review of the structure of the Commission. The Committee will appropriately report to the Legislative Assembly on these matters as required under the Act.

[13] Crime and Corruption Amendment Bill 2015, explanatory notes.

[14] See Department of Justice and Attorney-General, Issues Paper: *'Corrupt conduct' under the Crime and Corruption Act 2001*, February 2016.

[15] See Hon Jackie Trad MP, Deputy Premier, Minister for Infrastructure, Local Government and Planning and Minister for Trade and Investment, 'Review of Councillor Complaints Process to Ensure Fair and Transparent System', media release, 21 April 2016.

[16] See Crime and Corruption Commission, Discussion Paper, *Making allegations of corrupt conduct public – is it in the public interest?*, June 2016.

2. Overview of the Crime and Corruption Commission

2.1 Introduction

The Commission is an independent statutory body. It was previously known as the Criminal Justice Commission and the Crime and Misconduct Commission. Its main purposes are to:

- combat and reduce the incidence of major crime; and
- continuously improve the integrity of, and to reduce the incidence of corruption in, the public sector.[17]

The Commission employs approximately 339 people and has a total budget of $56.196 million.[18]

2.2 Overview of the Commission's functions

The Commission has a range of functions set out in the *Crime and Corruption Act 2001*, namely:

- Major crime – investigating major crime referred to it by the Crime Reference Committee;[19]
- Corruption – raising the standards of integrity and conduct in units of public administration and ensuring complaints about corruption are dealt with in an appropriate way;[20]
- Prevention – helping prevent major crime and corruption;[21]
- Research – undertaking research to support its functions as well as research into the incidence and prevention of criminal activity, research into the administration of criminal justice or corruption referred by the Minister, and research into any other matter relevant to its functions;[22]
- Intelligence – gathering and analysing intelligence to support the proper performance of its functions;[23]
- Witness protection – operating a witness protection program;[24]
- Civil confiscation – undertaking civil proceedings to recover the proceeds of crime regardless of whether the owner has been convicted of a criminal offence;[25] and
- A function conferred on it under another Act.[26]

Since the Committee's last review, a number of the Commission's functions, and powers to support those functions, have been reformed. These reforms are discussed in detail in throughout this report.

2.3 Commission structure

The functions of the Commission are carried out by the relevant divisions and work areas within the Commission. The organisational chart outlining the structure of the Commission is provided at Appendix 4.

[17] *Crime and Corruption Act 2001*, s 4(1).
[18] Department of Justice and Attorney-General, *2016-17 Queensland State Budget – Service Delivery Statements*, pp 54-55.
[19] *Crime and Corruption Act 2001*, s 25.
[20] *Crime and Corruption Act 2001*, s 33.
[21] *Crime and Corruption Act 2001*, s 23.
[22] *Crime and Corruption Act 2001*, s 52.
[23] *Crime and Corruption Act 2001*, s 53.
[24] *Crime and Corruption Act 2001*, s 56(a) and *Witness Protection Act 2000*.
[25] *Crime and Corruption Act 2001*, s 56(b) and *Criminal Proceeds Confiscation Act 2002*.
[26] *Crime and Corruption Act 2001*, s 56(c).

3. Corporate governance

The CCC or the Commission is a term often used to describe the body as a whole. However, the membership of the Commission itself consists of five Commissioners:

- a full-time Chairperson;
- a part-time Deputy Chairperson; and
- three part-time Ordinary Commissioners.[27]

3.1 Roles of the Commission, Chairperson and Chief Executive Officer

The CC Act sets out the roles and responsibilities of the Commission, Chairperson and Chief Executive Officer as follows:

Commission[28]

- responsible for strategic leadership and direction of Commission's functions and exercise of Commission's powers by Chairperson, CEO and Commission staff;
- preparation of Commission's strategic and business plans;
- establishment of internal management committees and charters;
- preparation of internal audit charter.

Chairperson[29]

- chair of the Commission;
- proper performance of Commission's functions delegated to Chairperson under section 269;
- perform functions and exercise powers of the Commission delegated under section 269 or other functions and powers under the CC Act or another Act;
- reporting to Commission on the performance of Commission's functions, but not subject to the direction of the Commission in performing function or exercise of power in an investigation, hearing, operation or other proceeding.

Chief Executive Officer[30]

- responsible to Commission for administration of Commission;
- perform functions and exercise powers delegated to the CEO under section 269;
- perform functions and exercise powers delegated by the Chairperson or conferred under the CC Act;
- in performing a function or exercising a power, the CEO is subject to direction of: for function/power delegated by the Chairperson – the Chairperson; otherwise – the Commission;
- reporting to Commission on administration of the Commission; and performance of various functions and exercise of powers.

Since the Committee's last review, the structure and governance of the Commission has undergone significant changes. These changes are discussed in some detail below.

3.2 2014 amendments

In 2014, amendments were made to the membership of the Commission, so that membership consisted of: a full-time Chairman; a part-time Deputy Chairman; a full-time CEO; and two part-time Ordinary Commissioners.[31]

[27] *Crime and Corruption Act 2001*, s 223.
[28] *Crime and Corruption Act 2001*, s 251.
[29] *Crime and Corruption Act 2001*, s 252.
[30] *Crime and Corruption Act 2001*, s 253.
[31] *Crime and Misconduct and Other Legislation Amendment Act 2014*, s 34.

Prior to the 2014 amendments, the Chairperson effectively held the role of Chairperson and Chief Executive Officer (CEO). The Commission was constituted by a full-time Chairperson and four part-time Commissioners who were community representatives.[32]

Separation of the Chairperson's roles followed a recommendation of the then PCMC.

In 2010, the then Chairperson of the CMC, Mr Martin Moynihan AO QC engaged consultants to review the effectiveness of the CMC's governance structures, with the report on that review known as the 'Jameson Report'.[33] One of the recommendations implemented by the CMC from the Jameson Report was the establishment of a 'Deputy CEO' role.[34] This was an internal reform and the role itself was not established by statute.

The PCMC considered the effectiveness of this role in Report No. 90.[35]

The PCMC noted that the incident (the subject of the inquiry) highlighted 'a need for structural reform well beyond the creation of a Deputy CEO role'.[36] The PCMC believed that structural separation would ensure 'that more directed effort can be aimed towards "effective and efficient" operations by the CEO, whilst the Chairperson can concentrate on oversight of operational matters and the appropriate use of coercive powers.'[37]

The PCMC recommended that the then *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.[38] The PCMC did not recommend that the CEO be a Commissioner or a member of the Commission. In fact, one of the findings made by the PCMC was that the then current model was 'flawed because the Chairperson's role as "Chairperson of the board" and "CEO" is at odds' as it diminished the role of the other Commissioners and embedded 'the culture that the approval of the Chairperson alone is important.'[39] The PCMC expected that under the new model, the CEO (akin to a Director-General) would report directly to the Commission ("the board").[40]

The 2014 amendments also removed certain qualification requirements for part-time Commissioners. Qualifications for part-time Commissioners previously included having a demonstrated interest in civil liberties, or qualifications or expertise in public sector management, criminology, sociology, research in crime or crime prevention, or community service or community standards experience regarding the public sector.[41]

The Minister was previously also required to ask the Bar Association of Queensland and the Queensland Law Society to each nominate two people for the civil liberties commissioner position. Advertising throughout the State was required for the other part-time commissioners. Of the four part-

[32] *Crime and Misconduct Act 2001*, s 223 (as at 27 November 2013).
[33] 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, p 68.
[34] This position was formally titled 'Executive General Manager' and was held by Ms Edith Mendelle.
[35] 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.
[36] 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, p 78.
[37] 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, p 80.
[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, p 80.
[39] 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, Finding 19, p 80.
[40] 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, p 80.
[41] *Crime and Misconduct Act 2001*, s 225 (as at 27 November 2013).

time commissioners, at least one had to meet the civil liberties qualification and at least one commissioner had to be a woman.[42]

In 2014, the previous qualification requirements for part-time commissioners were replaced and now commissioners are required to have qualifications, experience or standing appropriate to assist the commission to perform its functions.

The 2014 amendments also made significant changes to the roles of the Commission, Chairperson and CEO.

3.3 Submissions to this review

A number of submitters raised concerns about the new governance structure established by the 2014 amendments.

The Honourable Philip Nase, a former part-time Commissioner,[43] submitted that the 2014 amendments 'radically alter the governance arrangements for the CCC' and in doing so, breach both the independence and governance principles that were included in the CM Act and the CJC Act.[44] According to the independence principle, the Commission is 'an independent body that is at arms-length from and operates, as far as possible, independently of the government of the day', while the governance principle conferred responsibility 'for setting the strategic direction of, and for monitoring and assessing the performance of, the CMC' on the five person commission.[45]

Mr Nase submitted that the current governance arrangements do not reflect accepted standards of governance because control is 'effectively concentrated' in two managers – the Chairman and CEO, and this control is subject to few if any checks and balances by the Commission. This conflicts with what Mr Nase described as 'the core function of any board of directors', which is to supervise and monitor the authority and performance of the CEO.[46]

Mr Nase argued in relation to the makeup of the Commission, that this situation detracts from 'the informed community expertise input into the Commission's operation and that the removal of community requirements, including the civil liberties position, takes away one important safeguard against the appointment of people (by a government) who are less than questioning of government partisan outlook…'.[47]

The Queensland Law Society (QLS) also expressed concerns regarding the current corporate governance arrangements, in particular the way in which the Commission's powers are concentrated 'in the person of the Chair of the CCC, rather than the CCC itself'.[48] QLS also had concerns about the CEO's dual status as a full-time commissioner, the inconsistency of such an appointment with best practice governance principles and the lack of clarity and oversight this may bring.[49]

QLS submitted that with the introduction of the 2014 amendments, 'an opportunity was missed to implement a best practice model of corporate governance best suited to oversight the operations of the CCC' and urged 'that the opportunity be taken to undertake a full and comprehensive review of the governance of the CCC'.[50]

[42] *Crime and Misconduct Act 2001*, ss 227 and 230 (as at 27 November 2013).
[43] The Honourable Philip Nase was a part-time Commissioner from 2008 to 2013.
[44] The Honourable Philip Nase, Submission No. 12, p 8.
[45] The Honourable Philip Nase, Submission No. 12, p 7.
[46] The Honourable Philip Nase, Submission No. 12, pp 3, 9-10.
[47] The Honourable Philip Nase, Submission No. 12, p 3.
[48] Queensland Law Society, Submission No. 25, p 17.
[49] Queensland Law Society, Submission No. 25, p 17.
[50] Queensland Law Society, Submission No. 25, p 17.

The Bar Association of Queensland (BAQ) also expressed concern with changes introduced in 2014 which 'removed authority from the Commission as a body and bestowed it upon either the full-time chairman or the new position of the full-time chief executive'.[51] In BAQ's view:

> The idea that the Chair of a private corporation or community organisation should have roles which are not ultimately subject to the governance of the board of directors is quite alarming. It is even more so in the case of a public sector organisation with the special coercive powers enjoyed by the Commission.[52]

BAQ therefore submitted that 'the position of the Commission as a body should be restored so that it can provide the governance for which it was designed'.[53]

A number of submitters also raised concerns in relation to temporary appointments to the Commission.

Mr Nase submitted that the principle of independence is undermined by 'the practice of using power to make acting appointments (which do not require bipartisan support) to fill positions on the commission, including the position of chairman, instead of the normal appointment processes in the Act'.[54]

The Accountability Round Table (ART) also supported the requirement for bipartisan support, noting that this is a long-standing requirement originating from the Fitzgerald Report (1989).[55] However, ART noted that 'the interests of accountability are not served by allowing the Opposition to veto, for an indefinite period, the appointment of the Chairman and other commissioners'.[56] ART argued that ultimately, the government 'should be allowed to put its nominees in place, though perhaps after a delay during which it is required to detail the qualifications and other attributes of those nominees'.[57]

The Commission outlined a range of concerns in relation to the current governance framework. The Commission argued that the current corporate governance structure 'is a hybrid of the private sector and public sector corporate governance models'.[58] The Commission was also concerned that the division of responsibility between the Chairperson and CEO is unclear and 'has potential to add unnecessary complexity to an organisational environment which, as one of Queensland's key integrity agencies, should be held up as a prime example of an effective corporate governance framework'.[59] The Commission went on to outline in detail the CEO's functions which focus on both corporate and operational management, along with functions that intersect with those held by the Chairperson or the Commission. The Commission argued that 'in that sense the CEO's functions are confused and add unnecessary complexity to the CCC'.[60]

The Commission provided further explanation and stated, '[f]or reasons of good governance, clarity and accountability, the [CEO] position should be appointed by the Commission and report directly to the Chairman, as do other senior officers under the CC Act'.[61]

The Commission sought significant changes to the governance framework, recommending:

- the Chairman be subject to the direction of the Commission;

[51] Bar Association of Queensland, Submission No. 28, p 4.
[52] Bar Association of Queensland, Submission No. 28, p 4.
[53] Bar Association of Queensland, Submission No. 28, p 4.
[54] The Honourable Philip Nase, Submission No. 12, p 12.
[55] Accountability Round Table, Submission No. 14, p 5.
[56] Accountability Round Table, Submission No. 14, p 5.
[57] Accountability Round Table, Submission No. 14, p 5.
[58] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p 3.
[59] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p 6.
[60] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), pp 6-7.
[61] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), pp 6-7.

- the Commission still comprise five people with the Chairman and four Commissioners, at least one of whom is eligible for appointment as Chairman, changing the title 'ordinary commissioner' to 'commissioner' and perhaps removing the Deputy Chairman designation;
- the Minister be required to consult the CCC Chairman before nominating a person for appointment as a Commissioner, to identify skills and experience required to meet the Commission's current and future strategic objectives;
- the CEO and senior officers be appointed by, and answerable to, the Commission;
- the CEO not be a Commissioner and not be a statutory appointment (that is the CEO appointed by the Commission);
- sections of the CC Act which confer operational responsibilities on the CEO role be repealed or amended;
- the acting appointment of any person as a Commissioner for more than three months receive bipartisan support.[62]

The Commission provided a schedule outlining the relevant sections of the CC Act for amendment in relation the appointment and responsibilities of the CEO.

The Commission made similar recommendations in their submission to the Legal Affairs and Community Safety Committee (LACSC) inquiry on the Crime and Corruption Amendment Bill 2015. The Bill was passed by the Legislative Assembly in 2016.

3.4 Recent developments

The *Crime and Corruption Amendment Act 2016* (the 2016 amendments) which commenced in May 2016 partially implemented the Commission's recommendation outlined above. The amendment Act removed the CEO as a Commissioner, but retained a five member Commission by adding an additional Ordinary Commissioner. The appointment of the CEO now requires the bipartisan support of the Committee, rather than a power of veto. The amendments also limited temporary appointments of Commissioners to three months, unless there is bipartisan support of the Committee. The Act also made amendments to restore gender neutral language eg. 'chairperson' instead of 'chairman'.

While the 2016 amendments removed the CEO as a Commissioner, the amendment Act did not otherwise change the functions and powers of the CEO, except for enabling the CEO to sub-delegate the Commission's financial accountability functions. The 2016 amendments also did not address a number of concerns raised by the Commission in relation to the governance framework.

Explanatory notes to the Crime and Corruption Amendment Bill acknowledged that a number of issues raised during stakeholder consultation, including corporate governance issues may be considered as part of this Committee's review.[63]

Following the 2016 amendments, the Committee sought the Commission's views in relation to any continuing concerns they had regarding governance issues. The Commission advised as follows:

> *Appointment process & accountability measures for CEO*
>
> - The current provisions in the Act which provide for the CEO to be appointed by Governor-in-Council (s. 229) are problematic because they deny the Commission the usual power enjoyed by a conventional board to appoint and dismiss the CEO. In doing so, the checks on Executive power envisaged by the Act are significantly weakened.
> - The Commission supports the concept of a CEO who has responsibility for the administration of the CCC but the Commission recommends that the Act be amended so that the CEO is

[62] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), pp 6-8.
[63] Crime and Corruption Amendment Bill 2015, explanatory notes, p 3.

appointed by the Commission in the same way as senior officers are appointed under section 245.

…

Accountability measures for Chairman

- Under section 252(3) of the Act the Chairman is not subject to the direction of the Commission in contrast with the position that existed prior to the 2014 amendments.
- As explained in our supplementary submission, the practical effect is that there is no check on the unilateral exercise of power by the Chairman and the potential exists for significant operational and strategic decisions to be taken without an appropriate level of independent scrutiny by the Commissioners, which collectively operate like a board of directors.
- For reasons of governance best practice and accountability, the CCC recommends that the CC Act be amended to reinstate the requirement that the position of Chairman be subject to the Commission.

Appointment process for Commissioners

Prior consultation with Chairman

- To enable the Commission to discharge its statutory obligations, it is important that the Commission be constituted by individuals who collectively possess a balance of appropriate skills. This imperative is recognised by a requirement in the Act for ordinary Commissioners to have the qualifications, experience or standing appropriate to assist the Commission to perform its functions.
- In order to help achieve this balance of appropriate skills the Commission recommends that section 228 of the Act be amended to require the Minister to consult with the Chairman before nominating a person for appointment as a Commissioner to identify:
- the skill set and experience of the current Commissioners; and
- the additional skills the Commission needs to acquire in order to enable the Commission to meet its statutory obligations.

…

The Commission considers that it is highly desirable that all of these governance issues are addressed contemporaneously and as a matter of priority because they go to the foundation of the ability of the CCC to operate efficiently and transparently in accordance with expected standards of good governance and accountability.

The exercise of Commission powers

Prior to the 2014 amendments, the Commission had the power to delegate, by resolution, its powers under the CC Act or any other Act to an appropriately qualified Commission officer (s. 269(1)). The 2014 amendments removed the Commission's express discretion to delegate its powers and replaced it with a prescriptive statutory delegation of powers to the CEO and Chairman.

This step has created some uncertainty about whether:

1. the 'Commission's functions and powers' under the CC Act which are statutorily delegated to the Chairman and CEO under s. 269 can also be exercised by the Commission itself; and
2. the Commission has any ability to delegate its functions and powers to Commission officers generally.

…

To ensure there is no uncertainty about the interpretation of section 269 and for reasons of good governance and accountability, the CCC believes that section 269 should be amended so that the general principle enunciated in section 27A(10) AIA applies. The CCC recommends that section 269 of the CC Act be amended by inserting the following new subsections:

(1A) To remove any doubt, it is declared that the Commission's functions and powers that are delegated to the Chairman or CEO under subsection (1) can:

(i) also be exercised by the Commission itself; and

(ii) be delegated by the Commission to another appropriately qualified Commission officer

(1B) To remove any doubt, it is declared that the Commission's functions under sections 234, 251(1) and (2) and 259 cannot be delegated.'

The Commission also outlined its concerns from a legal perspective if the exercise of its powers were subject to a legal challenge.

The Commission supported the 2016 amendments which made the CEO ineligible for appointment as a Commissioner. However, they have since raised concerns with the Committee in relation to this issue, in particular because these amendments prevent the CEO from being able to act as Chairperson. The Commission advised:

> Since the separation of the role of Chairperson/CEO, it has become apparent that it would be desirable for a suitably qualified CEO to be able to act as Chairperson, given:
>
> - the very close day-to-day working relationship between the Chairperson and CEO which means that it would be operationally convenient for the CEO to act as Chairperson from time to time;
> - the fact that ordinary commissioners, including the Deputy Chairperson, are appointed on a part-time basis and have other commitments which may well prevent acting in the role for more than a few days.

3.5 Comment

The Committee notes the significant changes to the upper governance framework of the Commission in recent years. The Committee considers that these arrangements have not been in place long enough, and particularly since relevant officers were permanently appointed to these roles, to enable a proper evaluation of these arrangements at this time. Therefore, the Committee will consider such issues during its periodic review of the structure of the Commission.[64]

Recommendation 1

The Committee recommends that the governance framework of the Commission be considered by the Committee during its periodic review of the structure of the Commission within the next 12 months.

[64] Under the *Crime and Corruption Act 2001*, s 292(g).

4. Major Crime Function

4.1 Jurisdiction – Major Crime

One of the primary objectives of the Commission is to combat and reduce the incidence of major crime. The Commission's major crime function is set out in Chapter 2, Part 2 of the CC Act. Under the CC Act, major crime is defined as:

- criminal activity that involves an indictable offence punishable on conviction by a term of imprisonment not less than 14 years; or
- criminal paedophilia; or
- organised crime; or
- terrorism; or
- something that is: (i) preparatory to the commission of criminal paedophilia, organised crime or terrorism; or (ii) undertaken to avoid detection of, or prosecution for, criminal paedophilia, organised crime or terrorism.[65]

4.2 Performing the crime function

The Commission performs its crime function by:

- investigating major crime referred by the CRC;
- gathering evidence for the prosecution of persons for offences;
- gathering evidence for the recovery of proceeds of major crime; and
- gathering evidence for the recovery of other property liable to forfeiture, or a person's unexplained wealth; and
- liaising with, providing information to, and receiving information from, other law enforcement agencies and prosecuting authorities, including agencies and authorities outside the State or Australia, about major crime.[66]

4.3 Referrals from the Crime Reference Committee (CRC)

To enable the Commission to effectively investigate major crime and criminal organisations and their participants, the Commission is granted an array of investigative powers not ordinarily available to the police service.[67]

An important check on the Commission's use of these powers is the system of referrals from the CRC.[68]

The CRC is a statutory committee established under the CC Act and comprises six members, namely: the senior executive officer (crime) (Chair of the CRC); the Chairperson of the Commission; the Commissioner of Police; the principal commissioner of the Family and Child Commission; and two community representatives.[69]

Pursuant to sections 25 and 26 of the CC Act, the Commission may only investigate major crime referred to it by the CRC; the Commission cannot initiate major crime investigations of its own accord.

The CRC may make two different types of referral:

[65] *Crime and Corruption Act 2001*, schedule 2.
[66] *Crime and Corruption Act 2001*, s 26.
[67] *Crime and Corruption Act 2001*, s 5(2).
[68] *Crime and Corruption Act 2001*, Chapter 6, Part 2.
[69] *Crime and Corruption Act 2001*, ss 274, 278.

- a specific referral, which relates to a particular incident of major crime; or
- a general referral, which relate to one or more categories or sub-categories of major crime.[70]

In practice, a specific referral is only made when the proposed investigation does not fall within an existing general referral.

The making of each type of referral is subject to different conditions.

The CRC may only make a general referral if it is satisfied that it is in the public interest to refer the major crime to the Commission for investigation.[71] In deciding whether it is in the public interest to refer major crime to the Commission for investigation, the CRC *may* have regard to the likely effectiveness of investigation in the major crime using the powers ordinarily available to the police service.[72]

In contrast, in making a specific referral the CRC *must* be satisfied that:

- the police service has carried out an investigation into the particular incident of major crime that has not been effective; and
- further investigation into the particular incident of major crime is unlikely to be effective using powers ordinarily available to police officers; and
- it is in the public interest to refer the particular incident of major crime to the commission for investigation.[73]

As such, the conditions to which the making of a specific referral are subject are more onerous than those governing the making of general referrals. Section 28(3) outlines in non-exclusive terms the matters to which the CRC may have regard when determining whether it is in the public interest to make a specific or general referral.

4.3.1 Submissions to this review

The Commission submitted that the distinction between 'major crime' and 'particular incidents of major crime' has 'created a framework that is difficult to apply in practice'.[74] The Commission made the following points in support of its submission:

- Like any law enforcement body, in practice the CCC investigates crime by commencing an investigation. An investigation – by its very nature – will focus on particularised "incidents" as well as certain suspects, places, activities, offences, facts and timeframes. This reality does not sit on all fours with the distinction between "major crime" and a "particular incident". The artificiality of the distinction is highlighted when one considers investigative scenarios that involve a series of incidents such as, for example, multiple armed robberies or a series of homicides. How is a particular incident distinguishable from a series of such incidents? And how is a series of incidents any different from ongoing criminal activity?
- The Act defines "major crime" (such as may found a general referral), but does not define "particular incident of major crime" (such as may found a specific referral) or give any guidance as to how to differentiate between the two terms.
- On a logical interpretation, "major crime" would include major crime that is constituted by a "particular incident".

[70] *Crime and Corruption Act 2001*, ss 27(1)-(2), 27(4); Crime and Misconduct and Summary Offences Bill 2009, explanatory notes, p 9.
[71] *Crime and Corruption Act 2001*, s 28(2).
[72] *Crime and Corruption Act 2001*, s 28(4).
[73] *Crime and Corruption Act 2001*, s 28(1).
[74] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p 10.

- The examples of "major crime" that are listed beneath paragraph (b) of s. 27(1) are not helpful in clarifying how that term differs from a "particular incident". Most of the examples listed (e.g. “terrorism" or "criminal paedophilia") could really only be investigated in the context of an incident or "one-off" act.[75]

The Commission further submits that the conditions which must be met before the CRC can make a specific referral ‘do not enable a timely and effective response to homicide investigations’.[76] The Commission notes that specific referrals are used ‘almost exclusively as a means of referring homicide investigations to the CCC, so as to enable coercive hearings to be accessed in appropriate matters’. In each calendar year, the Commission investigates approximately nine to twelve homicides (representing approximately 25 per cent of all homicides committed in Queensland each year) under a specific referral from the CRC. The Commission notes, however, that:

> …by the time a homicide investigation is capable of meeting the statutory criteria and a specific referral is applied for and made, many months may have elapsed. This means that the CCC’s intervention (primarily through its coercive hearings power) may not be as effective as it otherwise could have been, had such assistance been given much earlier. Since homicide is at the very top spectrum of criminal responsibility, one could argue that CCC assistance should be as accessible as possible.[77]

In essence, the Commission would like to avail itself of its major crime investigative powers at an earlier point in time than the system of specific referrals presently allows. In that regard, the Commission notes that under the general referral scheme ‘it is not uncommon for the CCC to become involved in certain kinds of investigations at a quite early stage (for example, in relation to stolen firearms, patterns of armed robberies, the activities of OMCGs, or homicides with a nexus to organised crime or against a vulnerable victim)’.[78] The Commission states that its involvement in such investigations at the outset ‘can maximise the effectiveness of any coercive hearings that are held by, for example, enabling witnesses to be questioned about still-recent events, and expediting outcomes in the public interest (such as quickly recovering stolen firearms)’.

The Commission therefore recommends that the CC Act be amended to abolish the distinction between specific and general referrals and that these arrangements be replaced with a system of ‘referrals’ only.[79] The Commission submits that under the recommended approach, the CRC would retain its current role as ‘a check and balance in overseeing the referral regime’.[80] Instead of requiring that the police service has exhausted its investigation into a particular incident of major crime, as presently required, the proposed system of referrals would be subject only to the requirement that the referral is in the public interest, with each referral to be reviewed every five years, as is presently the case for general referrals.[81] The list of factors in section 29 would continue to apply, namely that the CRC may direct the Commission to end an investigation because:

- it may be more appropriate or effective for another entity to undertake the investigation;
- investigation by the Commission is not a justifiable use of resources; or
- investigation by the Commission is not in the public interest.[82]

[75] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p 10.
[76] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p 10.
[77] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p 10.
[78] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p 10.
[79] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p. 12.
[80] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p. 11.
[81] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p 11; *Crime and Corruption Act 2001*, s 30A(1).
[82] *Crime and Corruption Act 2001*, s 29(2).

4.3.2 Background to current referral process

The Committee notes that the distinction between specific and general referrals was introduced by the *Crime and Misconduct and Summary Offences Act 2009*, with the intention of remedying the impact of the decision of the Supreme Court of Queensland in *Scott v Witness C*.[83] In that case, Jones J held that a referral from the former Queensland Crime Commission Management Committee (QCCMC) to the Queensland Crime Commission (QCC) granting the latter a general power of investigation into major crime relating to serious drug offences, without identifying any particular activity requiring investigation, was invalid.

Until the *Scott* decision, the CRC had continued the practice adopted by the former QCCMC of granting general, broad-based 'umbrella' referrals as well as specific referrals. A specific referral was issued for an investigation in respect of individual cases of major criminal activity that did not fall under an existing umbrella reference. Approximately 80 per cent of major crime investigations undertaken by the Commission and QCC were conducted under umbrella references. The referral that was held to be invalid in *Scott* was an umbrella referral.

In 2009, the 7th PCMC expressed concerns in its three-yearly report about 'the implications of this decision for past, present and future CMC major crime investigations' and recommended that the Government 'take steps to clarify the validity of investigations undertaken by the Crime and Misconduct Commission under umbrella referrals'.[84] The then Government responded to this recommendation by introducing the Crime and Misconduct and Summary Offences Bill 2009.

During the second reading of the Bill, the then Attorney-General and Minister for Industrial Relations, the Honourable Cameron Dick MP, commented:

> The Scott decision is considered to limit the CMC's major crime function to investigating specific matters referred to it by the Crime Reference Committee. This is not how parliament intended the crime referral arrangement to operate under either the repealed *Crime Commission Act 1997* or the current *Crime and Misconduct Act 2001*.
>
> …
>
> The bill responds to the Scott decision by validating past, present and future use of general 'umbrella' referrals for major crime investigations. In doing so, the bill gives effect to parliament's original intent that the crime function of the former QCC and the CMC should be subject to scrutiny by an independent reference committee which could use both specific and general referral mechanisms.[85]

In other words, the *Crime and Misconduct and Summary Offences Act 2009* affirmed the practice adopted by the QCCMC and continued under the CRC of issuing specific and general (umbrella) referrals. To ensure adequate and proper oversight by the CRC of general referrals, the *Crime and Misconduct and Summary Offences Act 2009* amended section 277 of the *Crime and Misconduct Act 2001* to require the Commission's Assistant Commissioner (Crime) to notify the CRC as soon as practicable after the Commission commences an investigation under an existing general referral. This notification then triggers section 29A, which requires the CRC as soon as practical after receiving notification under section 277 to consider whether to give the Commission a direction under section 29 in relation to that investigation.[86]

The Committee notes that the conditions governing the issue of specific referrals found in section 28(1) correspond to those which governed the making of a referral at the request of the Commissioner of Police under section 28(2) prior to the commencement of the amendments introduced by *Crime and Misconduct and Summary Offences Act 2009*. The Explanatory Notes to the Bill indicate that this was

[83] [2009] QSC 35; Crime and Misconduct and Summary Offences Amendment Bill 2009, explanatory notes, p 4.
[84] Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Committee*, April 2009, Recommendation 1, p 8.
[85] Queensland Parliament, Record of Proceedings, 23 April 2009, p 176.
[86] Crime and Misconduct and Summary Offences Amendment Bill 2009, explanatory notes, p 12.

quite deliberate and 'reflects current practice that the Police Commissioner has only ever requested specific referrals'.[87] Thus, while a general referral may be initiated by the CRC or requested by the Assistant Commissioner (Crime), a specific referral may also be requested by the Commissioner of Police.

This suggests that Parliament intended to maintain the additional condition upon the making of a specific reference – namely, that the police service has carried out an investigation into the particular incident of major crime that has not been effective. The Committee notes that this condition was a feature of section 46(5) of the *Crime Commission Act 1997*, from which section 28(1) is ultimately derived. This reaffirms the Committee's view that Parliament intended that where a specific referral is requested by the Commissioner of Police, the QPS must have undertaken an investigation into the subject matter of that referral beforehand, which has not been effective.

4.3.3 Comment

If implemented, the Commission's proposal would abolish this requirement. Given the clear expression of legislative intent that this requirement should be maintained, the Committee considers that it would be imprudent for it to recommend that this condition should now be abolished without consideration being given to the potential implications of any such amendment.

The Committee therefore recommends that the Government give consideration to the potential implications of the Commission's proposal to subsume the regime of specific referrals within the system of general referrals, particularly the impact of removing the condition in section 28(1)(a) that the police service has carried out an investigation into the particular incident of major crime that has not been effective.

Recommendation 2

The Committee recommends that the government give consideration to the potential implications of the Commission's proposal to replace the system of specific and general referrals with a system of 'referrals only', in particular the consequences of removing the condition expressed in section 28(1)(a) of the *Crime and Corruption Act 2001*.

4.4 Chair of Crime Reference Committee

The Commission also recommended that the CC Act be amended to provide that the Chairperson of the Commission is the Chair of the CRC, but with the ability to delegate this role to the Commission's Senior Executive Officer (Crime).[88]

4.4.1 Comment

The Committee is satisfied that it is appropriate that the Chairperson of the Commission, as the most senior Commission officer on the CRC, should chair that committee. It is appropriate that the Chairperson may delegate this role, but the Committee believes this should be the exception rather than the rule.

Recommendation 3

That the *Crime and Corruption Act 2001* be amended to provide that the Chairperson of the Commission be the Chair of the CRC, but may delegate this role to the Senior Executive Officer (Crime).

[87] 'Subsection 28(1) restates the threshold considerations for a specific referral currently set out in section 28(2) of the CMC Act': Crime and Misconduct and Summary Offences Amendment Bill 2009, explanatory notes, p 9.
[88] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p 11.

4.5 Criminal paedophilia

The Commission's Cerberus unit targets high-level child exploitation material offences, including those involving sophisticated encryption or methodology and matters where children are at risk of contact offending.[89] The Cerberus unit works with a range of other agencies including the Queensland Police Service Taskforce Argos, the Office of the Director of Public Prosecutions and both interstate and international law enforcement agencies.

4.5.1 Reviewing child exploitation material

Currently every image in alleged child exploitation material (CEM) is viewed and categorised according to the Australian National Victim Image Library (ANVIL) scale (also known as the "Oliver scale"). While there is no legislative requirement, the accepted practice in Queensland is that CEM is categorised according to the ANVIL scale and is used by the courts in sentencing.[90]

The Commission argued that this process is time consuming and reduces the time spent on victim identification and may cause psychological injury to the investigating or forensic officers.

The Commission noted that recent amendments to the New South Wales *Criminal Procedure Act 1986* allow a court to find that the proportion of the type of CEM found in a random sample is the same as in the material from which the sample was taken.

The Commission recommended that alternative strategies to ANVIL categorisation be considered in order to reduce the workload and risks to psychological health and to allow more appropriate prioritisation of policing work.[91]

4.5.2 Recent developments

The Commission made the same recommendation to the Queensland Organised Crime Commission of Inquiry (COI). The COI recommended that the Sentencing Advisory Council, once established, review the use of the 'Oliver scale' classification system, other classification options and the merits of using random sampling in the sentencing process.[92] The government has accepted the COI recommendation.[93] The Sentencing Advisory Council was established through the *Penalties and Sentences (Queensland Sentencing Advisory Council) Amendment Act 2016*.

4.5.3 Comment

The Committee supports the important work of the Commission in the Cerberus unit. The Committee awaits the outcome of the review of the classification system by the Sentencing Advisory Council.

[89] Crime and Corruption Commission, Submission No. 14, p 30.
[90] Crime and Corruption Commission, Submission No. 14, p 39.
[91] Crime and Corruption Commission, Submission No. 14, p 40.
[92] Byrne QC, M.J., *Queensland Organised Crime Commission of Inquiry Report*, October 2015, Recommendation 4.11.
[93] Queensland Government, *Queensland Organised Crime Commission of Inquiry's Report: Government Response*, March 2016, p 10.

5. Investigative powers and hearings

In October 2013, the Commission's powers were increased in the context of outlaw motor cycle gang (OMCG) activity in response to an incident on the Gold Coast. The Commission summarised the increase in powers as including:

- Providing for the CCC to hold private hearings to gather intelligence regarding criminal activity by criminal organisations or associated misconduct by public officials.
- Providing for the CCC to have an immediate response function relating to a criminal organisation engaging in an incident that threatened public safety or an anticipated incident that may threaten public safety through the issue of notices requiring witnesses to attend immediately at a private hearing.
- Removing the ability of criminal organisation participants to claim a reasonable excuse to refuse to be sworn or to answer a question on the basis of a fear of retribution to themselves or others.
- Increasing penalties for contempt at a hearing by refusing to answer a question. For a first offence the witness must be imprisoned for the term decided by the courts. However, for a second offence witnesses must serve a minimum two years and six months' imprisonment and, for a third or subsequent offence, a minimum of five years' imprisonment.
- Under this legislation persons served with a notice to attend a criminal intelligence hearing are not eligible to seek financial assistance from the Attorney-General for legal representation.[94]

Further amendments in November 2013 to 'enhance the CMC's ability to effectively deal with criminal organisations' included:

- Providing that a "participant" in a criminal organisation includes a person who was a participant at any time in the previous two years.
- Clarifying an existing legislative provision that the CMC may continue to investigate the affairs of a person, including by calling the person to a hearing, when that person has been charged with a criminal offence.
- Increasing statutory penalties for non-compliance by witnesses at hearings with requirements to attend, take an oath, produce documents or give answers.
- Maintaining confidentiality of material filed in the Supreme Court in contempt and other hearings-related proceedings.[95]

5.1 Specific intelligence operations

Under section 55A of the CC Act, the Crime Reference Committee (CRC) may authorise the Commission to conduct specific intelligence operations, including holding hearings.[96] The authorisation for a specific intelligence operation must identify the criminal organisation or participant to be investigated.[97]

The Commission submitted that the current definition of a 'criminal organisation' is limited and 'cannot be applied with ease to any criminal organisation other than OMCGs.'[98] The Commission outlined the three ways to identify a criminal organisation: an organisation being a declared criminal organisation under a regulation, such as OMCGs; an organisation being declared a criminal organisation under the *Criminal Organisations Act 2009*; and otherwise meeting the criteria under the definition in Schedule 2 of the CC Act. The Commission advise that it is the third category that poses problems, as:

[94] Crime and Corruption Commission, Submission No. 14, p 19.
[95] Crime and Corruption Commission, Submission No. 14, p 20.
[96] See also *Crime and Corruption Act 2001*, ss 55B and 55C.
[97] *Crime and Corruption Act 2001*, s 55A(3)(a).
[98] Crime and Corruption Commission, Submission No. 14, p 38.

- The evolution of organised crime into dynamic groups with flat hierarchies, makes identification of an "organisation" rather than a "network" problematical.
- Tying the intelligence function to criminal organisations so defined means that intelligence operations cannot be authorised in respect of "themes" or topics of intelligence value to the CCC or law enforcement more generally.[99]

The Commission submitted:

> Intelligence is of most value when it can be gathered as issues emerge. In particular, coercive intelligence hearings can be of great benefit if employed for the timely examination of "themes" or "trends" rather than the activities of particular individuals. In such circumstances, the need to articulate an identified criminal organisation can impede the gathering of the best intelligence.
>
> The CCC submits that intelligence collection capability should be broad enough to allow intelligence to be collected on:
>
> - A specified network/type of organised crime (e.g. OMCGs)
> - A commodity-based approach to intelligence collection (e.g. a priority drug market)
> - An offence-based approach (e.g. intelligence collection into a high-risk type of fraud activity)
> - An industry-based approach (e.g. organised crime infiltration of the transport sector).
>
> Constrained by the requirement for an identified "criminal organisation", intelligence hearings cannot be held to explore these emerging threats.
>
> The CCC is of the view that a preferable approach would be the ability to identify and examine organised crime threats, markets and issues as they emerge. As mentioned previously, the ACC's standing Determinations are an example of a mechanism which would permit an "area" or "theme" of organised criminal activity to be examined in a timely way. Importantly, this reform would more effectively allow the CCC to fill current intelligence gaps in criminal organisations active in Queensland, other than OMCGs.

Therefore, the Commission recommended:

> That a review of the definition of criminal organisation be undertaken to ensure the CCC is not unduly constrained in the exercise of its intelligence functions and can respond more effectively to address Queensland law enforcement's intelligence priorities in respect of organised crime.

5.1.1 Recent developments

The Commission made the same recommendation to other inquiries and reviews. The Queensland Organised Crime Commission of Inquiry (COI) recommended that:

> The Crime and Corruption Commission extend the focus of its intelligence and research functions beyond outlaw motorcycle gangs to other areas of organised crime that pose a risk to Queensland.[100]

The government has accepted this recommendation.[101]

The Taskforce on Organised Crime Legislation report also makes recommendations regarding amending the definitions of 'criminal organisation' and 'participant in a criminal organisation' which are relevant to the Commission's recommendation to review the definition.[102]

[99] Crime and Corruption Commission, Submission No. 14, p 38.
[100] Byrne QC, M.J., *Queensland Organised Crime Commission of Inquiry Report*, October 2015, Recommendation 2.1.
[101] Queensland Government, *Queensland Organised Crime Commission of Inquiry's Report: Government Response*, March 2016, p 3.
[102] Queensland Government, Department of Justice and Attorney-General, *Taskforce on Organised Crime Legislation*, Recommendations 6-11 and 42.

In May 2016, the Commission advised that while they were consulted about, and supported, these recommendations, they do not fully address all of the issues raised with the Committee in their submission to this review. The Commission advised:

> The CCC would still like to see amendments made to the CC Act that enable the CCC to adopt the following approaches to intelligence collection:
>
> - a commodity-based approach (e.g. a priority drug market);
> - an offence-based approach (e.g. intelligence collection into a high-risk type of fraud activity); and
> - An industry-based approach (e.g. organised crime infiltration of the transport sector).

5.1.2 Comment

The Committee notes the concerns raised by the Commission. The Committee will await the implementation of the recommendations from these other inquiries and reviews.

5.2 Contempt provisions

As mentioned earlier, in 2013 amendments were made to the CC Act to increase the penalties for contempt at a Commission hearing.[103] The minimum punishment for a first offence is imprisonment for a term decided by the courts. The minimum punishment for a second offence is two years and six months imprisonment and for a third or subsequent offence five years imprisonment.[104]

5.2.1 Submissions to this review

Legal Aid Queensland (LAQ) expressed concern about the mandatory penalties for repeated contempts under section 199 of the CC Act. LAQ submitted:

> We are concerned that these mandatory penalties are unreasonably harsh, especially when compared with the penalty for contempt provided for under the *Independent Commission Against Corruption Act 1988* (the ICAC Act). Under section 99 of the ICAC Act, the Supreme Court may punish the person (if found guilty) as if the person had committed the contempt in proceedings in the Supreme Court. There is no provision in the ICAC Act for mandatory minimum penalties or increased mandatory minimum penalties for repeat offences.
>
> …
>
> We would suggest that consideration be given to amending the contempt provisions to bring them in line with the penalties for contempt provided for under the ICAC Act.

Further, LAQ noted:

> The Act gives the CCC extraordinary powers to compel evidence from witnesses with the threat of imprisonment for a refusal to answer a question. These powers override longstanding civil liberties including the right to silence and privilege against self-incrimination. … The investigative hearings are invariably conducted in secret with witnesses and legal representatives prohibited from publication of what has occurred during a hearing. These circumstances mean that the officers of the CCC wield great powers in choosing whether to compel a witnesses attendance at a hearing, whether to require a question to be answered at a hearing and any subsequent hearing, whether to charge a witness with a simple offence of failure to answer a question or to initiate Supreme Court proceedings for contempt, including repeat contempts.
>
> Currently, the only effective mechanism restricting the use of such powers to appropriate cases is the pre-condition of a reference from the Crime Reference Committee. Whilst the Committee is required to consider whether it is in the public interest to refer a matter for investigation (s 28 of the Act), it is not specifically required to take into account whether the nature of the matter to be investigated is such

[103] *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013*, s 30.
[104] *Crime and Corruption Act 2001*, s 199(8B).

> that it is appropriate that witnesses ordinary rights and privileges should be overridden. Such consideration should be legislated as a relevant consideration.
>
> Once a matter has been referred, there is no effective oversight of decisions by officers of the CCC whether to compel a witnesses attendance at a hearing, whether to require a question to be answered at a hearing and any subsequent hearing, whether to charge a witness with a simple offence of failure to answer a question or to initiate Supreme Court proceedings for contempt, including repeat contempts. These decisions should be the subject of oversight, whether it is by greater oversight by the Crime Reference Committee or by way of oversight by the Public Interest Monitor.
>
> Finally, the CCC should be required to report in a detailed way to the Parliamentary Crime and Corruption Committee as to the use of its investigative powers, including the circumstances said to justify in each case the institution of Supreme Court contempt proceedings.[105]

5.2.2 Recent developments

In December 2015, the amendments relating to mandatory penalties for repeated contempts was judicially considered for the first time.[106] The Court of Appeal[107] overturned a mandatory sentence imposed by the Supreme Court in March 2015, in relation to a witness who had been sentenced to two and a half years imprisonment for refusing to answer the same question that led to the first contempt. The Commission has indicated that they will consider the best way to deal with such matters in the future, in terms of asking other questions to generate a second contempt.[108]

The Commission has indicated that in the past penalties imposed have been too low 'to reinforce the message … that it is a serious thing to refuse to answer our questions.'[109]

The Taskforce on Organised Crime Legislation (the Taskforce), to which the Commission made submissions, considered the 2013 amendments to the contempt provisions in some detail.[110] In particular the Taskforce was concerned about the scope of the contempt provisions:

> It should be noted, too, that the Taskforce (other than the Commissioned Officers' Union) was also concerned by the broad scope of this particular amendment. While couched within an amending Act clearly targeted at OMCGs, and unlike the new *special intelligence operations*, the new mandatory sentencing regime *is of general application.*
>
> That is, it applies to contempt of the Commission (in the manner outlined in section 199(8A)), irrespective whether the hearing relates to a criminal organisation or its participants; and, irrespective whether the person is identified as having ties with OMCGs.
>
> It is a regime which applies equally to those who are peripheral to organised crime and will apply to corruption and other investigations where there is not, necessarily, any perceived need to break the 'code of silence' seen to exist within OMCGs.
>
> That concern was addressed by the Commissioned Officers' Union and QPS (who support the retention of the mandatory minimum penalties) with the concession that, if considered necessary by the Government, the regime might be restricted to participants in criminal organisations only.[111]

[105] Legal Aid Queensland, Submission No. 21, p 2-3.
[106] *Witness JA v Scott* [2015] QCA 285.
[107] *Witness JA v Scott* [2015] QCA 285.
[108] Public meeting of the Parliamentary Crime and Corruption Committee, 14 March 2016, transcript, p 8.
[109] Public meeting of the Parliamentary Crime and Corruption Committee, 14 March 2016, transcript, p 8.
[110] See Queensland Government, Department of Justice and Attorney-General, *Taskforce on Organised Crime Legislation*, Chapter 20.
[111] Queensland Government, Department of Justice and Attorney-General, *Taskforce on Organised Crime Legislation*, Chapter 20, p 337.

The Taskforce recommended repeal of 'the fixed mandatory minimum sentencing regime in section 199(8A-B)', but also recommended 'that consideration be given to inserting an escalating, tiered *maximum penalty scheme*'.[112]

5.2.3 Comment

The Committee considers it is important to have an appropriate punishment regime in place in order to encourage compliance with the CC Act. The Committee awaits the government response to the Taskforce report.

5.3 Impact of High Court decisions

5.3.1 Legislative clarification for questions posed in *Lee v R*

The Commission raised concerns in relation to the implications of a High Court decision concerning coercive hearings of the New South Wales Crime Commission. The Commission advised:

> In *Lee v R* [2014] HCA20, the High Court considered a matter in which the transcripts of the evidence of two witnesses given in coercive hearings of the NSW Crime Commission were unlawfully published to a prosecutor in advance of those persons' joint trial, contrary to the terms of a non-publication order made by the Crime Commission. The unanimous judgement of the court was that what had occurred affected the criminal trial in a fundamental respect, because it altered the position of the prosecution *vis-a-vis* the accused.
>
> For the CCC, many of the safeguards by which the party exercising the coercive power can ensure the fairness of a subsequent trial already exist in the CC Act as it applies to hearings, such as non-publication orders (s. 180) and directions as to who may be present at a hearing (s. 179). In other cases, the CCC has been required to modify its existing practices to ensure that evidence given by a witness at a CCC hearing (of any kind) must be strictly quarantined and not provided to any prosecutor with carriage of or involvement in any prosecution of that witness.[113]

The Commission has been in discussions with officers from the Department of Justice and Attorney-General (DJAG) in relation to any legislative amendments needed. The Commission recommended that the discussions be progressed expeditiously.[114]

In May 2016, the Commission updated the Committee and advised that while some consultation has occurred with DJAG representatives, there have been no legislative developments.

The Commission noted that other States have already legislated to deal with this issue. The Commission advised:

> The CCC requests that particular attention be paid to the following proposals:
>
> - Amend s 197 of the CC Act to provide that derivative evidence is admissible. A possible amendment would be to include the equivalent of s 39(4) *Victorian Major Crime (Investigative Powers) Act 2004*.
> - Amend s 179 of the CC Act, (i.e. the presiding officer conducting a closed hearing may give a direction about who may be present at the hearing) to make it clear that when the witness is facing charges or may be charged that the arresting officer and or investigator are entitled to be present.
> - That consideration be given, in light of Lee, to the ongoing public utility of public investigative hearings conducted under s. 177 of the CC Act.

[112] Queensland Government, Department of Justice and Attorney-General, *Taskforce on Organised Crime Legislation*, Chapter 20, Recommendations 44 and 45.
[113] Crime and Corruption Commission, Submission No. 14, p 43.
[114] Crime and Corruption Commission, Submission No. 14, Recommendation 8, p 44.

5.3.2 Recent developments

In May 2016, the Commission advised:

> Regarding the recommendation for amendment to s 197 of the CC Act that derivative evidence is admissible, this question has recently arisen in a Supreme Court matter *X v Callanan* [2016] QSC 42. The Supreme Court on 8 March 2016 did not accept the contention that the absence of a derivative use immunity in s 197 was repugnant to Chapter III of the Australian Constitution. The applicant has appealed to the Court of Appeal but the matter has not yet been listed for hearing.

5.3.3 Comment

The Committee believes it is important for the discussions to continue with stakeholders in order to determine an appropriate resolution. The Committee notes that matters pending in the Court may have an impact on these discussions.

Recommendation 4

The Committee recommends that the Commission review court judgments that could have a bearing on the operation of the Commission and the Queensland Police Service and that relevant departments, including DJAG, should ensure that any amendments considered necessary are dealt with expeditiously.

5.3.4 Referral of briefs to the Office of the Director of Public Prosecutions

The Office of the Director of Public Prosecutions (ODPP) raised concerns in relation to the practical application of the operation of section 49. Mr Byrne QC advised that the ODPP had raised similar concerns with the PCMC in past reviews.[115]

Section 49 of the CC Act provides that if the Commission investigates a corruption matter it may report on the investigation to the ODPP for the purposes of any prosecution proceedings.

Mr Byrne noted that in 2014-15 the ODPP received two such briefs and eleven in 2013-14. Such briefs may sit for some time in the ODPP before advice is provided back to the Commission.

Aside from the impost on the office and the delays caused, Mr Byrne considered that recent High Court decisions provided further reasons why the power of referral to the ODPP is undesirable. Mr Byrne stated:

> The trilogy of decisions, namely *X7 v Australian Crime Commission* (2013) 248 CLR 93, *Lee v New South Wales Crime Commission* (2013) 248 CLR 196 and *Lee v The Queen* (2014) 88 ALJR 656, apply to investigations during which a defendant (whether charged at the time or later) is required to answer questions or otherwise provide evidence in the investigation. For present purposes, examples of that compulsion can be found in notices issued under section 74 of the Act and in the course of hearings conducted under Chapter 4 of the Act where the witness declines to answer questions and is directed to do so.
>
> The decisions mean, from a practical perspective, that where a prosecution is commenced against a witness who was earlier compelled to provide evidence and the prosecution relates to the same subject matter about which the compelled evidence was obtained, the prosecution cannot proceed where there is to be any reliance on the compulsorily obtained evidence. Further and importantly for the purposes of this submission, it is very likely that the prosecution of any such person will not be permitted to proceed where any witness and/or any member of the prosecution team has been exposed to the compulsorily obtained evidence, even though that evidence is not to be relied upon in the prosecution.
>
> The effect of these decisions on the manner in which briefs referred under section 49 of the Act are considered by this Office is considerable.

[115] Office of the Director of Public Prosecutions, Submission No. 24, p 1.

> The Commission must, pursuant to section 49(4) of the Act, provide all relevant information that, *inter alia*, supports a charge and supports a defence. Practically, that means that the compulsorily obtained information must be provided to this Office. That in turn means that the senior staff member who provides the initial advice has been exposed to the material and cannot prosecute the matter, should that be the result of the advice provided. The creation of "Chinese walls" around the prosecution results in a double handling of a brief which is usually complex and lengthy and is a further impost on the finite budget resources of this Office.

Therefore, the ODPP submitted that section 49 be amended to remove the availability of this procedure.[116]

In May 2016, the Commission advised the Committee that they saw no reason why such an amendment could not be made, based on Mr Byrne's submission.

5.3.5 Comment

The Committee considers that for the reasons articulated by the ODPP, removing the availability of this procedure is worthy of consideration.

Recommendation 5

The Committee recommends that the government give consideration to amending section 49 of the CC Act to remove the power for the Commission to refer corruption investigation briefs to the ODPP for the purposes of considering prosecution proceedings.

5.4 Review of Chapters 3 and 4 of the CC Act

In the two previous reviews the PCMC made recommendations in relation to reviewing chapters 3 and 4 of the Act in order to develop uniform provisions with general application to the Commissions functions where appropriate.[117] Such a review has not been completed.

The Commission raised this issue again in the current review. The Commission advised as follows:

> Chapters 3 and 4 of the CC Act contain separate provisions for compulsory powers, hearings and privilege claims relating to crime, witness protection, corruption and confiscation investigations.
>
> For example, different provisions apply in relation to:
>
> - notices to Produce and Notices to Discover: ss. 74, 74A, 75
> - procedures on claim of privilege for documents produced: Division 3, Subdivision 1, 1A and 2
> - general power to seize evidence: ss. 110, 110A and 111
> - refusal to answer questions at a hearing: ss. 190 and 192
> - deciding claims of privilege at a hearing: Division 4 Subdivision 1, 1A and 2
> - legal costs of appeal to court on privilege claim at hearing: ss. 205, 196(7).
>
> The differences in most cases are not able to be justified and have the potential to cause confusion for CCC officers working across the various functions in the CCC and third parties, such as legal representatives of witnesses who advise or appear in regards to matters across the CCC's functional areas.
>
> A detailed submission on rationalising Chapter 3 and 4 provisions was provided to the Attorney-General on 23 July 2010 and a copy was attached to the CCC's 2011 submission. The 8th PCMC recommended "the Government gives a high priority to completing the review of Chapters 3 and 4 of the *Crime and Misconduct Act 2001* as previously recommended by the CMC and the previous PCMC and supported

[116] Office of the Director of Public Prosecutions, Submission No. 24, p 2-3.

[117] Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Commission*, April 2009, Recommendation 17; Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, Recommendation 29.

by the Government in 2009 – in order to develop uniform provisions with generic application to CMC functions where appropriate."

The then government acknowledged that there was some ambiguity in Chapters 3 and 4. They were of the view that a review should also involve a review of the provisions in the CM Act that set out whether a privilege is abrogated or unaffected (as discussed below).

The CCC requests that the Committee urge government as a priority to re-enliven this important work on reviewing Chapters 3 and 4.

The Commission goes on to discuss issues regarding the availability of privileges:

Intrinsically linked to the above issue is the question of which privileges are available in response to the exercise of various coercive powers, which ones have been abrogated and what, if any, use of immunity applies. Again, there seems little justification for many differences, such as:

- the different definition of privilege for crime investigations, intelligence or witness protection functions compared to corruption investigations and confiscation related investigations
- reasonable excuse being claimable in crime hearings for answers but not available in corruption hearings
- in some cases a privilege is expressly abrogated such as in s. 192(2) for the privilege against self-incrimination for answers in corruption investigation hearings, while in others it requires a reading of exclusionary provisions together with the definition of privilege, which has been described as "obscure" and "confusing", (for example, see s. 190(2) for the abrogation of a range of privileges other than legal professional privilege).

There is also inconsistency and confusion about the terms "reasonable excuse" and "privilege", which in some sections are treated as mutually exclusive, such as ss. 74(5) and 74(7). In other cases, privilege appears to be treated as a ground for reasonable excuse, such s. 185(2), which allows the claim of legal professional privilege as a reasonable excuse in certain cases.

The Commission notes the strong views expressed by the PCMC in the last review in relation to specific privileges, where the PCMC noted that these issues have 'dragged on for a number of years without any firm direction. As subsequent reviews have commenced, the scope of matters to be considered has grown; however no substantive results have been achieved.'[118]

5.4.1 Comment

The Committee agrees that it is unsatisfactory that such matters have still not been resolved. The Committee supports the Commission's recommendation.

Recommendation 6

The Committee recommends that the government review of Chapters 3 and 4 of the CC Act to: develop uniform provisions with generic application to Commission functions where appropriate; and clarify what specific privileges are abrogated or unaffected by the provisions of the CC Act.

5.5 Privilege against self-incrimination in disciplinary proceedings

The Commission has long-sought amendments to the *Police Service Administration Act 1990*, the *Crime and Misconduct Act 2001* and the *Queensland Civil and Administrative Tribunal Act 2009*, to abolish the privilege against self-incrimination (also known as incrimination privilege) in disciplinary investigations or disciplinary proceedings, including disciplinary proceedings brought in the original jurisdiction of QCAT. The Commission has again recommended to this Committee that incrimination

[118] Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, p 111.

privilege be abrogated in these circumstances and that the use immunity provided in section 197 of the Act should be specified to not extend to disciplinary proceedings in QCAT.[119]

The Commission notes that the abrogation of self-incrimination privilege has been the subject of extensive consideration, including by the Queensland Law Reform Commission.[120] In 2011, the Independent Expert Panel noted that:

> The direct and derivative use of information or evidence from a directed disciplinary interview is a difficult area, with significant practical implications and competing public interests. Importantly, the issues also have broader implications for Government because changes in the police disciplinary context may create unintended consequences elsewhere in other public sector disciplinary systems. A careful, substantive policy review to cover the field adequately across the public sector, and not just at the obvious police disciplinary pressure point, is required.[121]

The ability of QPS officers to invoke incrimination privilege was recently considered by the Supreme Court of Queensland. In *Nugent v Stewart*,[122] Martin J held that although the provisions of the *Police Service Administration Act 1990* and the *Police Service (Discipline) Regulations 1990* do not expressly abrogate incrimination privilege, the language and character of this legislation gives rise to the inference that the privilege is abolished by necessary intendment in disciplinary proceedings conducted pursuant to that legislation.

The Committee notes that an appeal from this matter is currently being considered by the Queensland Court of Appeal. In these circumstances, the Committee considers that it would be prudent to await the outcome of these proceedings, which may involve a further appeal to the High Court of Australia.

The Committee notes that the matters raised by the Commission in relation to self-incrimination privilege can be dealt with by virtue of recommendations 4 and 6.

5.6 Consistency of investigative powers under the CC Act and the PPRA

The Commission has raised concerns about the inconsistencies between the CC Act and the *Police Powers and Responsibilities Act 2000* and how this impedes the CCC's operations.[123]

The Commission outlined their concerns in relation to a number of powers:

> The CCC seeks a new power to search persons generally as in sections 29, 30 of PPRA – that is, provide power to search persons where it is necessary to secure the safety of any person at a place where the CCC is carrying out its functions under the CC Act. Currently, the only power the CCC has to search a person is when the person is at the place and subject of a search warrant (s. 92(2) CC Act) or by way of a post-search approval order (s. 97 CC Act).
>
> There is a significant difference in the scope of surveillance device powers between the crime and corruption functions. The Crime power is now found in the PPRA and allows application to be made for an extensive range of surveillance devices, from listening devices through to data surveillance devices. By contrast, for corruption investigations, only a listening device is available. For major crime investigations only, the warrant will also apply outside Queensland. Similar discrepancies apply to the powers for the crime and corruption functions in respect of assumed identities and controlled operations.
>
> The overt search warrant powers and immediate search powers in Parts 2 and 3 of Chapter 3 need to be amended so as to be comparable with the equivalent powers in Parts 1 and 2 of Chapter 7 of the

[119] Crime and Corruption Commission, Submission No. 14, Recommendation 20, p 74.
[120] Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-Incrimination*, Report No. 59, December 2004.
[121] Webbe, S., Williams AO QC, G., & Grayson APM, F., *Simple, Effective, Transparent, Strong: Report by the Independent Expert Panel*, Brisbane: Department of Premier and Cabinet, May 2011, p 95.
[122] [2015] QSC 338.
[123] Crime and Corruption Commission, Submission No. 14, p 44.

PPRA. In particular, these parts should include a power modelled on section 154 of the PPRA (order in search warrant about information necessary to access information stored electronically).

In relation to section 154 of the PPRA, the Commission published a research paper in October 2015 which identified a range of limitations with the section[124].

The Commission recommended a review of the power provisions in the PPRA and the CC Act to ensure consistency where appropriate and that the Commission obtain a new power in relation to access of information and an increased power to search.[125]

5.6.1 Recent developments

The Commission made submissions to the Queensland Organised Crime Commission of Inquiry (COI) in relation to an enhanced version of section 154 of the PPRA. Those submissions were accepted by the COI, which made the following recommendations:

Recommendation 4.7

The Queensland Government amend section 154 (Order in search warrant about information necessary to access information stored electronically) of the *Police Powers and Responsibilities Act 2000* so that:

- 'stored information' includes information accessible by a computer or storage device (for example from a 'cloud' storage service); and
- an application for another order may be made after the seizure of a computer or storage device; and
- an order may contain conditions for the provision of access information at some future time when the computer or storage device is not on the premises.

In developing the amendments regard should be had to section 465AA of the *Crimes Act 1958* (Vic).

Recommendation 4.8

The Queensland Government amend Chapter 3, Part 2 (Search warrants generally) of the *Crime and Corruption Act 2001* to include a provision allowing for the issuer of a search warrant to make orders about information necessary to access information, in the same, or similar, terms as section 154 of the Police Powers and Responsibilities Act, as amended in accordance with recommendation 4.7.

A consequential amendment might also be made to provide that a failure to comply with such an order may be dealt with under the new offence provision in the Criminal Code recommended in 4.9, below.

Recommendation 4.9

The Queensland Government amend the Criminal Code to insert a new offence of failing to comply with an order in a search warrant about information necessary to access information stored electronically (whether made under the *Police Powers and Responsibilities Act 2000* or the *Crime and Corruption Act 2001*). The offence would be an indictable offence, and carry a maximum penalty of five years imprisonment.

The new offence would include a circumstance of aggravation, increasing the maximum penalty to seven years imprisonment, when the specified person is in possession of child exploitation material at the time the search warrant is executed.

Section 552A of the Criminal Code should be amended to provide that the new offence may be heard summarily on the prosecution election.

[124] Crime and Corruption Commission, *Accessing electronically stored evidence of child exploitation material offences: An examination of the legislative limitations of section 154 of the Police Powers and Responsibilities Act 2000*, October 2015.

[125] Crime and Corruption Commission, Submission No. 14, Recommendation 9, p 45.

The Government accepted these recommendations, noting the current limitations of the QPS and the Commission in relation to technology-facilitated crimes.[126]

In May 2016, the Commission advised that as the government has accepted the COI recommendations this aspect of the Commission's recommendation is no longer necessary. The Commission is still seeking a review in relation to consistency of the power provisions in the PPRA and the CC Act.

5.6.2 Comment

The Committee notes the recommendations of the COI have been accepted by government. The Committee awaits the implementation of these recommendations.

The Committee notes that the Commission already has significant powers to perform its functions. Therefore, while the Committee does not have a fixed view on an increase in the Commission's powers, the Committee does support a review of these powers.

Recommendation 7

The Committee recommends that the government consider a review of the power provisions in the PPRA and CC Act to: ensure consistency between the PPRA and CC Act and between the various functions in the CC Act where appropriate; and consider any new powers necessary for the Commission's operations.

5.7 Parliamentary privilege

The Commission raised concerns about the effect of parliamentary privilege on the effective performance of the corruption function. The Commission stated:

> A valid claim of parliamentary privilege prevents corruption investigations from obtaining protected information and documents. A corruption investigation may also be a contempt of parliament. In Queensland the procedures for clarifying the boundaries of parliamentary privilege relevant to corruption investigations depend upon several factors. These include the nature of the relevant conduct or offence; the relevant procedures of the Legislative Assembly of Queensland (or a committee thereof) to sanction, authorise or control a relevant investigation and the authority of both the Legislative Assembly and the Supreme Court to protect individuals from impermissible executive action. These processes often involve issues of complexity which may result in delay to timely investigations.[127]

A number of recent corruption investigations were cited as examples where the Commission suggested that parliamentary privilege had added complexity to the investigations. The Commission recommended that consideration should be given to either amending the CC Act or developing a procedure with Parliament to allow access to privileged material in defined circumstances.

The Committee sought the opinion of the Clerk of the Parliament in relation to the matters raised by the Commission. In response, the Clerk stated:

> The three cited investigations are:
>
> - Mr Gordon Nuttall
> - Mr Scott Driscoll
> - A matter concerning the Queensland Racing Commission Inquiry.
>
> I find it curious that the CCC's submission cites these three investigations as supporting its submission and recommendation. I am familiar with each matter and, in my submission, parliamentary privilege has been navigable in each of these investigations. I also do not believe that the issue of parliamentary privilege has been particularly complex in two of the cited investigations. Furthermore, whilst issues of parliamentary privilege may delay investigations, in the overall time scale of such investigations and

[126] Queensland Government, *Queensland Organised Crime Commission of Inquiry's Report: Government Response*, March 2016, pp 8-10.
[127] Crime and Corruption Commission, Submission No. 14, p 74.

> prosecutions, the delay occasioned by identifying and ensuring the observance of parliamentary privilege is insignificant.[128]

The Clerk went on to outline details of the process involved in each of the cited examples. In relation to issues of parliamentary privilege more generally, the Clerk advised:

> Freedom of speech in parliament is protected by s.9 of the *Constitution of Queensland Act 2001* and ss.8 and 9 of the *Parliament of Queensland Act 2001*. As s.8 of the POQ acknowledges in its content, the protection in the section is a continuation of a constitutional protection that was first recognised in statute in 1688. Although the privilege is arguably much old than this often, being referred to as an ancient right of usage and practice (the *lex consuentudo Parliamenti*). There are instances of the right being claimed as early as 1512.
>
> There is no doubt that the protection is now considered a fundamental aspect of our Westminster system of government. The protection to prevent parliamentary proceedings from being questioned or impeached, is recognised as forming part of the English common law (doctrine of necessity) and has been enshrined in one form or another in statute since the Queensland Parliament has been established. It cannot be waived without legislative action. In other words, the only way to remove the protection is by statute.
>
> In my opinion to remove the protection by statute is not a step that should be taken lightly and would be extraordinary in a constitutional sense. I use the word "extraordinary" rather than the word "unprecedented", because there have been rare instances where parliaments have either legislated or sought to legislate to allow waiver of the protection. In Queensland there are limited exceptions to the privilege:
>
> - Section 53 of the *Criminal Code* 1899 - to enable evidence of proceedings in the Assembly to be used for the prosecution of offences in that part of the Code
> - Section 9(3) of the *Parliament of Queensland Act 2001* - which exempts a document obtained by the House or a committee in relation to a purpose for which it was brought into existence. The example in the section provides:
>
>   *Example–*
>
>   *A document evidencing fraud in a department tabled at a portfolio committee inquiry can be used in a criminal prosecution for the fraud if the document was not created for the committee's inquiry and the committee has authorised the document to be published.*
>
> Unfortunately, usually such legislative action is taken in the context of a particular difficult issue or matter, and does not result in careful consideration of all the consequences. In most instances removal in a moment of political controversy has later been regretted.
>
> I am concerned that dealing with this one issue arising from a request from the CCC may lead to an ad hoc legislative response, the long term consequences of which have not been properly considered. Legislative action in haste to difficult issues often has long term deleterious consequences.
>
> I am especially concerned that legislative action may be advocated where the absolute necessity for the legislation has not been demonstrated and/or alternative approaches to the issue explored. In my submission, the CCC has not made out a case for reform.

5.7.1 Comment

The Committee notes the Clerk's advice that the issues of parliamentary privilege arising in these investigations have been navigable and the delays caused by dealing with such matters have been insignificant to the overall period of any investigations and prosecutions. The Committee does not believe there is any change required and does not support the Commission's recommendation.

[128] Laurie, N.J., Clerk of the Parliament, letter dated 13 June 2016.

6. Corruption Function

6.1 Introduction

In addition to combatting and reducing the incidence of major crime, the CCC is responsible for reducing the incidence of corruption in the public sector.[129] This is known as the Commission's 'corruption function'.[130]

In performing its corruption function, the Commission receives complaints about, or information or matter involving, corruption from the general public and units of public administration, including the Queensland Police Service. 'Corruption' refers to both 'corrupt conduct' (as defined by section 15) and 'police misconduct', which is defined as conduct, other than corrupt conduct, of a police officer that:

- is disgraceful, improper or unbecoming of a police officer;
- shows unfitness to be or continue as a police officer; or
- does not meet the standard of conduct the community reasonably expects of a police officer.

Pursuant to section 41(1) of the Act, the Commissioner of Police has primary responsibility for dealing with complaints about police misconduct.

Section 33(b) of the Act confers upon the Commission a broad discretion to deal with such matters in 'an appropriate way', having regard to the principles set out in section 34. The section 34 principles are:

(a) the **cooperation** principle, which requires the Commission to work cooperatively with units of public administration to deal with corruption;

(b) the **capacity building** principle, which recognises that the Commission has a lead role in building the capacity of units of public administration to prevent and deal with cases of corruption effectively and appropriately;

(c) the **devolution** principle, which recognises that, subject to the cooperation and public interest principles and to the capacity of a unit of public administration to deal with a complaint about corruption, units of public administration should generally have responsibility for dealing with allegations of corruption; and,

(d) the **public interest** principle, which recognises that:

- the Commission has an overriding responsibility to promote public confidence:
  - in the integrity of units of public administration; and,
  - if corruption does happen within a unit of public administration, in the way it is dealt with; and,
- the Commission should exercise its power to deal with particular cases of misconduct when it is appropriate for it to do so, having regard primarily to:
  - the capacity of, and the resources available to, a unit of public administration to effectively deal with the corruption;
  - the nature and seriousness of the corruption, particularly if there is reason to believe that corruption is prevalent or systemic within a unit of public administration; and

[129] *Crime and Corruption Act 2001*, ss 4(1), 7.
[130] *Crime and Corruption Act 2001*, s 33.

- any likely increase in public confidence in having the corruption dealt with by the Commission directly.

In addition to dealing with complaints about corruption, the Commission is also responsible for raising standards of integrity and conduct in units of public administration.[131]

6.2 Performing the Corruption Function

There has been a steady drop in the number of complaints received by the Commission in recent years. In 2012-13, the Commission received a total of 4,494 complaints, which represented a 15 per cent decrease compared with 2011-12.[132] In 2013-14, the Commission received a total of 3,881 complaints, which represented a 14 per cent decrease compared with 2012-13.[133] In the past financial year, the Commission received a total of 2,347 complaints, representing a 40 per cent decrease in the number of complaints received by the Commission from the previous financial year.[134]

At the public hearing on 12 October 2015, the then Acting Chief Executive Officer of the Commission, Ms Kathleen Florian, described this as 'a positive outcome'.[135] While the Commission points out that it is difficult to definitively attribute this decrease to any particular cause, the Commission states that the decrease is likely to have been influenced by 'the implementation of changes arising from the Callinan and Aroney review',[136] in particular:

- the requirement for complaints about corruption to be supplied in the form of a statutory declaration;
- the narrowing of the Commission's jurisdiction as a result of changes to the definition of "corrupt conduct"; and,
- raising the threshold at which units of public administration must notify the Commission of alleged corrupt conduct from one of mere suspicion to a reasonable suspicion.

The Commission notes that the decrease in complaints had been most marked in respect of notifications of corrupt conduct by units of public administration, which fell from an average of approximately 1,478 notifications in 2012-13 and 2013-14 to 517 notifications in 2014-15, a decrease of approximately 65 per cent.[137] One consequence of this is that the Commission now receives a proportionally greater number of complaints involving police (approximately 64 per cent of all complaints received in 2014-15) than it has in previous years, when the distribution of complaints about the police and units of public administration was largely even.[138]

In the vast majority of cases, the Commission devolves complaints to units of public administration or the Commissioner of Police to deal with. In 2012-13, the Commission retained for its own investigation forty-seven new complaints,[139] which represents approximately 1 per cent of complaints received by the Commission in that period. In 2013-14, the Commission retained 53 new complaints (approximately 1.4 per cent of all complaints) for its own investigation.[140] In 2014-15, the Commission retained 48 complaints (approximately 2 per cent) for its own investigation.[141] The Committee has

[131] *Crime and Corruption Act 2001*, s 33(a).
[132] Crime and Misconduct Commission, *Annual Report 2012-13*, Brisbane: CMC, 2013, p 24.
[133] Crime and Misconduct Commission, *Annual Report 2013-14*, Brisbane: CMC, 2014, p 18.
[134] Crime and Corruption Commission, Submission No. 14, p 49.
[135] Public hearing transcript, Brisbane, 12 October 2015, p 12.
[136] Crime and Corruption Commission, Submission No. 14, p 49.
[137] Crime and Corruption Commission, Submission No. 14, p 52.
[138] Crime and Corruption Commission, Submission No. 14, p 51.
[139] Crime and Misconduct Commission, *Annual Report 2012-13*, Brisbane: CMC, 2013, p 23.
[140] Crime and Misconduct Commission, *Annual Report 2013-14*, Brisbane: CMC, 2014, p 20.
[141] Crime and Corruption Commission, *Annual Report 2014-15*, Brisbane: CCC, 2015, p 8.

been advised by the Commission that as of 13 June 2016, the Commission has retained 2.6 per cent of matters for its own investigation in 2015-16.

Complaints that are devolved to units of public administration or the Commissioner of Police to deal with are subject to the Commission's monitoring function. In performing its monitoring function, the Commission may, having regard to the principles stated in section 34:

- issue advisory guidelines for the conduct of investigations by the Commissioner of Police into police misconduct and by public officials into corrupt conduct;
- review or audit the way in which the Commissioner of Police or a public official has dealt with police misconduct or corrupt conduct, respectively, in relation to either a particular complaint or a class of complaint;
- assume responsibility for and complete an investigation by the Commissioner of Police into police misconduct or by a public official into corrupt conduct; or
- require a public official to:
    - report to the Commission about an investigation into corrupt conduct in the way and at the times the Commission directs; or
    - undertake further investigation into the corrupt conduct as directed by the Commission.[142]

The way in which the Commission performs its monitoring function depends on the seriousness of the complaint, including:

- no further action, which due to the low-level nature of the alleged corrupt conduct, does not require any further involvement by the Commission;
- auditing of systems and practices with units of public administration for dealing with complaints;
- merit and compliance review for matters involving serious or systemic corrupt conduct; or
- public interest review, the highest level of monitoring undertaken by the Commission.[143]

6.2.1 Serious and systemic corrupt conduct

The matters retained by the Commission for its own investigation represent, in the Commission's assessment, the most serious cases of alleged corrupt conduct. From 1 July 2014, the Commission has been given the statutory mandate to focus on serious cases of corrupt conduct and cases of systemic corrupt conduct within units of public administration.[144] This formalised the long-standing practice of the Commission.

The Commission does not retain for its investigation all matters assessed by it as involving serious or systemic corrupt conduct. In 2014-15, the Commission categorised 279 matters as falling within the most serious category of corrupt conduct and retained 49 (or 17 per cent) of those matters for investigation. In a further 50 of those cases, the Commission considered it appropriate to closely monitor the way in which agencies dealt with those matters.

In 2015-16 (to date), the Commission received 365 matters that it assessed as falling within the most serious category of corrupt conduct. The Commission retained 52 (or 18 per cent) of those matters for

[142] *Crime and Corruption Act 2001*, ss 47(1) and 48(1).
[143] Crime and Corruption Commission, *Corruption in Focus: A Guide to Dealing with Corrupt Conduct in the Queensland Public Sector*, October 2014, pp 1.7-1.8.
[144] *Crime and Corruption Act 2001*, s 35(3).

its own investigation, and in a 109 cases the Commission determined to closely monitor the way in which agencies dealt with those matters.

6.3 Recent developments in the principles of dealing with corruption

The 2014 amendments effected important changes to the way in which the Commission performs its corruption function. Prime among these were:

(a) the renaming of 'official misconduct' as 'corrupt conduct' and 'misconduct' as 'corruption';

(b) amending the definition of corrupt conduct;

(c) removing the Commission's corruption prevention function;

(d) abolishing capacity building as one of the principles governing the performance of the Commission's corruption function;

(e) requiring the Attorney-General and Minister for Justice's prior approval of the Commission's research plans;

(f) introducing a requirement for complaints to be submitted by way of statutory declaration;

(g) introducing a higher notification threshold for units of public administration;

(h) introducing a requirement for the Commission to focus its corruption function on more serious cases of corrupt conduct and cases of systemic corrupt conduct within units of public administration; and,

(i) introducing a requirement for public officials to prepare, and consult with the Chair of the Commission on, a policy about how to deal with complaints about themselves.

These amendments were primarily designed to reduce the number of trivial, baseless and vexatious complaints the Commission is required to assess, even for the purpose of devolution. In 2012, the then Government appointed an Independent Advisory Panel, consisting of retired High Court judge, the Honourable Ian Callinan AC QC, and Professor of Law at the University of Queensland, Professor Nicholas Aroney, to conduct a review of the *Crime and Misconduct Act 2001*. Callinan and Aroney found that the Commission was being distracted from focussing on serious and systemic corruption in units of public administration by an 'inundation' of trivial and minor complaints. Collectively, the intention of the 2014 amendments was to relieve the Commission of this burden, thereby allowing it to refocus its attention on matters considered to be more deserving of its attention.

The *Crime and Corruption Amendment Act 2016*, which commenced operation on 5 May 2016, reversed a number of the amendments introduced in 2014, including paragraphs (c) to (f). The Committee does not intend to revisit these issues in this review. The Committee notes, however, that the majority of submissions to this review to address these issues were supportive of the 2016 amendments.

6.3.1 Changes to the Commission's jurisdiction

As a result of these changes, the threshold for conduct that enlivens the CCC's investigative jurisdiction was significantly increased. To better understand how the 2014 amendments raised the CCC's investigation threshold, it is useful to set out the respective provisions.

Prior to the commencement of the *Crime and Misconduct and Other Legislation Amendment Act 2014*, 'official misconduct' was defined as conduct that could, if proved, be a criminal offence or a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment.[145] 'Conduct' was defined in section 14 in the following terms:

[145] *Crime and Misconduct Act 2001*, s 15 (as at 27 November 2013).

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

(i) a unit of public administration; or

(ii) any person holding an appointment; or

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

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

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

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

Section 9 of the *Crime and Misconduct and Other Legislation Amendment Act 2014* replaced the definitions of 'official misconduct' and 'conduct' with a new definition of 'corrupt conduct'. Corrupt conduct is now defined in section 15 as:

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

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

(i) a unit of public administration; or

(ii) a person holding an appointment; and

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

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

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

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

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

(d) would, if proved, be:

(i) a criminal offence; or

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

'Conduct' includes:

(a) neglect, failure and inaction;

(b) conspiracy to engage in conduct; and,

(c) attempt to engage in conduct.

Section 15(2) provides a list of conduct that could amount to corrupt conduct if all of the elements of the definition of corrupt conduct in section 15(1) are satisfied, while section 14 of the *Crime and*

Misconduct and Other Legislation Amendment Act 2014 inserted in section 35 (which describes how the Commission performs its corruption function) a new subsection (3) which requires the Commission, in performing its corruption function, to focus on more serious cases of corrupt conduct and cases of systemic corrupt conduct within a unit of public administration.[146]

In effect, the current definition of corrupt conduct merges the former sections 14 and 15 into a single provision and introduces the following changes:

- it is necessary to show that the conduct in question *would*, rather than *could*, if proved be a criminal offence or a disciplinary breach providing reasonable grounds for terminating the person's services;
- the conduct must have been engaged in for the purpose of providing a benefit to the person or causing a detriment to another person;
- where the conduct results, or could result, in the performance of functions or powers in a way that involves a breach of trust placed in a person holding an appointment in a unit of public administration, this must be done 'either knowingly or recklessly';[147] and,
- whereas previously official misconduct could be established by showing that one or more of the elements of the definition of 'official misconduct' were present, under the current definition of corrupt conduct each element of section 15(1)(a)-(d) must be satisfied, that is, the elements are cumulative rather than alternative.

That these amendments raise the threshold at which the Commission's jurisdiction is enlivened can be readily apprehended. The practical effect of the amendments is that the Commission, in performing its corruption function, retains for its own investigation only those complaints which contain allegations involving serious or systemic corruption. The Commission devolves to the unit of public administration to which a complaint relates, allegations that do not meet these criteria for investigation by that agency, subject to the Commission's monitoring role.

The reasons for these amendments and the reception to them among interested parties are discussed in detail below.

6.4 The Commission's jurisdiction

As noted above, the 2014 amendments raised the threshold at which the Commission's jurisdiction is enlivened. The catalyst for raising the Commission's threshold was what Callinan and Aroney considered to be a preponderance of baseless, trivial, vexatious, or misdirected complaints processed by the Commission.[148] Callinan and Aroney therefore recommended a range of measures designed to bring about a 'large reduction' in the number of matters going to, and being dealt with (even for the purposes of devolution) by, the Commission, 'not least so that proper and sufficient attention can be given to the genuine and substantial ones'.[149]

[146] A note to s 13 was also inserted to like effect: *Crime and Misconduct and Other Legislation Amendment Act 2014*, s 9.

[147] This element is imported from s 4(c) (definition of 'corrupt conduct') of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).

[148] Callinan AC, Hon. I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 204. Callinan and Aroney concluded that "a very large number, indeed the vast majority", of complaints made to the Commission each year fall within this category: Callinan AC, Hon. I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 47.

[149] Callinan AC, Hon. I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, pp 204, 212 (Recommendation 3).

Callinan and Aroney noted that in comparison with cognate legislation in other Australian jurisdictions, the definition of 'official misconduct' is 'very wide'.[150] One element which in their view contributed to this state of affairs was the use of the conditional terms 'could, if proved' in the definition of 'misconduct' in section 15 (as then drafted). Callinan and Aroney noted that:

> …only Queensland combines two terms of conditionality (i.e. "could, if proved"), which is more than necessary to enable complaints to be made where the available information is less than conclusive, and which we consider serves only to lower the threshold in the definition further than any of the other states, and too far in our opinion.[151]

The Committee notes that the definition of 'serious misconduct' in the Tasmanian *Integrity Commissioner Act 2009* also contains the dual conditionality, 'could, if proved'.[152] However, the legislation of other jurisdictions employs different language. In New South Wales, the definition of 'corrupt conduct' requires that the conduct in question 'could constitute or involve', among other things, a criminal or disciplinary offence, or reasonable grounds for dismissal of a public official.[153] In *Greiner v Independent Commission Against Corruption*,[154] a majority of the New South Wales Court of Appeal decided that 'could' must not be given a literal construction, in the sense that 'conduct which would have but an improbable possibility of leading to dismissal' is captured by the definition.[155] Instead, the provision calls for an objective assessment of the conduct in question so that the question to be asked, in effect, is 'would, if the facts were found to be proved at trial' provide grounds on which the prosecution of a criminal or disciplinary offence or an action for dismissal would succeed?[156]

Similarly, in Western Australia the definition of 'misconduct' requires that the conduct in question 'constitutes or could constitute' a disciplinary offence providing reasonable grounds for dismissal.[157] The Victorian legislation adopts a more definite measure by which the conduct in question is assessed, 'being conduct that would, if the facts were found proved beyond reasonable doubt at a trial, constitute a relevant offence'.[158]

Callinan and Aroney considered that if a court were required to interpret the definition of 'official misconduct', it would in all likelihood apply similar reasoning to that of the majority of the New South Wales Court of Appeal in *Greiner v ICAC*.[159] However, to remove any doubt Callinan and Aroney recommended that section 15 should be amended by substituting 'would' for 'could'.[160] This would bring section 15 into greater conformity with the corresponding provision in the Victorian legislation and the New South Wales legislation, as interpreted by the New South Wales Court of Appeal in *Greiner v ICAC*.[161]

This recommendation was accepted by the then Government. However, whereas Callinan and Aroney recommended that the elements of the definition of 'conduct' is section 14 should remain as

[150] Callinan AC, Hon. I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 117.
[151] Callinan AC, Hon. I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 119.
[152] *Integrity Commissioner Act 2009* (Tas), s 4.
[153] *Independent Commission Against Corruption Act 1988* (NSW), s 9(1).
[154] (1992) 28 NSWLR 125.
[155] (1992) 28 NSWLR 125, at p. 169 per Mahoney JA.
[156] (1992) 28 NSWLR 125, at pp 186-7 per Priestley JA.
[157] *Corruption, Crime and Misconduct Act 2003* (WA), s 4.
[158] *Independent Broad-based Anti-corruption Act 2011* (Vic), s 4(1).
[159] Callinan AC, Hon. I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, pp 45-7, 117.
[160] Callinan AC, Hon. I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 119.
[161] Callinan AC, Hon. I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p. 119.

alternatives,[162] the elements of the revised definition of 'corrupt conduct' introduced in 2014 are cumulative. The 2014 amendments also introduced two new elements into the definition of 'corrupt conduct':

- the conduct must have been engaged in for the purpose of providing a benefit to the person or causing a detriment to another person;[163] and,
- where the conduct results, or could result, in the performance of functions or powers in a way that involves a breach of trust placed in a person holding an appointment in a unit of public administration, this must be done 'either knowingly or recklessly'.[164]

Consequently, the threshold at which the Commission's jurisdiction is enlivened is now substantially higher than it was previously, as well as relative to other jurisdictions.[165]

6.4.1 Focus on serious and systemic conduct

In performing the corruption function, the Commission receives complaints about corruption from members of the public and by way of notification by units of public administration and the Queensland Police Service. As discussed above, the Commission reserves for investigation only a very small number of complaints it receives in relation to corruption. The vast majority of complaints that are assessed by the Commission as involving corruption (or a suspicion thereof) are referred back to the unit of public administration from which the complaint originates or the QPS for investigation. This is known as the principle of devolution.

Callinan and Aroney did not consider it necessary to amend the Act to require the Commission to focus its attention on the investigation of serious corruption, as corresponding legislation does in New South Wales, Victoria, South Australia and Western Australia.[166] In their view, the amendments they recommended in relation to increasing both the threshold of official misconduct and the reporting threshold would, if implemented, be sufficient to address 'the underlying problem, which is the excessive number of trivial complaints and allegations which [the Commission] has to process'.[167]

Despite this, in 2014 section 35 of the Act was amended to require the Commission, in performing its misconduct function, to focus on more serious cases of corrupt conduct and cases of systemic corrupt conduct within a unit of public administration.[168] The Committee notes that this amendment formalises the practice already adopted by the Commission when deciding what matters it chooses to investigate itself, rather than devolve to units of public administration.[169]

6.4.2 Submissions to this Review

The majority of submissions that addressed the changes to the Commission's jurisdiction were critical of these amendments. Some submissions raised concerns about the combined effect of the narrowing

[162] Callinan AC, Hon. I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, Recommendation 3A, p 213.
[163] *Crime and Corruption Act 2001*, s 15(1)(c). This element closely resembles section 92A of the Queensland *Criminal Code 1899*, which creates the offence of misconduct in public office.
[164] *Crime and Corruption Act 2001*, s 15(1)(b)(ii).
[165] See the comments of the Department of Justice and Attorney-General in Queensland Parliament, Legal Affairs and Community Safety Committee, *Report No. 62 – Crime and Misconduct and Other Legislation Amendment Bill 2014*, April 2014, p 24.
[166] *Independent Commission Against Corruption Act 1988* (NSW), s 12A; *Independent Broad-based Anti-corruption Act 2011* (Vic), s 15(2)(a); *Independent Commissioner Against Corruption Act 2012* (SA), s 3(2)(a); *Corruption, Crime and Misconduct Act 2003* (WA), ss 7B(4) and 18.
[167] Callinan AC, Hon. I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 120.
[168] *Crime and Corruption Act 2001*, s 35(3).
[169] Callinan AC, Hon. I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 61.

of the Commission's jurisdiction and the removal of its corruption prevention function. Both the Department of Infrastructure, Local Government and Planning and the Department of State Development noted that since the introduction of the 2014 amendments, the 'role and presence' of the Commission in the public sector has diminished.[170] Both departments regard this as 'disappointing', as they had benefited from the closer relations they enjoyed with the Commission in the past. Similarly, Queensland Rail submitted that it would welcome the return of the Commission to 'a greater role in corrupt conduct matters other than 'serious corrupt conduct' matters'.[171]

A number of submissions expressed the view that in seeking to reduce the number of trivial, vexatious and baseless complaints, the 2014 amendments set the threshold too high. The Bar Association of Queensland (BAQ) acknowledges the 'resource issues involved in investigating allegations of "non-serious" corruption or misconduct' and for that reason, 'supports those changes which placed greater responsibility on the Public Service Commission and the heads of department in terms of investigating official misconduct'.[172] However, the BAQ suggested that in setting the Commission's threshold for investigation of corruption 'the line has been drawn too far in favour of restricting investigation of corruption rather than drawn appropriately to avoid unnecessary or uncalled for investigations'.

This view was shared by the Accountability Round Table (ART). At the public hearing on 30 November 2015, Dr David Solomon AM, who appeared on behalf of the ART, submitted that the definition of 'corrupt conduct' has been 'narrowed to the point where a lot of conduct which should be investigated in our view will not be able to be investigated'.[173] As such, he considered that the amendments went 'much too far' and had resulted in the Commission being 'dealt out of most of the anti-corruption type investigations'.[174] The ART is concerned that units of public administration, which are required to investigate other serious cases of corruption, 'do not have the resources or powers possessed by the CCC, so most investigations into corrupt conduct will not be as thorough as they would be if they were conducted by the CCC'.[175]

In a similar vein, Professor Charles Sampford submitted that there is a 'practical difficulty' in mandating that the Commission must focus on serious corrupt conduct and systemic corrupt conduct inasmuch as 'the seriousness of the corruption may not become evident until the investigation has been completed'.[176] Professor Sampford also raised concerns that this may send a legislative signal 'that the lower levels of corruption are not really a problem and of minor concern to the State of Queensland'.

Retired District Court judge and former part-time Commissioner, the Honourable Philip Nase, submitted that the definition of 'corrupt conduct' should be 'discarded and replaced'.[177] At the public hearing on 26 October 2015, Mr Nase conceded that he did not have detailed knowledge of the definition of 'corrupt conduct', but stated that it is his understanding that:

> … the definition was copied really from the Victorian body, and I understand that they are having great difficulty investigating anything because of the definition and because of a rule that they cannot use any of their powers until they are reasonably satisfied that under that definition there is a prima facie case.[178]

Mr Nase also submitted that the assumption on which the amendment rests – that the Commission was receiving 'too many complaints compared with other anti-corruption agencies, and that a

[170] Department of Infrastructure, Local Government and Planning, Submission No. 7, p 1; Department of State Development, Submission No. 10, p 1.
[171] Queensland Rail, Submission No. 22, p 1.
[172] Bar Association of Queensland, Submission No. 28 (Supplementary), p 3.
[173] Public hearing transcript, Brisbane, 30 November 2015, p 17.
[174] Public hearing transcript, Brisbane, 30 November 2015, pp 17, 20.
[175] Accountability Round Table, Submission No. 13, p 1.
[176] Professor Charles Sampford, Submission No. 15, p 9.
[177] The Honourable Philip Nase, Submission No. 12, p 2.
[178] Public hearing transcript, Brisbane, 26 October 2015, p 14.

narrower definition of official misconduct could assist reduce the number of complaints' – is 'now disputed'.[179]

Other submissions focused on issues of transparency and accountability. At the public hearing on 26 October 2015, Professor Tim Prenzler submitted that 'raising the threshold for matters that are within the jurisdiction of the Commission means that even more matters are dealt with in-house and that is where they are likely to be covered-up and behavioural issues are not properly addressed'.[180] This in turn facilitates greater secrecy and reduced accountability, thereby undermining public confidence in public sector integrity.

On the other hand, the Public Service Commission (PSC) expressed the view that by refocusing the Commission's attention on serious and systemic corrupt conduct, the 2014 amendments reinforce managerial accountability. At the public hearing on 30 November 2015, Mr Peter McKay, the PSC's Deputy Commissioner of Workplace Renewal and Operations, explained that one of his concerns with lowering the current threshold of 'corrupt conduct' is that it may undermine responsibility within units of public administration for managing conduct issues. Mr McKay likened the former system to the 'outsourcing of complaint management' from government departments to the Commission, so that, in effect, 'it becomes someone else's problem'.[181] Mr McKay submitted that, at least in some agencies, this encouraged 'an attitude of if an issue is raised it is best to remove all doubt and refer it to the CMC which has then dragged out the ability to respond to those'.[182]

The Commission is also generally supportive of the increased jurisdictional threshold under which it currently operates. At the public hearing on 12 October 2015, the then Acting CEO of the Commission, Ms Kathleen Florian, advised the Committee that along with the introduction of a heightened notification threshold, the changes to the definition of corrupt conduct 'have resulted in a reduction of minor and trivial complaints coming to the CCC'.[183] Ms Florian stated that the Commission regards this result 'as a positive outcome'.

At the same time, the Commission acknowledged the concern raised by Professor Sampford that the seriousness of an allegation of corruption is sometimes only obvious in hindsight. At the public hearing on 30 November 2015, Mr MacSporran commented that:

> The only danger in leaving the line where it is, in our view, as we have made submissions about in the past, is that it is hard to quantify how serious a prospect it is and that matters where corrupt conduct is engaged in will be missed. They will go under the radar. It is very difficult to strike the right balance between where the threshold should exist for reporting purposes, but the stance we have taken is that the current threshold is too high. It runs the risk of matters failing to come to our attention.[184]

In this regard, the Commission recommended that the current definition of corrupt conduct should be amended by removing the requirement in section 15(1)(c) for the complainant to demonstrate that the person whose conduct is complained of was engaged in for the purpose of providing a benefit to the person or another person or causing a detriment to another person.[185] The Commission adduces the following reasoning in support of the proposed amendment:

- the purposive character of section 15(1)(c) is inconsistent with paragraph (a) of the definition of "conduct" in section 14, which includes "neglect, failure and inaction", because there will be cases in which serious neglect or inaction warranting dismissal will not have occurred with such purpose in mind;

[179] The Honourable Philip Nase, Submission No. 12, pp 5-6.
[180] Public hearing transcript, Brisbane, 26 October 2015, p 3.
[181] Public hearing transcript, Brisbane, 30 November 2015, p 4.
[182] Public hearing transcript, Brisbane, 30 November 2015, p 3.
[183] Public hearing transcript, Brisbane, 12 October 2015, p 12.
[184] Public hearing transcript, Brisbane, 30 November 2015, p 22.
[185] Crime and Corruption Commission, Submission No. 14, p 67.

- by requiring the assessor to inquire into the state of mind of the person whose conduct is complained of, section 15(1)(c) may prevent the Commission from assessing and dealing with the complaint in an expeditious manner because the intention of the subject of the complaint may not be known to the complainant when the complaint is made;
- in addition to causing delays in the assessment of allegations of corrupt conduct, the subjective element inherent in section 15(1)(c) is a source of confusion for units of public administration when assessing complaints and was identified by a recent Commission audit as one of the reasons for a decline in notifications of corrupt conduct by units from units of public administration;
- the majority of offences found in Chapter 13 of the *Queensland Criminal Code* (corruption and abuse of office) already require proof of a detriment or benefit;
- Western Australia is the only other Australian jurisdiction which has such a requirement, but unlike Queensland, because the elements of the definition of "misconduct" in the Western Australian legislation are alternative, rather than cumulative, "the absence of a benefit or detriment is not fatal to their jurisdiction where one or more alternative limbs of the definition are present";[186] and
- insofar as the legislative intent behind the introduction of section 15(1)(c) is to limit the Commission's jurisdiction to serious and systemic corrupt conduct, this substitution of "would" for "could" in section 15(1)(d) is sufficient to achieve this objective.[187]

The Commission submits that deleting section 15(1)(c) will not compromise the intention of the Act.

6.4.3 Comment

The Committee notes that when the call for submissions to this review closed on 27 July 2015, the Commission and units of public administration had been operating under the increased threshold at which the Commission's jurisdiction is enlivened for little more than twelve months. As such, the Committee considers that it is too soon to accurately evaluate whether any changes to the Commission's jurisdiction are warranted.

In this regard, the Committee notes that the Department of Justice and Attorney-General has recently released an Issues Paper which aims to identify any issues arising from the current definition of 'corrupt conduct' and any potential changes to the current definition which might be desirable in order to address these issues. In particular, the Issues Paper seeks feedback on whether concerns raised by certain stakeholders prior to the commencement of the new definition have been realised and whether the current definition prevents the Commission from assessing and dealing with conduct that ought to be within its jurisdiction.

The call for submissions closed on 29 March 2016. Unfortunately, at the time of this report, the Committee has not had the benefit of being able to review the submissions received by the Department, apart from the submission made by the Commission. In these circumstances, the Committee considers that it would be premature to make any definitive recommendation for the reform of section 15, whether along the lines sought by the Commission or otherwise.

[186] *Corruption, Crime and Misconduct Act 2003* (WA), s 4(d)(iv). In addition, the requirement for a benefit or detriment is applicable only to conduct involving the misuse of information or material acquired by a public officer acquired by a public officer in connection with his or her functions in that capacity.
[187] Crime and Corruption Commission, "'Corrupt Conduct' under the *Crime and Corruption Act 2001*: Submission to the Department of Justice and Attorney-General", April 2016, p 9.

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The Committee accordingly recommends that this Committee and its successors should continue to monitor whether the definition of 'corrupt conduct' is inhibiting the Commission from investigating any conduct that ought to be subject to its jurisdiction, and any amendments to section 15 introduced by the Government in response to any issues identified in the responses to the Department's Issues Paper.

6.5 The devolution principle

Assuming that the conduct complained of satisfies the definition of corrupt conduct, sections 34, 35 and 46 prescribe how the CCC is to exercise its corruption function in relation to a complaint. Of particular importance is section 35(3) which provides that in performing its corruption function, the CCC must focus on more serious cases of corrupt conduct and cases of systemic corrupt conduct within a unit of public administration. In the case of corrupt conduct failing outside these parameters, the legislative intent is that the CCC will devolve responsibility for dealing with such complaints to the units of public administration from which the complaint originates, subject to the principles of cooperation, capacity building and public interest.

As noted above, the vast majority of complaints received by the Commission are devolved to the relevant unit of public administration or the Queensland Police Service. Of those matters retained by the Commission for investigation, the Commission focusses 'on matters associated with individual and collective leadership as the key to creating a culture of ethical behaviour and fairness in organisations'.[188] These matters include 'recurring themes' such as 'cronyism, nepotism, fraud (including procurement and research fraud) and the non-disclosure of conflicts of interest and associations requiring resolution in favour of the public interest'. However, the greater part of the Commission's investigations have been in response to allegations of opportunistic corruption. The Commission notes that such matters:

> … have shown a potential to evolve into entrenched corruption by exploiting systemic failures in internal controls, a lack of senior management engagement in corruption prevention and an overall lack of public sector awareness of corruption risks and their prevention.[189]

As the devolution principle continues to be one of the most controversial aspects of the Commission's corruption function, the Committee addresses the evolution of this principle in some detail below.

6.5.1 History and evolution of devolution

The principle of devolution of responsibility for investigating misconduct and corrupt conduct to heads of department or (in relation to police misconduct) the Commissioner of Police, has been a perennial source of controversy. As the previous Committee noted in its three-yearly review, 'while the principle of devolution is applicable across all areas of the public sector, it comes under the most scrutiny in its application to complaints received about the Queensland Police Service'.[190]

Complaints received by, and submissions made to, the current Committee frequently contend that the principle of devolution, particularly where its application results in 'police investigating the police', is anathema to the recommendations of the Fitzgerald Commission of Inquiry. This perception is unwarranted.

This was recognised by predecessors of this Committee almost from the outset. In the second three-yearly review of the Commission, the 2nd Parliamentary Criminal Justice Committee acknowledged that:

[188] Crime and Corruption Commission, Submission No. 14, p 59.
[189] Crime and Corruption Commission, Submission No. 14, p 59.
[190] Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, p 47.

> The Fitzgerald Report did not intend that the Commission investigate all complaints against police and public officials. The Committee considers that there needs to be an efficient mechanism in place with the Queensland Police Service and other government bodies to investigate and determine minor or purely disciplinary matters. The Commission should be able to refer matters of a minor or disciplinary nature to the Queensland Police Service or the relevant Department. This process is an efficient manner of handling complaints and also aids the Queensland Police Service and Government Departments in taking responsibility for the actions of its personnel.[191]

The Fitzgerald Report recommended that a Complaints Branch be established within what was to become the Official Misconduct Division of the Criminal Justice Commission 'to receive complaints of misconduct or suspected misconduct by public officials, including police, and any other complaints against police or other public officials'.[192] The Fitzgerald Report contemplated that the Complaints Branch 'should have the discretion, subject to guidelines to be established, to dismiss frivolous or vexatious complaints summarily and refer trivial or purely disciplinary matters to chief executives of departments or the Commissioner of Police to investigate and take appropriate action'.[193] The Complaints Branch would be responsible for screening complaints 'to determine substance before referring to other agencies'.[194]

This division of responsibility was embodied in various provisions of the *Criminal Justice Act 1989*.[195] However, it soon became apparent that the Act was 'inadequately drafted'.[196] In particular, the Act did not clearly express which matters the Commission might refer to the Commissioner of Police or units of public administration for investigation. For example, while section 2.28(6) authorised the Chairman or his delegate to issue written directions to the Commissioner of Police or the principal officer of a unit of public administration relating to any complaint or matter involving suspected misconduct, 'including the transference to the Commission of responsibility for investigation of any such complaint or matter', it was unclear whether the Chairman was also empowered by this provision to direct the Commissioner of Police or principal officers to also *investigate* such complaints or matter.[197]

Similarly, section 2.29 conferred certain functions on the Complaints Section of the Official Misconduct Division, 'subject to any guidelines relating thereto'. The Commission consequently promulgated guidelines in having 'the result that the Complaints Section in fact refers to the Principal Officer of a unit of public administration, any complaint, information or matter that, in the opinion of the Chief Officer of the Section, involves or may involve cause for taking disciplinary action [other than for official misconduct] by the principal officer against a person holding an appointment in the unit of public administration'.[198] Although the Commission had received advice attesting to the validity of these

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[191] Parliamentary Criminal Justice Committee, *Report No. 26 – A Report of a Review of the Activities of the Criminal Justice Commission Pursuant to s. 118(1)(f) of the* Criminal Justice Act 1989, February 1995, p 88.

[192] Fitzgerald, T.E., *Report of a Commission of Inquiry Pursuant to Orders in Council*, 1989, Recommendation 10(g), p 374.

[193] Fitzgerald, T.E., *Report of a Commission of Inquiry Pursuant to Orders in Council*, 1989, pp 314-5, 374.

[194] Fitzgerald, T.E., *Report of a Commission of Inquiry Pursuant to Orders in Council*, 1989, p 315.

[195] See, in particular, sections 2.14(1)(b), 2.20(2)(f), 2.28(6) and 2.29.

[196] Parliamentary Criminal Justice Committee, *Report No. 18 – Review of the Operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission: Part C – A Report Pursuant to Section 4.8(1)(f) of the* Criminal Justice Act 1989-1992, August 1992, p 16.

[197] Parliamentary Criminal Justice Committee, *Report No. 9 – Review of the Committee's Operations and the Operations of the Criminal Justice Commission: Part A, Submissions Vol. 2 – CJC Submissions and Minutes of Evidence taken on 6 and 13 June 1991*, July 1991, p 71.

[198] Parliamentary Criminal Justice Committee, *Report No. 9 – Review of the Committee's Operations and the Operations of the Criminal Justice Commission: Part A, Submissions Vol. 2 – CJC Submissions and Minutes of Evidence taken on 6 and 13 June 1991*, July 1991, p. 74. For these guidelines, see Criminal Justice Commission, *Annual Report, 1989-90*, Brisbane: CJC, 1990, p 38. These guidelines were again amended the following year. See Criminal Justice Commission, *Annual Report, 1990-91*, Brisbane: CJC, 1991, p 103 (Appendix H: 'Guidelines Issued by the Criminal Justice Commission to the Complaints Sections, Official Misconduct Division, Pursuant to the Criminal Justice Act 1989-1990 on 5 October 1990').

guidelines, it recommended that 'consideration should be given to amending the Act to put the powers of the Section beyond doubt'.

The PCJC accepted these recommendations, which were implemented by section 6 of the *Criminal Justice Amendment Act 1992*. Section 2.29(4) of the amended Act gave statutory recognition to the Commission's existing practice of referring matters that warrant the taking of disciplinary action (other than for official misconduct) to units of public administration, while section 2.29(7) authorised the CJC to 'issue guidelines with respect to the investigation by or on behalf of the Complaints Section of complaints, information and matters, including decisions to investigate or not to investigate'. Such guidelines were introduced by the CJC in 1992 and revised from time to time.[199]

In this manner, a practice developed under the *Criminal Justice Act 1989* whereby the Commission assumed responsibility for investigating complaints of official misconduct meeting certain criteria developed by the CJC, with responsibility for investigating complaints falling short of official misconduct, but otherwise providing cause for the taking of disciplinary action, being assumed by the CEOs of government departments. As the 6th PCMC noted in its three-yearly review, in the final years of its existence the CJC 'placed increasing emphasis on the prevention side of its misconduct role', including greater emphasis on 'devolving responsibility for dealing with misconduct (both by investigation and prevention) back to the relevant agencies themselves'.[200]

The introduction of the *Crime and Misconduct Act 2001* formalised this practice. One objective of the Act was to 'legislatively [recognise] long-term changes in complaints practices, giving the QPS and other units of public administration more responsibility for investigating and dealing with misconduct'.[201] To this end, section 46(1)(b) of the *Crime and Corruption Act 2001* provides that the Commission deals with a complaint about corrupt conduct (formerly misconduct) by taking the action it considers most appropriate in the circumstances, having regard to the principles set out in section 34 – i.e. cooperation, capacity building, devolution and the public interest.

Collectively, these principles recognise that:

> … there is a public benefit in the commission and units of public administration working cooperatively to prevent, investigate and deal with misconduct. They also acknowledge that the commission has a lead role in building capacity to investigate and deal with misconduct in a way that promotes public confidence in the process. Thirdly, they recognise that, subject to the other principles, misconduct should generally be investigated and dealt with within the unit where it happens. The forth principle recognises that the commission should exercise its power to investigate and deal with particular cases of misconduct itself when it is appropriate.[202]

As explained by the 5th PCMC (the first Committee to review the operation of the Commission under the *Crime and Misconduct 2001*), the principles of devolution and capacity building:

> … are based on the premise that all relevant agencies, as well as being accountable to external agencies (such as the CMC, the Auditor-General and the courts), also have responsibility for their own integrity, and that good management requires the agencies themselves to develop systems to prevent and deal with any lapses in integrity.[203]

While these principles are well-settled, the Commission's application of them continues to generate controversy. On one view, the devolution principle, as implemented by the *Crime and Misconduct Act*

[199] Criminal Justice Commission, *Annual Report, 1991-92*, Brisbane: CJC, pp 114-18 (Appendices C and D).
[200] Parliamentary Crime and Misconduct Committee, *Report No. 71 – Three Yearly Review of the Crime and Misconduct Commission*, October 2006, p 41.
[201] Crime and Misconduct Bill 2001, explanatory notes, p 2.
[202] Crime and Misconduct Bill 2001, explanatory notes, pp 14-5.
[203] Parliamentary Crime and Misconduct Committee, *Report No. 64 – Three Yearly Review of the Crime and Misconduct Commission*, March 2004, p 25.

2001, 'has gone too far'.[204] In 2011, an Independent Expert Panel appointed by the then Government to review the police complaints, discipline and misconduct system, noted that 'the original rationale for devolution in favour of the opportunity for remedial intervention, restorative justice, and learning outcomes was directed at the minor and less serious matters only'. Despite this, the principle of devolution 'has evolved through to include official misconduct and serious (Category A) police misconduct'.[205]

The Independent Expert Panel observed that at the time of their review, the level of public confidence in the police complaints system was declining and that the principle of devolution, or 'police investigating police', was at least partly responsible for this state of affairs.[206] The Commission's reliance on seconded police officers to conduct investigations into police complaints was also identified as a contributing factor to public discontent.[207]

Both the Commission and previous Committees have consistently endorsed the principle of devolution, whilst recognising that there is a continuing need, and broad public support, for a body that is independent of the police service to investigate complaints against police.[208] The Commission submitted to the 6th PCMC's three-yearly review that it:

> … remains strongly convinced that responsibility for continuously improving the integrity of the Queensland public sector, and reducing the incidence of misconduct within it, must not rest solely with monitoring bodies such as the CMC. This responsibility must be part of the core business of the public sector agencies themselves, including the QPS. The biggest challenge for the CMC is to embed that notion in the public sector.[209]

The 3rd PCMC in its 1998 three-yearly review considered 'that there are sound reasons for allowing managers to deal with misconduct which does not constitute official misconduct as a managerial issue, and in a way that is appropriate to the organisation'.[210] The Committee commended the then 'current dichotomy between misconduct which does not constitute official misconduct which is internally investigated, and official misconduct, which is investigated by an independent agency'.[211] The

[204] Webbe, S., Williams AO QC, G., & Grayson APM, F., *Simple, Effective, Transparent, Strong: Report by the Independent Expert Panel*, Brisbane: Department of Premier and Cabinet, May 2011, p 14.
[205] Webbe, S., Williams AO QC, G., & Grayson APM, F., *Simple, Effective, Transparent, Strong: Report by the Independent Expert Panel*, Brisbane: Department of Premier and Cabinet, May 2011, p 27.
[206] Webbe, S., Williams AO QC, G., & Grayson APM, F., *Simple, Effective, Transparent, Strong: Report by the Independent Expert Panel*, Brisbane: Department of Premier and Cabinet, May 2011, p 14.
[207] Webbe, S., Williams AO QC, G., & Grayson APM, F., *Simple, Effective, Transparent, Strong: Report by the Independent Expert Panel*, Brisbane: Department of Premier and Cabinet, May 2011, p 16.
[208] Parliamentary Criminal Justice Committee, *Report No. 26 – A Report of a Review of the Activities of the Criminal Justice Commission Pursuant to s. 118(1)(f) of the* Criminal Justice Act 1989, February 1995, pp 87-8; Parliamentary Criminal Justice Committee, *Report No. 45 – A Report of a Review of the Activities of the Criminal Justice Commission Pursuant to s. 118(1)(f) of the* Criminal Justice Act 1989, 1998, pp 46, 55; Parliamentary Criminal Justice Committee, *Report No. 55 – Three Yearly Review of the Criminal Justice Commission*, 2001, pp 35-7; Parliamentary Crime and Misconduct Committee, *Report No. 64 – Three Yearly Review of the Crime and Misconduct Commission*, March 2004, pp 25-6; Parliamentary Crime and Misconduct Committee, *Report No. 71 – Three Yearly Review of the Crime and Misconduct Commission*, October 2006, p 44; Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Commission*, April 2009, p 30; Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, p 49.
[209] Parliamentary Crime and Misconduct Committee, *Report No. 71 – Three Yearly Review of the Crime and Misconduct Commission*, October 2006, pp 42-3.
[210] Parliamentary Criminal Justice Committee, *Report No. 45 – A Report of a Review of the Activities of the Criminal Justice Commission Pursuant to s. 118(1)(f) of the* Criminal Justice Act 1989, 1998, p 55.
[211] Parliamentary Criminal Justice Committee, *Report No. 45 – A Report of a Review of the Activities of the Criminal Justice Commission Pursuant to s. 118(1)(f) of the* Criminal Justice Act 1989, 1998, p 55.

Committee also expressed the view that it would be preferable in the long term 'if the jurisdiction of the Commission were reduced in relation to police misconduct'.[212]

The 4th PCMC recommended that 'the CJC continue with its present policy of gradually devolving responsibility to the Queensland Police Service for the handling of complaints against police officers', but emphasised the importance of 'effective and cogent oversight' by the Commission in order to preserve public confidence in the QPS.[213] The 5th PCMC also recognised that:

> There are advantages in agencies being primarily responsible for preventing the incidence of, and dealing with instances of, misconduct by their own officers. This can allow for a more mature and forward looking organisation taking responsibility for its own development, polices and personnel.[214]

The 6th and 7th PCMCs concurred with these sentiments. The 6th PCMC expressed its support for:

> … the concepts of devolution and capacity building and … the current legislative framework and role of the CMC. Agencies can learn and grow from dealing with misconduct themselves and can implement policy and procedural changes and educative and preventative measures as needed. Done properly, this can in time lead to both a more mature organisation, and enhanced public confidence in the organisation.[215]

Likewise, the 7th PCMC considered that devolution 'has a crucial role to play in building the capacity within agencies to identify and avert risks of misconduct' and 'should result in a more mature organisation that is prepared to take responsibility for any problems and that is better equipped to meet community expectations'.[216]

However, the endorsement by previous Committees of the principle of devolution has not been given without reservation. In 2004, the 5th PCMC expressed concern that the devolution regime 'has the considerable potential to dilute' the Commission's capacity for oversight of misconduct investigations and made a number of recommendations directed towards enhancing the capacity of agencies to deal with misconduct, including adequate resourcing to ensure that they are able to deal with and prevent misconduct, and ensuring that the Commission carefully oversees and monitors the performance of agencies in dealing with and preventing misconduct.[217]

Both the 6th and the 7th PCMC's acknowledged the validity of concerns frequently raised by complainants to those Committee's, about the devolution of their complaints back to the relevant agency for investigation.[218] The 7th PCMC noted that this aspect of the Commission's misconduct function:

> … has perhaps the greatest potential to erode public confidence in the independence and integrity of the Commission as an oversight agency. The Committee appreciates that complainants to the Commission will often have a very personal stake in the outcome of the misconduct investigation, especially where they feel personally aggrieved by the conduct complained of. Various complainants to the Committee have raised concerns about the Commission's devolution of their complaint back to

[212] Parliamentary Criminal Justice Committee, *Report No. 45 – A Report of a Review of the Activities of the Criminal Justice Commission Pursuant to s. 118(1)(f) of the* Criminal Justice Act 1989, 1998, p 46.
[213] Parliamentary Criminal Justice Committee, *Report No. 55 – Three Yearly Review of the Criminal Justice Commission*, 2001, pp 35, 37.
[214] Parliamentary Crime and Misconduct Committee, *Report No. 64 – Three Yearly Review of the Crime and Misconduct Commission*, March 2004, p 25.
[215] Parliamentary Crime and Misconduct Committee, *Report No. 71 – Three Yearly Review of the Crime and Misconduct Commission*, October 2006, p 44.
[216] Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Commission*, April 2009, pp 30, 31.
[217] Parliamentary Crime and Misconduct Committee, *Report No. 64 – Three Yearly Review of the Crime and Misconduct Commission*, March 2004, pp 25-7.
[218] Parliamentary Crime and Misconduct Committee, *Report No. 71 – Three Yearly Review of the Crime and Misconduct Commission*, October 2006, pp 43-4; Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Commission*, April 2009, p 29.

> the agency complained of, including concerns that the matter will not be properly or independently investigated, that any evidence of misconduct found will be "covered up", or that the seriousness of these concerns has not been fully appreciated by the Commission. The Committee acknowledges that even where there is no objective evidence that anything other than a full and thorough investigation was done by an agency, the perception of a biased process or outcome, or "Caesar judging Caesar", will often remain. It is that perception that can operate to erode public confidence in the CMC.[219]

Both the 6th and the 7th PCMC's considered that such concerns 'can best be addressed by ensuring:

- adequate distance between subject officers and those investigating and adjudicating on any complaint, to avoid the reality or perception of a lack of impartiality or independence; and
- where appropriate (particularly in cases where such distance cannot be provided or in cases of allegations of serious misconduct) oversight, review or full investigation by the CMC itself occurs'.[220]

In respect of the latter point, the 7th PCMC also recommended that 'section 34(d) of the *Crime and Misconduct Act 2001* be strengthened to require greater consideration of the public interest in devolution decisions, particularly where the complaint relates to the culture of a unit of public administration or where the nature of the complaint is such that devolution is unlikely to remove public perceptions about a lack of impartiality'.[221]

Submissions to the Independent Expert Panel's review also raised concerns about the way in which the Commission applies the public interest principle when deciding whether or not to devolve responsibility for police complaints to the QPS. The Independent Expert Panel noted that 'a range of stakeholders and commentators in the media' adhered to the view that the public interest 'is not given sufficient weight or priority in checking the principle of devolution', with the death in custody of Mulrunji on Palm Island in 2004 being cited as one instance where the public interest ought to have compelled the Commission to assume responsibility for the investigation.[222]

In its response to the Independent Expert Panel's report, the then Government signalled its intention to amend section 34 'to clarify that consideration of the 'public interest' becomes a pre-condition of devolution'.[223] The Government also indicated that both the Commission and the QPS would amend their guidelines 'to reflect the factors which should be considered in the "public interest"'.

The 8th PCMC noted the Government's intention to amend section 34 and consequently made no recommendation with respect to this issue other than to suggest that 'future Committees must monitor the operation of this amendment and how the practice of devolution continues to evolve'. Consequent upon a change in government shortly after the 8th PCMC's three-yearly review was tabled, no such amendment was ever made.

The 8th PCMC also noted that the way in which the Commission performs its misconduct function, and implements the devolution principle in particular, is poorly understood. That Committee observed that:

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[219] Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Commission*, April 2009, pp 29-30.

[220] Parliamentary Crime and Misconduct Committee, *Report No. 71 – Three Yearly Review of the Crime and Misconduct Commission*, October 2006, p 44; Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Commission*, April 2009, p 30.

[221] Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Commission*, April 2009, Recommendation 3, p 30.

[222] Webbe, S., Williams AO QC, G., & Grayson APM, F., *Simple, Effective, Transparent, Strong: Report by the Independent Expert Panel*, May 2011, pp 20-1.

[223] Queensland Government, Department of Premier and Cabinet, *Government Response to the Independent Review of the Queensland Police Complaints, Discipline and Misconduct System*, August 2011, p 14 (response to Recommendation 22).

> The experience of this Committee from receipt of complaints received by the 8th PCMC in relation to the performance of the CMC's misconduct function, particularly in relation to devolution is that there continues to be a general misconception in the community, the media (and even among some Members of Parliament) that the CMC's role in relation to misconduct is to investigate all matters that are referred to it.[224]

This perception was reaffirmed by a public attitudes survey conducted by the Commission in 2011, which revealed that 'there was limited awareness that the CMC referred less serious complaints to the relevant agency to investigate in accordance with the devolution principle'.[225]

The 8th PCMC suggested that 'if the process of devolution is going to continue to operate in Queensland as an effective strategy in dealing with complaints, more needs to be done to ensure the general public understand the framework within which the complaint is going to be dealt with'.[226] To this end, the Committee recommended that 'both the Government and the CMC take a more active approach in promoting the process of devolution in any communication strategies relating to government departments complaints or disciplinary processes in order to assist participants involved in misconduct complaints processes to become aware of, and understand how, their complaints will be managed'.[227]

The then Government expressed its support for this recommendation. The Government acknowledged that the devolution principle is 'one of the least understood' of the four principles that the Commission takes into consideration when determining how to deal with a complaint. Given the 'complex nature' of the devolution principle, the Government expressed its support for the Commission 'working collaboratively with individual Government departments to promote and explain devolution in any communication strategy relating to a department's complaints or disciplinary processes'.[228]

6.5.2 Submissions to this Review

In the previous three-yearly review, the 8th PCMC noted that 'the principle of devolution continues to be the most controversial way in which the CMC performs its misconduct functions', particularly 'in its application to complaints received about the Queensland Police Service'.[229] The experience of this Committee suggests that this controversy has not abated with the passage of time.

The majority of the submissions received by the Committee that addressed the principle of devolution expressed dissatisfaction with the way in which it is applied. Professor Tim Prenzler observed in an article enclosed with his submission that 'devolution is something of a sleeper issue that has been inadequately recognised in the debate in most locations'.[230] He suggests that the issue of devolution has not garnered greater public attention because 'there is often an assumption by proponents of anticorruption commissions that existing commissions carry out a lot more investigations than is the case'.[231] This perception is verified by a survey commissioned by the Commission shortly before the

[224] Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, p 49.
[225] Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, p 49.
[226] Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, p 49.
[227] Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, Recommendation 9, p 49.
[228] Queensland Government, *Government Response to the 8th Parliamentary Crime and Misconduct Committee Report No. 86, May 2012: Three Yearly Review of the Crime and Misconduct Commission*, tabled on 8 November 2012, p 5.
[229] Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, p 47.
[230] Prenzler, T., & Faulkner, N., 'Towards a Model Public Sector Integrity Commission', (2010) *69(3) Australian Journal of Public Administration*, 251-262, p 256.
[231] Prenzler, T., & Faulkner, N., 'Towards a Model Public Sector Integrity Commission', (2010) *69(3) Australian Journal of Public Administration*, 251-262, p 256.

article was written, which identified that '91% of public respondents supported the view that "complaints against the police should be investigated by an independent body not the police themselves"'. [232]

At the public meeting on 26 October 2015, Professor Prenzler described the devolution principle as 'a fraud on the public, because people think that you have this independent anti-corruption agency that is doing independent work, but in fact you have these police officers investigating police'.[233] He argued that this contravenes principles of due process and 'has prompted disillusionment among scholars, journalists and lawyers; and generated profound dissatisfaction among complainants'.[234] Consequently, Professor Prenzler submitted that in order to 'engender adequate public confidence in the legitimacy of public sector integrity', the Commission should assume a 'much more substantive role in complaints management' by directly and independently' investigating a 'much larger proportion of complaints'.[235]

Several other submissions raised concerns that the system of 'police investigating police' creates a perception of bias and therefore undermines public confidence in public sector integrity. The Whistleblowers Action Group (WAG) submitted that 'the Queensland public can have no confidence that its government is both open and accountable with the current legislative and administrative arrangements', which effectively 'legislate for "Caesar to judge Caesar" and create an environment for the CCC to become "captured" by the agency investigating itself'.[236] WAG also submitted that by not separating 'the functions and responsibilities for investigating wrong-doing reported by whistleblowers' from 'the functions and responsibilities for protecting whistleblowers', the current legislative framework provides no encouragement to 'those who witness and wish to report acts of crime or corruption with the public sector' to come forward and do so.[237]

The Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS) likewise submitted that it is 'inappropriate for police officers to investigate other officers against whom a complaint is made'.[238] On the one hand, ATSILS submitted that the devolution principle places the investigating officers 'in an invidious position – all the more so given the collegiate mind-set of the Queensland Police Service'.[239] On the other hand, ATSILS submits that the principle of devolution is contrary to 'fundamental principles of natural justice', which on their interpretation 'should mandate, in the majority of cases, the investigation of complaints against police by an independent body like the CCC'.[240]

This view also found support among the Queensland Council for Civil Liberties (QCCL) and the Queensland Law Society (QLS). The QCCL submitted that the 'model of police investigating police' was 'discredited' by the Fitzgerald Inquiry.[241] They stated that they 'often [receive] complaints from members of the public that their complaint about a police officer is investigated by another police officer from the same police station' and that 'it is not surprising that those members of the public have no faith whatsoever in the prospect of an appropriate investigation of their complaint'.

The QLS submitted that the 'devolution of investigative jurisdiction … effectively ensures that the situation that was so decried during the Fitzgerald Inquiry of "police investigating police" is re-

[232] Prenzler, T., & Faulkner, N., 'Towards a Model Public Sector Integrity Commission', (2010) *69(3) Australian Journal of Public Administration*, 251-262, p 256.
[233] Public hearing transcript, Brisbane, 26 October 2015, p 5.
[234] Prenzler, T., & Faulkner, N., 'Towards a Model Public Sector Integrity Commission', (2010) *69(3) Australian Journal of Public Administration*, 251-262, p 256.
[235] Professor Tim Prenzler, Submission No. 6, p 2.
[236] Whistleblowers Action Group, Submission No. 19, p 2.
[237] Whistleblowers Action Group, Submission No. 19, p 6.
[238] Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Submission No. 23, p 9.
[239] Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Submission No. 23, p 9.
[240] Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Submission No. 23, p 10.
[241] Queensland Council for Civil Liberties, Submission No. 26, p 1.

instigated some 26 years after the report was handed down'.[242] The QLS stated that this gives rise to 'very real and grave concerns', as 'the conferral of corruption investigations back to the internal investigations section of the respective administrative departments has been shown to be ineffective and significantly conducive to creating an environment which allows corruption to exist'.[243] In this regard, the QLS suggested that it is 'the lack of suitable accountability' in a unit of public administration that 'gave rise to the potential for the conduct subject to the complaint to allegedly occur in the first place'.[244]

However, at the public hearing on 26 October 2015, Mr Adam Dwyer, a member of the QLS' Criminal Law Committee, conceded that 'there is no empirical evidence that we are aware of' that supports these submissions. Instead, Mr Dwyer said that these comments partake more of 'a general statement in relation to this area'.[245] Nevertheless, the QLS recommended that 'consideration be given to having complaints of misconduct other than breaches of discipline or minor indiscretions investigated by the Commission'.[246]

On the other hand, the Bar Association of Queensland acknowledged the 'resource issues involved in investigating issues of "non-serious" corruption and misconduct' and, for this reason, 'the Association supports those changes [in the 2014 Act] which placed greater responsibility on the Public Service Commission and the heads of department in terms of investigating official misconduct'.[247]

The Queensland Police Service (QPS) also supports the principle of devolution, albeit for different reasons. At the public hearing on 30 November 2015, the Commissioner of Police, Mr Ian Stewart, expressed the view that 'the Service is and should be the custodian of its own standards'.[248] To remove responsibility for disciplining police officers from the QPS would, in Commissioner Stewart's view, 'limit and render futile management responsibility and leadership for our own workforce'.

The Queensland Police Union (QPU) expressed its support for this position. At the public hearing on 26 October 2015, the President of the Queensland Police Union, Mr Ian Leavers, submitted that the Commissioner of Police should be 'responsible for running his own department and that includes discipline as well'.[249] Mr Leavers submitted that these comments apply equally to Directors-General of units of public administration, leaving the Commission to investigate 'high-level police discipline and corruption', such as bribery, institutionalised corruption and forbearing from prosecuting offences in return for patronage.

Several submissions also expressed concerns about whether units of public administration have the capacity to adequately investigate corrupt conduct. The Department of Main Roads and Transport stated that while they 'can appreciate the rationale behind this further "second tier" devolution', they are concerned that this 'practice increases the risks that not only will the resulting investigation be of a lesser standard than expected by the CCC', as well as reducing 'the levels of independence and transparency to have the business unit concerned effectively investigating itself'.[250]

The Commission acknowledged the dissatisfaction among some sectors of the public with the principle of devolution, but submitted that it is not possible for it to investigate every complaint it receives given its current level of funding. At the public hearing on 30 November 2015, the Commission's Chair stated that 'in an ideal world', an integrity body such as the Commission would have additional oversight in

[242] Queensland Law Society, Submission No. 25, p 8.
[243] Queensland Law Society, Submission No. 25, p 7.
[244] Queensland Law Society, Submission No. 25, p 8.
[245] Public hearing transcript, Brisbane, 26 October 2015, p 23.
[246] Queensland Law Society, Submission No. 25, p 13.
[247] Bar Association of Queensland, Submission No. 28 (Supplementary), p 3.
[248] Public hearing transcript, Brisbane, 30 November 2015, p 10.
[249] Public hearing transcript, Brisbane, 26 October 2015, p 11.
[250] Department of Transport and Main Roads, Submission No. 2, p 2.

respect of matters which currently fall within the purview of the Public Service Commission, but this 'would require resources'.[251] Mr MacSporran submitted that:

> One solution potentially is to give the CCC a greater degree of discretion under that devolution principle to configure its own assessment of what matters should go back [to units of public administration] and what matters stay [with the CCC]. Currently, that decision has to be made consistently with the resources we have. That is always an overriding factor.[252]

The Commission's written submissions do not directly address the principle of devolution. However, a considerable amount of time was taken up with the discussion of this issue when the Commission appeared before this Committee at its public hearings. At the public hearing on 12 October 2015, the Chairperson stated that 'the principle of devolution remains the guiding principle for how we do our business'.[253] In practice, this means that, in the first instance, the Commission:

> … necessarily … have to consider sending it back [to the agency] unless there is a good reason not to. The good reasons are set out in section 34. That is the overriding principle that governs the way we operate … if there is a systemic or serious nature to the corruption then there is a very good reason for the Commission to retain the investigation itself or at least very closely monitor the UPA's dealing with it.[254]

At the public hearing on 30 November 2015, the Chairperson expressed the opinion that, 'properly managed', the devolution principle 'works very well'.[255] This view is supported by the results of reviews conducted by the Commission as part of its monitoring role, of investigations devolved to units of public administration. Throughout the period of this review, the Commission has expressed a very high degree of satisfaction with the way in which units of public administration have dealt with complaints concerning suspected misconduct/corrupt conduct. For example, in 2012-13 the Commission reviewed 235 complaints investigated or otherwise dealt with by units of public administration (excluding the Queensland Police Service) and in 91 per cent of these cases the Commission was satisfied with the way in which the complaint was dealt with.[256] For police complaints, the degree of satisfaction was even higher, with 94 per cent of complaints of police misconduct being dealt with by the Queensland Police Service to the Commission's satisfaction.[257] In 2013-14, the Commission reviewed 181 misconduct complaints and 128 police misconduct complaints and was satisfied with the manner in which these complaints were dealt with in 88 per cent and 95 per cent of cases, respectively.[258] The Commission's 2014-15 Annual Report does not provide a similar breakdown, but notes that 96 per cent of recommendations made by the Commission to units of public administration were accepted by the latter.[259]

However, the Commission has expressed some concern with 'a number of aspects of the police discipline system in Queensland'.[260] In particular, the Commission is concerned about 'the prevalence of the suspension of sanctions by the QPS, which has the potential to undermine public confidence in the QPS and the discipline system it administers'. The Committee considers the recommendations made by the Commission in relation to these matters below.

[251] Public hearing transcript, Brisbane, 30 November 2015, p 26.
[252] Public hearing transcript, Brisbane, 30 November 2015, p 26.
[253] Public hearing transcript, Brisbane, 12 October 2015, p 15.
[254] Public hearing transcript, Brisbane, 12 October 2015, p 15.
[255] Public hearing transcript, Brisbane, 30 November 2015, p 26.
[256] Crime and Misconduct Commission, *Annual Report 2012-13*, Brisbane: CMC, 2013, p 34.
[257] Crime and Misconduct Commission, *Annual Report 2012-13*, Brisbane: CMC, 2013, p 29.
[258] Crime and Misconduct Commission, *Annual Report 2013-14*, Brisbane: CMC, 2013, pp 23, 29.
[259] Crime and Corruption Commission, *Annual Report 2014-15*, Brisbane: CMC, p 8. For 2012-13 and 2013-14, the percentage of recommendations accepted were 95% and 98%, respectively.
[260] Crime and Corruption Commission, Submission No. 14, p 56.

6.5.3 Comment

The Committee recognises the basic principle, embodied in both the *Crime and Corruption Act 2001* and the *Public Service Act 2008*, that the responsibility for maintaining and imposing standards of integrity and discipline should in the first instance rest with management in units of public administration. Contrary to the popular perception alluded to earlier, this principle was expressly endorsed in the Fitzgerald Report, at least in relation to minor or purely disciplinary matters.

The Committee agrees that the principle of devolution, properly applied, can help raise and maintain standards of integrity in units of public administration, by making management accountable for those standards. At the same time, however, the Committee recognises the force of the argument that any substantiated allegation of corruption is indicative of a failure to uphold those standards within the relevant unit. If sustained over time, this may provide good grounds for the Commission to assume greater responsibility for investigating complaints originating from a particular unit of public administration, in the interests of maintaining public confidence.

The Committee also acknowledges that the devolution of complaints back to units of public administration is a genuine source of concern for many complainants, who approach the Commission in the expectation that it will act as an independent arbiter by directly investigating their complaint. Rightly or wrongly, the devolution of complaints fosters a perception of a lack of transparency and accountability within units of publication administration, which is likely to be exacerbated whenever the original decision is confirmed on review.

In the Committee's experience, this perception is more prominent among members of the public than employees of units of public administration, who benefit from education and awareness initiatives undertaken by the Commission and the Public Service Commission. In contrast, members of the public are less likely to be familiar with the ways in which their complaint may be dealt with by the Commission.

The Commission advised the Committee that it has responded to the recommendations made by the 8th PCMC in its three-yearly review in 2012, which encouraged the Commission to take a more active approach in raising public awareness of how the Commission manages complaints, in a number of ways, including:

- explaining the principle of devolution as part of its standard correspondence back to complainants;
- communicating the principle of devolution in documents that are readily available on the Commission's website, such as the Commission's Charter of Service, its Annual Reports and 'Corruption in Focus', the Commission's guide to units of public administration;
- closely monitoring some matters devolved to units of public administration;
- conducting audits; and
- updated and more explicit section 40 directions, which provide clear guidance to participating units of public administration in relation to the types of conduct of which the Commission must be notified.

The Committee notes that these measures are primarily addressed to units of public administration. Of those measures that are addressed to the general public, the principle of devolution is explained either in documents that a person wishing to make a complaint would not ordinarily be expected to consult or locate – both the Commission's Charter of Service and the Annual Reports are located in the 'CCC corporate publications' section of its website – or in a letter provided to a complainant only after a complaint has been made.

The Committee is of the view that the Commission should do more to raise public awareness of the way in which the principle of devolution operates. For example, while the Commission's webpage 'Procedures for dealing with complaints about corruption' states that 'the CCC will retain and

investigate only the most serious allegations of corrupt conduct', it does not provide any information regarding what types of conduct are likely to fall within this category, nor does it refer to the fact that the overwhelming majority of complaints (98 to 99 per cent) received by Commission are referred back to the relevant unit of public administration for investigation.[261] Two-thirds of the way down the same webpage, under the heading 'Possible courses of action', the Commission explains that 'under the principle of devolution, referring the complaint to the relevant public official is the preferred option', but the terms 'relevant public official' and 'devolution', a term whose meaning is unlikely to be readily comprehensible to the general public, are not defined.

The Committee considers that the Commission should give more prominence to the principle of devolution on its website and public documents, including: specifying the kinds of conduct that the Commission retains and investigates itself; the proportion of all complaints that are referred to the unit of public administration in which the conduct complained of occurred; and, explaining in plain English the practical effect of the principle of devolution.

Recommendation 9

The Committee recommends that the Commission give greater prominence to the principle of devolution on its website and public documents, including: specifying the kinds of conduct that the Commission retains and investigates itself; the proportion of all complaints that are referred to the unit of public administration in which the conduct complained of occurred; and, explaining in plain English the practical effect of the principle of devolution.

6.5.3.1 The application of the devolution principle to local governments

Several local governments raised concerns about the application of the principle of devolution to local governments, particularly in relation to local government CEOs. Pursuant to section 176B(3) of the *Local Government Act 2009*, if a complaint about the conduct or performance of a councillor is made to the local government or the chief executive of the Department of Infrastructure, Local Government and Planning, the local government's CEO must conduct a preliminary assessment of the complaint to determine, among other things, whether the complaint is about corrupt conduct as defined by the *Crime and Corruption Act 2001*.[262] As is discussed in greater detail below, the CEO of a unit of public administration, including local governments,[263] who reasonably suspects that a complaint, information or matter involves, or may involve, corrupt conduct, must notify the Commission of the complaint.[264]

The Moreton Bay Regional Council submitted that as the CEO is appointed by the local government,[265] the obligation of the CEO to notify the Commission of suspected corrupt conduct involving a councillor places local government CEOs in an invidious position when dealing with complaints about councillor conduct:

> At best the relationship between CEO's and councillors is strained, and the operations of the local government compromised. At worst a CEO might be seen to have a conflict between their personal interest in maintaining a relationship directly impacting on their employment and the public interest in, and statutory duty to, notify matters to the CCC that might involve corrupt conduct. The difficulties are obviously exacerbated when a complaint is perceived to be politically motivated.[266]

[261] Crime and Corruption Commission, 'Procedures for dealing with complaints about corruption', 30 June 2014, <http://www.ccc.qld.gov.au/corruption/how-the-ccc-investigates-corruption/procedures> (accessed 14 June 2016).
[262] If the complaint is received by the mayor or CEO of the local government, the preliminary assessment must be conducted by the CEO of the Department of Infrastructure, Local Government and Planning: *Local Government Act 2009*, s 176B(2).
[263] *Local Government Act 2009*, s 182(1).
[264] *Crime and Corruption Act 2001*, ss 38-39.
[265] *Local Government Act 2009*, s 194(1).
[266] Moreton Bay Regional Council, Submission No. 20, pp 1-2.

The Council therefore submitted 'that it would be beneficial for the Committee to consider ways in which the CEO of a local government can be insulated from this position'.[267]

The Tablelands Regional Council submitted that one such way of insulating local government CEOs is to adopt the proposal made by the Local Government Managers Australia (Queensland), the peak body for local government CEOs, which recommends that complaints against local government CEOs be dealt with by the Commission and those against councillors be assigned to the Commission or the CEO of the department responsible for the local government portfolio.[268] The Tablelands Regional Council endorsed this proposal.

However, at the public hearing on 9 November 2015, Mr Greg Hallam, the CEO of the Local Government Association of Queensland, said that among that organisation's members, there 'is a mixed bag' of support for the current arrangements.[269] Mr Hallam indicated that local governments of regional areas were less likely to support the current role of the CEO in investigating councillor conduct:

> If you are in a small community – and Mr Seeney would probably understand – it is much more difficult in a place like Monto or Biloela or Atherton because these matters cannot be kept confidential, so to speak. If you have a situation where a CEO is having to investigate elected members, it becomes very difficult.[270]

6.5.3.1.1 Comment

The Committee acknowledges the difficulties confronting CEOs of local governments in performing their statutory obligations to undertake a preliminary assessment of allegations of misconduct made against councillors, to whom CEOs are ultimately responsible. This situation is atypical in terms of the way in which the principle of devolution ordinarily operates, whereby the investigating officer is superordinate to the officer whose conduct they are investigating.

The Committee notes that the Government has recently appointed an independent panel to 'thoroughly examine the statutory provisions relating to [councillor] complaints to assess the effectiveness of the current legislative and policy framework and make recommendations about any policy, legislative and operational changes required to improve the system of dealing with complaints about councillors' conduct'.[271] The Committee understands that the review was instigated, in part, by similar concerns to those expressed by the LGAQ to this Committee regarding the potentially conflicted role of CEOs of local governments in the preliminary assessment and general management of complaints.

The independent panel is composed of members eminently qualified to undertake such a review, including the former Integrity Commissioner, Dr David Solomon, the former CEO of Logan City Council, Mr Gary Kellar, and the former Mayor of the Noosa Shire Council, Mr Noel Playford, and they are expected to deliver their recommendations within six months, that is in or around October. In these circumstances, the Committee considers that it would be prudent to await the recommendations of the independent review panel before making any recommendations of its own.

The Committee considers that this Committee and its successors should monitor the recommendations of the independent review panel, particularly in relation to potential options for resolving the potentially conflicted role of CEOs of local governments in the preliminary assessment and general management of complaints.

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[267] Moreton Bay Regional Council, Submission No. 20, p 2.
[268] Tablelands Regional Council, Submission No. 5, p 1.
[269] Public hearing transcript, Brisbane, 9 November 2015, p 12.
[270] Public hearing transcript, Brisbane, 9 November 2015, p 12.
[271] Hon Jackie Trad MP, Deputy Premier, Minister for Infrastructure, Local Government and Planning and Minister for Trade and Investment, 'Review of Councillor Complaints Process to Ensure Fair and Transparent System', media release, 21 April 2016.

Recommendation 10

The Committee recommends that this Committee and its successors monitor the recommendations of the independent review panel, particularly in relation to potential options for resolving the potentially conflicted role of CEOs of local governments in the preliminary assessment and general management of complaints.

6.5.4 The notification threshold

As mentioned above, a public official (including the Commissioner of Police) who reasonably suspects that a complaint, information or matter, involves, or may involve corrupt conduct, must notify the Commission of the complaint.[272] The Commissioner of Police must also notify the Commission of a complaint, information or matter that he or she reasonably suspects involves police misconduct.[273] These duties are paramount.[274]

An important adjunct to these duties is the ability of the Commission to issue guidelines to public officials and the Commissioner of Police under section 40 of the CC Act, regarding the kinds of complaints of which the Commission must be notified, as well as those that need not be reported to the Commission.[275] The Commission may also issue directions in relation to how and when a public official must comply with the duty imposed by section 37 or section 38.[276] These notifications may be specifically directed to a unit of public administration, or may apply across all units of public administration. A public official must comply with any direction given by the Commission pursuant to section 40(1).[277]

Prior to the commencement of the 2014 amendments, a public official was obliged to notify the Commission when they had a mere suspicion that a complaint, information or matter involved, or may involve, official misconduct (as corrupt conduct was then known);[278] there was no requirement that this suspicion be reasonably held. By requiring public officials to notify the Commission of '*any* suspicion, whether on reasonable grounds or not', Callinan and Aroney considered that the duty imposed by section 38 'extends … too far'.[279] They noted that this approach was inconsistent with the corresponding duty imposed on public officials in New South Wales, Victoria and Western Australia, which requires public officials in those States to notify the relevant authority of matters they '[suspect] on reasonable grounds concerns or may concern corrupt conduct' or 'constitutes corrupt conduct'.[280]

They were also of the view that the standard of mere suspicion 'places honest public servants in a position in which they must conscientiously refer virtually every mere allegation, and … gives the unscrupulous public servant or member of the public a charter to make oppressive, malicious or vindictive complaints with little if any fear of any adverse legal consequence'.[281] As such, they considered that the standard that applied under section 38 exacerbates the problems created by the

[272] *Crime and Corruption Act 2001*, s 38.
[273] *Crime and Corruption Act 2001*, s 37.
[274] *Crime and Corruption Act 2001*, s 39.
[275] *Crime and Corruption Act 2001*, s 40(1)(a).
[276] *Crime and Corruption Act 2001*, s 40(1)(b).
[277] *Crime and Corruption Act 2001*, s 40(4).
[278] Crime and Corruption Commission, Submission No. 14, p 19.
[279] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 48 (emphasis in original).
[280] *Independent Commission Against Corruption Act 1988* (NSW), s 11(2); *Corruption, Crime and Misconduct Commission Act 2003* (WA), s 28(2)(a); *Independent Broad-based Anti-corruption Act 2011* (Vic), s 57(1). In Western Australia, the duty applies to 'misconduct' rather than corrupt conduct.
[281] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 118.

'very wide' definition of official misconduct,[282] in particular the proliferation of baseless complaints. In their view, this has many other 'regrettable consequences: damage and exposure to the subjects of it; expenditure of public money on processing it; abrogation of responsibility by managing officials; distraction from more important tasks; and more bureaucrats to administer the considerable numbers of complaints'.[283]

Callinan and Aroney therefore recommended that section 38 be amended to raise the threshold for mandatory notification of matters to the Commission by public officials, to ensure that this duty arises only if the suspicion of corrupt conduct is reasonable.[284] Not only would this introduce greater conformity between Queensland and other Australian jurisdictions, it would also place public officials in the same position as the Commissioner of Police, who is obliged to notify the Commission of complaints, information or matter that the Commissioner reasonably suspects involves police misconduct.[285] This recommendation was implemented in 2014.

The Committee considers that while some of these concerns are justified, others are less well-founded. For example, the operation of the principle of devolution, together with the Commission's monitoring function, limits the ability of managers to abrogate their responsibility to deal with corrupt conduct within their respective departments. Moreover, the introduction of the condition of reasonableness may also require managers to undertake preliminary inquiries to determine the veracity of the complaint, thereby distracting them from 'more important tasks'. This is confirmed by the Commission, which informed the Committee that 'the "reasonable suspicion" test has [had] the effect of shifting the responsibility for identifying and conducting an initial triage of allegations of corrupt conduct, received by the public sector agency, to the public official'.

Nevertheless, few submissions to this Committee's review addressed this amendment in any detail. Stanwell noted that while it 'does not historically receive many complaints or information of corrupt conduct', it commended the new reporting threshold because it 'enables Stanwell to ensure that the conduct or information it refers to the CCC appears to have some basis'.[286] Stanwell contrasted this with the former regime, which lacked 'any materiality or veracity threshold relevant to the referral of "official misconduct"' and therefore 'obliged Stanwell to immediately refer any allegations of official misconduct to the [CMC]'.

Together Queensland described the effect of the increased notification threshold as 'significant' because 'matters that would have previously been reported to the CMC and, even if referred back to Agencies, would have been monitored by the CMC were now made wholly the responsibility of the various Ethical Standards Units or equivalent at Agency level'.[287] They submitted that 'this has proved problematic in two ways':

> Firstly, cuts to the Public Service over the Newman years have meant that the Ethical Standards Units have been significantly reduced or even abolished, and the skills to manage the matters have been lost. Secondly, it has meant a loss of sector wide consistency and guidance.

Together Queensland submitted that this should be addressed by giving the Commission 'oversight of misconduct across the public sector, a responsibility it has historically had'.

[282] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 117.
[283] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 48.
[284] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, Recommendation 3E, p 215.
[285] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, pp 117-18.
[286] Stanwell Corporation Ltd, Submission No. 3, p 1.
[287] Together Queensland, Submission No. 16, p 3.

The Queensland Law Society (QLS) also submitted that 'the need for … vigilant detection and deterrence [of corruption] is best served by maintaining that all corruption investigations are referred directly to the CCC'.[288]

Both the Department of State Development and the Department of Infrastructure, Local Government and Planning commented that 'the increased threshold for reporting by public officials of matters, particularly the 'reasonable suspicion' test, have resulted in fewer matters involving corrupt conduct by employees being reported to the CCC' by those departments.[289] As a consequence, those departments have been 'required to manage matters involving allegations about employee misconduct more independently'. However, their submissions do not elaborate on whether they consider this to be a positive or negative development.

The Committee notes that one of the objectives of increasing the notification threshold was to achieve a reduction in the number of, or potential for, 'oppressive, malicious or vindictive complaints'. However, the Commission stated in its primary submission that the number of complaints it received from all sources decreased by approximately 40 per cent from 2013-14 to 2014-15, and that this decrease 'relates to all complaints, whether they be low level or significant'.[290]

At the same time, the Commission noted that 'there is now a significant difference in allegations received by sector'.[291] In 2012-13 and 2013-14, 51 per cent of all allegations of misconduct assessed by the Commission involved the police. In 2014-15, the proportion of allegations involving police increased to 66 per cent. The Commission stated that:

> The reasons for the current proportion of complaints against QPS staff are not yet clear. However, traditionally a large proportion of complaints about the public sector (excluding police) were received by way of agency referral, and conversely a large proportion of complaints about the QPS were received from members of the public.[292]

The Commission noted, however, that 'this is no longer the case with respect to complaints received about the public sector, as agency notifications have continued to decrease by 65 per cent across the review period'.[293]

According to the Commission, 'this decrease in complaint numbers does not in itself suggest that there has been an increase in integrity standards in Queensland'.[294] Instead, the Commission suggested that the primary cause of this reduction is likely to consist in the addition to the definition of corrupt conduct of the requirement that the conduct in question was done for the purpose of gaining a benefit or causing a detriment.[295] At the public hearing on 12 October 2015, the Chair of the Commission submitted that this requirement 'is simply too difficult and too complex. We think for that reason a lot of the complaints may not be able to be dealt with because the proof is lacking in that respect'.[296] Consequently, the Commission is concerned that the current reporting threshold 'runs the risk of matters failing to come to our attention'.[297]

To test this hypothesis (among others), in 2014 the Commission initiated an audit to assess the appropriateness of systems and procedures adopted by units of public administration for dealing with complaints about corruption. The primary objective of the audit was to ascertain whether the decrease

[288] Queensland Law Society, Submission No. 25, p 8.
[289] Department of Infrastructure, Local Government and Planning, Submission No. 7, p 1; Department of State Development, Submission No. 10, p 1.
[290] Crime and Corruption Commission, Submission No. 14, pp 49-50.
[291] Crime and Corruption Commission, Submission No. 14, p 51.
[292] Crime and Corruption Commission, Submission No. 14, p 51.
[293] Crime and Corruption Commission, Submission No. 14, p 52.
[294] Crime and Corruption Commission, Submission No. 14, p 50.
[295] Crime and Corruption Commission, Submission No. 14, p 50.
[296] Public hearing transcript, Brisbane, 12 October 2015, p 15.
[297] Public hearing transcript, Brisbane, 30 November 2015, p 22.

in agency notifications is primarily attributable to 'justifiable reasons' and to ensure that the Commission 'continues to receive notifications, information and complaints about the serious and/or systemic corruption within its jurisdiction' in a timely manner.[298]

That audit had not been completed by the time the Commission made its submissions to this Committee's review. At that time, the Commission's preliminary view was that:

> The way it should work is that the threshold should be lower but the CCC has an ability from time to time to issue directions under section 40 of our Act to control the way complaints are reported to us, so you have an ability to be more flexible about the kind of matters that come to the CCC. I know that the reviews that have been done in the past quite sensibly were concerned about the volume of material that came to the CCC – a lot of it minor, some of it frivolous and some even vexatious, that was taking up a lot of our resources and time that could not be justified. There is some clear truth in that. The danger is that, in trying to set the bar too high to eliminate that, you lose some of the matters that you should be taking care of.[299]

The Commission is of the opinion that the threshold 'does not need to go as far back as it was, but there needs to be a greater ability for us to see this material to make an informed decision about what should be investigated as potentially corrupt conduct and what is not worth wasting our time on'.[300] In this regard, the Chairperson referred to the recent experience of the New South Wales Independent Commission Against Corruption, noting that:

> … some of the ICAC work was done in respect of those very high-profile results they achieved in recent years arose out of quite innocuous, very low level reports. It was only because they were looked at carefully that other things emerged from them and enabled the inquiry to go along to the conclusions you know about.[301]

The Commission has since completed its audit. The audit identified that 28 per cent of the audited files (i.e. 62 out of a sample of 225) did meet the definition of corrupt conduct and ought to have been reported to the Commission, but were not.[302] Of the 62 matters that were not reported, approximately one-third (21) were assessed by the Commission as falling within the most serious category of corrupt conduct. The Commission justifiably regards this result as 'concerning' and says that it 'demonstrates that a number of high-risk corruption matters may not be being reported to it'.[303]

Unfortunately, in only 13 of these 62 cases did the relevant agency record the reason for not reporting the matter to the Commission. In five of those 13 cases, the relevant unit of public administration indicated that the allegation did not satisfy one of the elements of the definition of corrupt conduct, while in the other eight cases the material provided in support of the allegation was not considered by the relevant agency to have raised a reasonable suspicion of corrupt conduct. While the Commission is aware of 'some anecdotal evidence [that] there has been some confusion by UPAs over the application of the requirement for the conduct to provide a benefit or cause a detriment', it is of the opinion that these findings 'are consistent with the CCC's view that the reason for the decline in notifications of corrupt conduct from UPAs is primarily due to the introduction of the reasonable suspicion test in section 39 of the CC Act'.[304]

Despite these findings, the Commission does not recommend any change to the reporting threshold in section 38 at this time. While the Commission accepts that 'the higher threshold reduces the CCC's

[298] Public hearing transcript, Brisbane, 30 November 2015, p 22.
[299] Public hearing transcript, Brisbane, 30 November 2015, p 22.
[300] Public hearing transcript, Brisbane, 30 November 2015, p 22.
[301] Public hearing transcript, Brisbane, 30 November 2015, p 23.
[302] Crime and Corruption Commission, '"Corrupt Conduct" under the *Crime and Corruption Act 2001*: Submission to the Department of Justice and Attorney-General', April 2016, p 13.
[303] Crime and Corruption Commission, '"Corrupt Conduct" under the *Crime and Corruption Act 2001*: Submission to the Department of Justice and Attorney-General', April 2016, p 13.
[304] Crime and Corruption Commission, '"Corrupt Conduct" under the *Crime and Corruption Act 2001*: Submission to the Department of Justice and Attorney-General', April 2016, p 13.

visibility over some conduct', it is of the view that there is 'no compelling evidence to support the view that it has impacted on the number of matters reported to the CCC of serious or systemic corrupt conduct'.[305]

At a public meeting with the Chairperson and the CEO of the Commission on 13 June 2016, the Committee sought clarification from the Commission regarding these findings. The Chair explained to the Committee that while the extent of non-reporting of serious allegations of corrupt conduct to the Commission appears at first glance to be 'quite disturbing', the Commission had re-examined these matters and determined that closer monitoring of these cases was unnecessary. The Committee has also received written advice from the Commission that during the audit, it developed an assessment guide to assist agencies to understand and apply the new threshold, after the audit identified deficiencies in the assessment tools, policies and procedures employed by agencies, which may have contributed to the incorrect assessments. As such, the Commission considers that participating in the audit process was a productive exercise for the agencies involved.

The Commission also informed the Committee that it intends to introduce an enhanced auditing and monitoring program to assist the agencies to adapt to the new reporting regime. While the Commission acknowledges that educating units of public administration about the new standard remains 'a work in progress', it is encouraging units of public administration to 'be conservative' when applying the reasonable suspicion test 'so that more comes to us'.

6.5.4.1 Comment

The Committee welcomes these initiatives. As they have only recently been introduced by the Commission, it is much too soon to evaluate their effectiveness. The Committee therefore considers that both the Commission and this Committee and its successors should closely monitor and, if necessary, review these arrangements in order to ensure that the Commission continues to be notified of matters that ought to be brought to its attention, particularly suspicions of serious or systemic corrupt conduct that are reasonably held. In this regard, the Committee notes that the reinstatement of the Commission's corruption prevention function is likely to assist the Commission in raising awareness within units of public administration of how to apply the new provisions.

However, if the Commission is to perform its monitoring function effectively, the Committee considers it essential for units of public administration to prepare and retain complete and accurate records of any decision not to notify the Commission of an allegation of corrupt conduct, including the reasoning on which that decision is based, the evidence (or lack thereof) considered and any findings in relation thereto. Without such record-keeping, the effectiveness of the amendments sought by the Commission in relation to the performance of its monitoring function, which seek to grant the Commission power to enter and search premises and to compel the production of documents or information, may be ineffectual.

Recommendation 11

The Committee recommends that this Committee and its successors monitor and review the operation of the new notification threshold to ensure that the Commission continues to be notified of matters that ought to be brought to its attention.

[305] Crime and Corruption Commission, '"Corrupt Conduct" under the *Crime and Corruption Act 2001*: Submission to the Department of Justice and Attorney-General', April 2016, p 13.

Recommendation 12

The Committee recommends that the *Crime and Corruption Act 2001* be amended to require units of public administration to prepare and retain complete and accurate records of any decision not to notify the Commission of an allegation of corrupt conduct, including the reasoning on which that decision is based, the evidence (or lack thereof) considered and any findings in relation thereto.

6.5.5 Conflicting notification obligations for CEOs of government-owned corporations

Stanwell Corporation directs the Committee's attention to a potential conflict between the obligation imposed on CEOs of government-owned corporations to notify the Commission of suspected corrupt conduct pursuant to section 156(2) of the *Government Owned Corporations Act 1993* (*GOC Act*), and the obligation of confidence imposed on authorised persons (including company CEOs) to whom information regarding a potential contravention of the *Corporations Act 2001* (*Corporations Act*) by an officer or employee of the company, which arises under the whistleblower protection scheme established by Chapter 9, Part 9.4AAA of the *Corporations Act*.

Under the *Corporations Act*, a person ('discloser') who in good faith discloses to an 'authorised person' information which the discloser has reasonable grounds to suspect indicates that the company or an officer or employee of the company, has or may have contravened a provision of the Corporations legislation, is entitled to certain protections from civil and criminal liability and to compensation for any victimisation arising from the disclosure.[306] 'Authorised persons' include company directors, secretaries, senior managers and persons authorised by the company to receive such disclosures. Pursuant to section 1317AE of the *Corporations Act*, an authorised person to whom such disclosure is made commits an offence if they disclose the information, the identity of the discloser or information that is likely to lead to the identification of the discloser, unless the disclosure is made to the Australian Securities and Investment Commission (ASIC), the Australian Prudential Regulatory Authority, the Australian Federal Police or someone else with the consent of the discloser.

Stanwell is a company incorporated under the *Corporations Act* but is also governed by the *GOC Act*. Stanwell illustrates the potential conflict between these two duties with reference to the following examples:

- ASIC commences a covert investigation into alleged insider trading involving Stanwell personnel and directs Stanwell not to discuss the investigation with any third party. As insider trading is likely to constitute corrupt conduct, Stanwell may be prevented from complying with its paramount duty to notify the Commission under section 156(2) of the *Government Owned Corporations Act* and section 38 of the *Crime and Corruption Act*;
- a whistleblower discloses to Stanwell information about serious fraud allegedly committed by a Stanwell employee. As Stanwell is incorporated under the *Corporations Act 2001*, it may be prevented from complying with its duty to notify the Commission by section 1317AE of the *Corporations Act*, which makes it an offence for a person to disclose information (that qualifies for protection) or to otherwise identify the discloser without their consent;
- if Stanwell does disclose such information to the Commission, this could result in investigations being undertaken simultaneously by the Commission and ASIC; and
- other potential issues arising under the Australian Consumer Law and with respect to the Australian Competition and Consumer Commission.

Stanwell submitted that by virtue of section 109 of the Commonwealth Constitution, the *Corporations Act* prevails to the extent of any inconsistency. Nevertheless, they state that 'it would be useful for the

[306] *Corporations Act 2001* (Cth), ss 1317AA-1317AC. A disclosure only qualifies for protection under Part 9.4AAA if the person making the disclosure is an officer or employee of a company, or a person who has a contract for the supply of services or goods to a company or an employee of the person supplying those goods or services.

impacted GOC's and Commonwealth and State agencies to have a clear, mutual understanding of how to manage circumstances where these conflicts arise (and where, as a result, there are conflicting compliance obligations and potential multiple investigations)'.[307]

The Commission acknowledged the potential for conflict under these statutory regimes in its submission to the 8th PCMC's review in 2012. At that time, the Commission noted that 'while it seems a discloser [under the *Corporations Act*] may give permission for a complaint to be communicated to a State-based integrity agency such as the CMC, it is not specifically identified'.[308] The Commission expressed concern that 'without such certainty there will be continued doubt for GOCs about reporting obligations and concern about exposure to prosecution for failing to report suspected official misconduct to the CMC. There is also the possibility of concurrent investigations of the same alleged misconduct being undertaken by the CMC and a Commonwealth agency, and the likely undermining of the CMC's specific obligations and powers as outlined in our Act'.

The PCMC's report stated that 'it is unacceptable for there to be any confusion or doubt within GOCs as to how they must comply with their reporting obligations', given that this could potentially expose them to prosecution for failing to report suspected misconduct to the CMC.[309] The PCMC also considered it desirable to avoid the prospect of concurrent investigations to ensure that 'there is no waste of resources and more importantly, that the powers of the CMC are not undermined'.

The PCMC accordingly recommended that 'the Government support the CMC in resolving any inter-jurisdictional issues in the application of the jurisdiction of the CMC to GOCs as quickly as possible, including making amendments to the relevant legislation, in order to provide certainty to the processes and procedures being implemented by both the CMC and the GOCs to comply with the new arrangements'.[310] In addition, the PCMC recommended that 'successor committees closely monitor the CMC's supervision of [GOCs] over the next reporting period to assess the effectiveness of the new arrangements'.[311]

The then Government agreed with the Committee's recommendations and proposed that 'the CMC should work in co-operation with the GOCs and other public sector stakeholders to resolve the legal issues and if legislative amendments are required, the CMC should report these matters to the Attorney-General and Minister for Justice'.[312]

The Commission advised the Committee that legislative amendment is necessary to resolve these issues. To this end, the Commission has suggested that section 156 of the *GOC Act* and section 19 of the *Public Interest Disclosure Act 2010* ("*PID Act*") should be amended to provide that:

- they are displacement provisions for the purpose of section 5G of the *Corporations Act*; and
- section 1317AE of the *Corporations Act* does not apply to any disclosure which is necessary for or incidental to compliance with section 156 of the *GOC Act* and section 19 of the *PID Act*, respectively.

Section 5G of the *Corporations Act* provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with

[307] Stanwell Corporation Ltd, Submission No. 3, p 2.
[308] Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, p 72.
[309] Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, p 72.
[310] Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, Recommendation 23, p. 73.
[311] Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, Recommendation 24, p 73.
[312] Queensland Government, Department of Premier and Cabinet, *Government Response to the 8th Parliamentary Crime and Misconduct Committee Report No. 86, May 2012: Three Yearly Review of the Crime and Misconduct Commission*, 8 November 2012, p 10.

which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency. The proposed amendments would therefore enable the CEO of a government-owned corporation to comply with his or her duty to notify the Commission of suspected corrupt conduct under section 156 of the *GOC Act* without breaching the statutory obligation of confidence imposed by section 1317AE of the *Corporations Act* in relation to information disclosed to the CEO by an employee regarding a potential breach of the Corporations legislation.

6.5.5.1 Comment

The Committee agrees with the view expressed by the 8th PCMC it is unacceptable for there to be any confusion or doubt within GOCs as to how they must comply with their reporting obligations. It is regrettable that this confusion has not been satisfactorily resolved in the intervening period.

The Committee accordingly recommends that the *Government Owned Corporations Act 1993* and the *Public Interest Disclosure Act 2010* be amended to provide that where a government owned corporation is required to refer a matter under the *Corporations Act 2001* or any other federal government legislation, that the Commission also be advised so that both Federal and State bodies can liaise on the matter..

Recommendation 13

The Committee recommends that the *Government Owned Corporations Act 1993* and the *Public Interest Disclosure Act 2010* be amended to provide that where a government owned corporation is required to refer a matter under the *Corporations Act 2001* or any other federal government legislation, that the Commission also be advised so that both Federal and State bodies can liaise on the matter.

6.6 Monitoring

When the Commission decides to devolve responsibility for investigating a complaint to a unit of public administration, it may also decide to monitor the progress and outcome of that investigation. The Commission utilises various mechanisms to monitor the way in which agencies handle complaints, including overseeing investigations, reviewing interim and finalised investigation reports, and undertaking audits.[313]

The Commission submitted that its ability to perform effective oversight of investigations may be compromised in certain situations. The Commission advised the Committee of several instances in which public officials have been reluctant to accept recommendations made by the Commission about how an investigation should be undertaken, or have declined or refused to provide specific details or information requested by the Commission in order to effectively monitor whether an investigation has been conducted in a thorough and appropriate manner.

In such circumstances, the Commission is limited to 'leveraging our cooperative relationships with agencies'.[314] This is because, in contrast to the situation where the Commission undertakes an investigation itself, the Commission has no power to compel a unit of public administration to provide it with information when the Commission is performing its monitoring function. This limitation arises from the definition of 'corruption investigation' in Schedule 2 of the Act, which defines this term as 'an investigation conducted by the Commission in the performance of its corruption function'. The Commission's submission noted that 'historically, the CCC has adopted the practice that the monitoring role does not fall within the meaning of a corruption investigation'.[315]

Where a unit of public administration refuses to cooperate with the Commission, the question necessarily arises of whether the Commission should assume responsibility for and complete the

[313] Crime and Corruption Commission, Submission No. 14, p 47.
[314] Crime and Corruption Commission, Submission No. 14, p 47.
[315] Crime and Corruption Commission, Submission No. 14, p 69.

investigation itself.[316] In response, the Commission submitted that given their finite resources, it is not always possible or desirable, in the interests of efficiency, to assume responsibility for an investigation for the sole purpose of securing the production of what may be a small number of documents. The Commission also stated that it is unclear as a matter of law whether the Commission is obliged to carry an investigation through to completion once it has assumed responsibility for it.

In the Commission's view, it would be preferable for it to be able to 'force the issue' by either invoking, or threatening to invoke, compulsory powers such as those provided in respect of corruption investigations by sections 73 and 75. Those provisions respectively empower the Commission to enter and search premises and to issue notices to discover information. The Committee regards its inability to draw on such powers when monitoring an investigation as an 'unnecessary obstruction' to the performance of its monitoring function.

The Commission has therefore recommended that sections 73 and 75 should be amended to expressly state that these powers apply to the performance of the Commission's corruption monitoring roles under sections 47 and 48.[317] The Commission submits that amending sections 73 and 75 is preferable to amending the definition of 'corruption investigation', which 'may have unintended consequences'.[318]

Since making its written submissions, the Commission has also recommended to the Committee that section 55 of the Act should be amended in a like manner. As presently drafted, section 55(1) provides that the Commissioner of Police must give the Chair of the Commission access to intelligence information held by the police service as required by the Chair as soon as possible after receiving the request. That power is provided to the Commission in support of its intelligence functions.[319]

The Committee notes that the Commission has enjoyed these powers when performing its crime function since the Act was introduced in 2001. As such, the Committee asked the Commission if it could shed any light on why the Act had accorded it these powers in respect of its crime function, but not when it is monitoring an investigation in accordance with its corruption function. In response, the Commission stated that it considers this disparity to be an unintended 'loophole' in the Act and supported this interpretation by referring to the powers granted to the Queensland Auditor-General by sections 46 to 48 of the *Auditor-General Act 2009*.

Those provisions grant the Auditor-General and authorised auditors certain powers for the purpose of conducting an audit of an entity or of consolidated fund accounts, namely:

- the power of full and free access to all documents and property relevant to the audit or belonging to, in the custody or under the control of, an entity;[320] and,
- the power to issue a written notice requiring the recipient to:
    - provide information in the way stated in the notice; [321]
    - attend a hearing to answer questions;
    - produce documents belonging to, in the custody or under the control of, the recipient,[322]

  provided the information or documents are reasonably necessary for the purposes of an audit under the Act.

[316] For complaints involving police misconduct, see *Crime and Corruption Act 2001*, s 47(1)(c); for complaints involving corrupt conduct, see s 48(1)(d).
[317] Crime and Corruption Commission, Submission No. 14, Recommendation 14, p. 70.
[318] Crime and Corruption Commission, Submission No. 14, p 70.
[319] *Crime and Corruption Act 2001*, s 53(e).
[320] *Auditor-General Act 2009* (Qld), ss 46(1)-(2).
[321] *Auditor-General Act 2009* (Qld), s 47(1).
[322] *Auditor-General Act 2009* (Qld), s 48(1).

According to the Commission, the fact that Parliament has granted these powers to the Auditor-General indicates that Parliament did not intend to prevent the Commission from utilising similar powers in the exercise of its statutory responsibilities.

The Committee has difficulty accepting this argument. As the Explanatory Notes accompanying the Auditor-General Bill 2009 explain, the powers conferred by sections 46 to 48 of the Act are derived from the *Financial Administration and Audit Act 1977* (Qld) and 'retain the existing powers of the Auditor-General and other authorised auditors to obtain information necessary to conduct audits'.[323] Given that these powers antedate the introduction of the *Crime and Misconduct Act 2001*, there is a strong presumption that Parliament must have intended not to extend these powers to the Commission in the performance of its monitoring function.

The Committee derives support for this interpretation from the Explanatory Notes on the Crime and Misconduct Bill 2001, which state:

> Overall, there is largely no increase in power in respect of either the crime or misconduct functions of the commission (with the exception of the crime function gaining electronic data surveillance powers). In some instances this has meant limiting a power to a crime or misconduct investigation respectively to ensure no cumulative expansion of powers has occurred …
>
> The commission has extensive powers that raise issues about the rights of individuals. These powers are equivalent to those presently given to the CJC and the QCC. Apart from the specific matters above, great care in drafting has ensured that where powers have been updated, they have not resulted in an increase in power in respect of crime or misconduct investigations.[324]

The Committee notes that under the *Criminal Justice Act 1989*, the CJC did not possess the powers it now seeks. This indicates that Parliament deliberately chose not to grant the Commission powers to enter premises or discover information when it is performing its monitoring function.

6.6.1 Comment

That, of course, does not prevent this Committee from making a recommendation that, in light of present experience, these powers should now be granted to the Commission. In this regard, the Committee notes that in consequence of the increased emphasis placed on the principle of devolution by the 2014 amendments, investigations of alleged of corrupt conduct must increasingly be conducted by units of public administration. In order to maintain public confidence in with way in which corruption within a unit of public administration is dealt with – which is the Commission's overriding responsibility – the Committee considers it desirable that the Commission is given sufficient powers to enable it to effectively monitor the way in which units of public administration deal with complaints.

The Committee accordingly recommends that the government give consideration to amending sections 55, 73 and 75 of the Act, to expressly provide that the powers conferred on the Commission by these provisions apply to the performance of the Commission's monitoring function.

Recommendation 14

The Committee recommends that the government give consideration to amending sections 55, 73 and 75 of the *Crime and Corruption Act 2001* to expressly provide that the powers conferred on the Commission by these provisions apply to the performance of the Commission's monitoring function.

6.6.2 Reviewing police disciplinary decisions

In addition to monitoring the ways in which units of public administration deal with allegations of corrupt conduct, the Commission also monitors the way in which the Queensland Police Service (QPS) deals with allegations of police misconduct.[325] Subject to this monitoring role, the Commissioner of

[323] Auditor-General Bill 2009, explanatory notes, p 12.
[324] Crime and Misconduct Bill 2001, explanatory notes, pp 3-4.
[325] *Crime and Corruption Act 2001*, s 47.

Police has primary responsibility for dealing with complaints about, or information or matter which the Commissioner of Police reasonably suspects involves, police misconduct.[326] The Commission has long held concerns about several aspects of these arrangements.

These concerns reached their peak in 2011 when the Deputy Commissioner of QPS, Ms Kathy Rynders (DC Rynders), decided not to institute disciplinary proceedings against six QPS officers involved in two police investigations relating to the death in custody of Mulrunji on Palm Island in 2004. In June 2010, the Commission tabled in Parliament a report on an internal QPS review of the original QPS investigation into Mulrunji's death.[327] The Commission's report found that while both the initial police investigation and the subsequent internal police review were seriously flawed, there was insufficient evidence to support the laying of criminal charges against any of the officers. However, the Commission considered that the conduct was serious enough to warrant disciplinary action against each of the officers and made recommendations to that effect to the Commissioner of Police. The Commission foreshadowed that it would assume responsibility for the matter and apply to the Queensland Civil and Administrative Tribunal (QCAT) to commence disciplinary proceedings if it was not satisfied with the Commissioner's intended course of action.[328]

The Commissioner of Police appointed DC Rynders as the prescribed officer to consider the matter and decided whether or not to initiate disciplinary proceedings. On 7 January 2011, DC Rynders submitted her report, which recommended against initiating disciplinary proceedings against any of the six officers due to extenuating circumstances. The practical effect of this decision was to deprive the Commission of the opportunity to apply to QCAT for a review of the decision, due to the combined operation of sections 219G and 219BA of the Act.

Section 219G(1) entitles the Commission to apply to QCAT for a review of a reviewable decision. At the time of DC Rynders' decision, a 'reviewable decision' was defined in section 219BA(1) as:

(a) a decision made in relation to an allegation of misconduct against a prescribed person, other than a decision made by a court or QCAT; or

(b) a finding mentioned in the *Public Service Administration Act 1990*, section 7.4(2A)(b) or 7A.5(1)(b) that misconduct is proved against an officer.

As DC Rynders did not find that misconduct was proved against any of the officers, the Commission could not apply for a review of her decision under section 219BA(1)(b).

Further, the Commission received legal advice that section 219BA(1)(a) is applicable only if there are disciplinary proceedings on foot.[329] As DC Rynders decided not to initiate disciplinary proceedings against the officers involved, section 219BA(1)(a) was also inapplicable.

The then Chair of the Commission, the Honourable Martin Moynihan AO QC, stated that he was 'astounded' by DC Rynders' decision.[330] In his view, the decision 'circumvented the independent review process' in a manner that is contrary to the intention of the Act and undermined public confidence in the police disciplinary system.

As a result of this decision, the Commission announced that it intended to seek amendments to the Act to enable the Commission to apply to QCAT for an independent review of a decision by the QPS

[326] *Crime and Corruption Act 2001*, s 41(1).

[327] Crime and Misconduct Commission, *CMC's Review of the Queensland Police Service's* Palm Island Review, June 2010, tabled on 17 June 2010.

[328] Crime and Misconduct Commission, 'CMC directs Police Commissioner to take action', media release, 17 June 2010.

[329] Crime and Misconduct Commission, 'Clarification of CMC power to seek review before QCAT', media release, 15 March 2011.

[330] Crime and Misconduct Commission, 'QPS takes no disciplinary action against action against Palm Island officers', media release, 15 March 2011.

not to initiate disciplinary proceedings.[331] An Independent Expert Panel appointed in 2011 by the then Government to review the Queensland police complaints, discipline and misconduct system, endorsed this proposal.[332] The then Government accepted this recommendation,[333] as did the 8th PCMC in its three-yearly review of the Commission.[334]

Despite the widespread support for this recommendation, it is yet to be implemented. Consequently, the Commission again recommended that the definition of 'reviewable decision' be amended to enable it to commence proceedings in QCAT for the review of a decision by the QPS not to commence disciplinary proceedings against an officer for police misconduct.[335] The Commission describes its inability to currently do so as a 'significant flaw' which 'seriously hinders the CCC's powers to effectively supervise the QPS in the performance of its disciplinary functions'.[336]

In addition, the Commission seeks what it describes as an 'important related' amendment of section 50 of the Act, to enable the Commission to initiate in QCAT's original jurisdiction disciplinary proceedings in respect of both corrupt conduct and police misconduct.[337] As presently drafted, if the Commission investigates (either by itself or in cooperation with a public official), or assumes responsibility for the investigation of a complaint about *corruption*, and issues a report to the Commissioner of Police for the purpose of taking disciplinary action against the subject of the complaint, section 50 allows the Commission to initiate disciplinary proceedings in QCAT in relation to corrupt conduct only.[338] This creates an anomalous situation whereby the Commission, after investigating a complaint regarding police misconduct, can issue a report to the Commissioner of Police recommending disciplinary proceedings against the officer, but cannot itself initiate disciplinary proceedings in QCAT.

Among the submissions received by the Committee there was mixed support for these recommendations. Professor Tim Prenzler broadly supported according the Commission the power 'to direct or over-ride disciplinary decisions by government departments' in order to 'counter the tendency towards weak disciplinary responses when matters are dealt with in house'.[339] For the Aboriginal and Torres Strait Islander Legal Service, DC Rynders' decision not to initiate disciplinary proceedings against the officers involved in the investigation of the death of Mulrunji highlights the necessity of amending the Act 'to ensure that when the CCC refers alleged police misconduct to the QPS to consider disciplinary proceedings, and the QPS decides not to initiate disciplinary proceedings, the decision is reviewable in QCAT'.[340]

On the other hand, both the Queensland Police Union and the QPS oppose the Commission's recommendations. At the public hearing on 26 October 2015, the President of the Queensland Police Union, Mr Ian Leavers, strongly condemned the Commission's recommendations, suggesting that it is

[331] Crime and Misconduct Commission, 'QPS takes no disciplinary action against action against Palm Island officers', media release, 15 March 2011.
[332] Webbe, S., Williams AO QC, G., & Grayson APM, F., *Simple, Effective, Transparent, Strong: An Independent Review of the Queensland Police Complaints, Discipline and Misconduct System*, May 2011, Recommendation 9, p 66.
[333] Queensland Government, Department of Premier and Cabinet, *Government Response to the Independent Review of the Queensland Police Complaints, Discipline and Misconduct System*, August 2011, pp 8-9.
[334] Parliamentary Crime and Misconduct Commission, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, pp 84-5.
[335] Crime and Corruption Commission, Submission No. 14, Recommendation 19, pp 72-3.
[336] Crime and Corruption Commission, Submission No. 14, p 73.
[337] Crime and Corruption Commission, Submission No. 14, Recommendation 18, p 73.
[338] *Crime and Corruption Act 2001*, ss 49-50.
[339] Professor Tim Prenzler, Submission No. 6, p 2.
[340] Aboriginal and Torres Strait Islander Legal Service, Submission No. 23, p 20.

'unjust' for the Commission to devolve responsibility for investigating a complaint to the QPS 'and then if they are not happy with the findings of the Police Service they want to have another crack'.[341]

Similarly, the Commissioner of Police, Mr Ian Stewart, submitted that:

> The CCC has existing legislative authority to commence proceedings in QCAT in its original jurisdiction. I understand the CCC are yet to exercise this power in relation to a police officer. The legislative scheme currently reserves corruption proceedings to the CCC through a hearing process direct with QCAT, whilst police misconduct is managed by an administrative QPS process subject to QCAT review. The current model is clear, well known and has oversight by the CCC and QCAT. What is proposed, i.e. a dual model where police misconduct may be dealt with through alternative mechanisms, subject to an agency's view, introduces the risk of uncertainty into the process. An original hearing jurisdiction is resource intensive and would appear justified in cases of corruption, but may not be so easily satisfied in cases of police misconduct. If this model is adopted, consideration of a review right for the Commissioner would also need to be assessed.[342]

6.6.2.1 Comment

As noted above, however, the Commission does not have jurisdiction to initiate disciplinary proceedings in QCAT in respect of police misconduct if the QPS declines to do so. The Commission also lacks the ability to apply to QCAT for a review of that decision. The Committee also considers that the risk of uncertainty which may be introduced into this process is overstated.

The Committee agrees with the Commission that the definition of 'reviewable decision' in section 219BA should be amended to specify that the Commission may apply to QCAT for the review of a decision by the QPS not to initiate disciplinary proceedings against an officer for police misconduct. The Committee considers that it is anomalous that the Commission should have the power to apply to QCAT for a review of what is in its opinion a lenient disciplinary decision made by the QPS in respect of a substantiated allegation of police misconduct, but that it should not have the power to apply for the review of what is, in effect, no penalty at all.

The Committee considers that section 50 should also be amended to enable the Commission to initiate disciplinary proceedings in QCAT's original jurisdiction in respect of police misconduct. This would reconcile the anomaly that presently exists between the wording of section 49(1), which contemplates that the Commission may investigate police misconduct, and section 50(1), which despite section 49(1), allows the Commission to initiate disciplinary proceedings only in respect of corrupt conduct.

In respect of proceedings initiated pursuant to both of the proposed amendments, the Commissioner of Police should have the right to contest those proceedings and to seek a review of QCAT's decision.

Recommendation 15

The Committee recommends that the definition of 'reviewable decision' in section 219BA of the *Crime and Corruption Act 2001* be amended to specify that the Commission may apply to QCAT for the review of a decision by the QPS not to initiate disciplinary proceedings against an officer for police misconduct.

Recommendation 16

The Committee recommends that section 50 of the *Crime and Corruption Act 2001* be amended to enable the Commission to initiate disciplinary proceedings in QCAT's original jurisdiction in respect of police misconduct.

[341] Public hearing transcript, Brisbane, 26 October 2015, p 9.
[342] Queensland Police Service, 'QPS Response to Parliamentary Crime and Corruption Committee – Response to Correspondence dated 4 December, 2015', p 2.

6.6.3 The use of suspended sanctions

A related concern of the Commission is with 'the prevalence of suspended sanctions by the QPS'.[343] At present, section 12(1) of the *Police Service (Discipline) Regulations 1990*, a disciplinary sanction imposed on a police officer can be suspended and, in lieu thereof, the officer can be required to perform voluntary community service or undergo voluntary counselling, treatment or some other program designed to correct or rehabilitate the officer. If the officer successfully completes the voluntary community service or counselling, the suspended disciplinary sanction is rescinded and is taken to have never been imposed.[344]

In 2010, the Commission recommended that this power to suspend disciplinary sanctions be abolished.[345] The Commission noted that in a review of the QPS in 1996, the Honourable Sir Max Bingham QC concluded that within the QPS there was 'an over-reliance on the suspension of sanctions against police officers'.[346] In another review the following year, the Honourable William Carter QC 'found their misuse widespread'.

In the Commission's view, these findings confirm that 'there is an inherent likelihood of this discretion being used inappropriately'.[347] Moreover, the widespread use of suspended sanctions 'removes the deterrent effect of the sanction and undermines public confidence in the system and the QPS'.[348] This is particularly the case when suspending a sanction of dismissal, which enables 'a demonstrably unsuitable officer to remain in the police service'. Given that the effect of section 12(2) of the *Police Service (Discipline) Regulations* is, upon the successful completion of the community service or counselling, to treat the sanction as if it had never been imposed, this 'can mean, in effect, that no penalty is imposed at all, even though the breach might objectively have warranted dismissal'.[349]

In 2011, the Independent Review Panel agreed that the ability of the QPS to suspend a sanction of dismissal should be removed, but not for lesser sanctions.[350] In respect of the latter, the Independent Review Panel noted that 'there is reason to support suspicion of sanctions other than dismissal because the higher sanction reinforces to the officer the serious consequences of the misconduct but enable mitigating circumstances to be accounted for in suspending the sanction'.[351]

However, the Independent Review Panel recommended that a suspended disciplinary sanction should never be expunged from the officer's record, but should remain so that future conduct can be seen in

[343] Crime and Corruption Commission, Submission No. 14, p 56.
[344] *Police Service (Discipline) Regulations 1990*, s 12(2).
[345] Crime and Misconduct Commission, *Setting the Standard: A Review of Current Processes for the Management of Police Discipline and Misconduct Matters*, December 2010, pp 78-80.
[346] Crime and Misconduct Commission, *Setting the Standard: A Review of Current Processes for the Management of Police Discipline and Misconduct Matters*, December 2010, p 78.
[347] Crime and Misconduct Commission, *Setting the Standard: A Review of Current Processes for the Management of Police Discipline and Misconduct Matters*, December 2010, p xxi.
[348] Crime and Misconduct Commission, *Setting the Standard: A Review of Current Processes for the Management of Police Discipline and Misconduct Matters*, December 2010, p 78.
[349] Crime and Misconduct Commission, *Setting the Standard: A Review of Current Processes for the Management of Police Discipline and Misconduct Matters*, December 2010, p xxi.
[350] Webbe, S., Williams AO QC, G., & Grayson APM, F., *Simple, Effective, Transparent, Strong: An Independent Review of the Queensland Police Complaints, Discipline and Misconduct System*, May 2011, Recommendation 40, p 111.
[351] Webbe, S., Williams AO QC, G., & Grayson APM, F., *Simple, Effective, Transparent, Strong: An Independent Review of the Queensland Police Complaints, Discipline and Misconduct System*, May 2011, p 110.

context.[352] Further, the Independent Review Panel recommended that the relevant legislation be amended to expressly provide that there is a 'presumption … against suspending a sanction'.[353]

The Independent Review Panel's recommendations were supported by the then Government. On the use of suspended sanctions, the Government response observed:

> A sanction of dismissal is imposed for the most serious cases of misconduct where it is no longer appropriate for an officer to remain a member of the Service. To allow the suspension of such a sanction does not reflect the high standards expected of QPS officers by the community and the Service itself.[354]

To ensure that appropriate monitoring is in place to limit the use of suspended sanctions, the Government recommended that the QPS Ethical Standards Command be required to report on the number of instances in which it is used to the then PCMC in an annual Ethical Health Scorecard for the QPS.[355] The Government response also noted that the Independent Review Panel's recommendation that a suspended disciplinary sanction should never be removed from an officer's record is supported by the QPS.[356]

However, the Commissioner of Police submitted to this Committee that:

> The Service's power to suspend sanctions within the police discipline system is based in Regulations and aligns with well-known penalty principles in the justice system. It is an effective and real sanction that has been utilised itself by the Tribunal's established to review Service discipline decisions. It has been found by the Queensland Court of Appeal to be a valid and appropriate sanction on a case by case basis. The Service considers power to invoke a suspension should be retained as part of a suite of options in managing its members and accepts, where reasonable minds differ, QCAT review mechanisms exist.[357]

Similarly, at the public hearing on 26 October 2015, the President of the Queensland Police Union, Mr Ian Leavers, described the Commission's position on the use of suspended sentences as 'hypocritical':

> Considering suspended sentences form part of our legal system that the CCC Chair purports to understand, it is bizarre he would want to give judges the ability to impose suspended sentences on criminals who appear before the courts, yet police who are the subject of internal departmental issues cannot have access to this fundamental penalty.[358]

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[352] Webbe, S., Williams AO QC, G., & Grayson APM, F., *Simple, Effective, Transparent, Strong: An Independent Review of the Queensland Police Complaints, Discipline and Misconduct System*, May 2011, Recommendation 42, pp 110-11.

[353] Webbe, S., Williams AO QC, G., & Grayson APM, F., *Simple, Effective, Transparent, Strong: An Independent Review of the Queensland Police Complaints, Discipline and Misconduct System*, May 2011, Recommendation 41, p 111.

[354] Queensland Government, Department of Premier and Cabinet, *Government Response to the Independent Review of the Queensland Police Complaints, Discipline and Misconduct System*, August 2011, p 18.

[355] Queensland Government, Department of Premier and Cabinet, *Government Response to the Independent Review of the Queensland Police Complaints, Discipline and Misconduct System*, August 2011, p 18. The Independent Review Panel recommended that QPS and the CMC provide to the PCMC a joint Ethical Health Scorecard for the QPS, which includes "an integrated, whole system account of performance and activities in misconduct prevention, risk management and performance management, and the operation of the police complaints, discipline and misconduct system": Webbe, S., Williams AO QC, G., & Grayson APM, F., *Simple, Effective, Transparent, Strong: An Independent Review of the Queensland Police Complaints, Discipline and Misconduct System*, May 2011, Recommendation 47, p 116.

[356] Queensland Government, Department of Premier and Cabinet, *Government Response to the Independent Review of the Queensland Police Complaints, Discipline and Misconduct System*, August 2011, p 19.

[357] Queensland Police Service, 'QPS Response to Parliamentary Crime and Corruption Committee – Response to Correspondence dated 4 December, 2015', p 2.

[358] Public hearing transcript, Brisbane, 26 October 2015, p 8.

This argument was anticipated by the Commission in its *Setting the Standard* released in 2010. At that time, the Commission noted that 'no other police jurisdiction in Australia has a similar power' and that although suspension of penalty is a feature of the criminal justice system, this power is only available under the *Penalties and Sentences Act 1992* when the sentence is one of imprisonment.[359] The Commission submits that 'this is very different from even the most serious sanction available in a discipline system, which is dismissal'.

Another answer to the argument that denying the QPS the ability to suspend disciplinary sanctions is discriminatory is provided by the Fitzgerald Report, which notes (in the context of recommending that a police officer's privilege against self-incrimination should be abolished in disciplinary hearings):

> A police officer is not in the same position as an ordinary citizen. He is bound to uphold the law and actively to enforce it. He is employed by the community to do that task.[360]

A similar point was made in the submission by the Aboriginal and Torres Strait Islander Legal Service, which noted that far from according QPS officers similar treatment to other public servants, the use of suspended sanctions by the QPS is 'in stark contrast to the manner in which other employees across the State are dealt with when found to have acted in a manner warranting dismissal'.[361] ATSILS submitted that this offends public expectations 'that serving police officers should not be judged at a lower bar in terms of acceptable conduct – if anything, given the amount of power bestowed upon police, it should be the exact opposite'.[362]

6.6.3.1 Comment

The Committee acknowledges that this issue raises complex questions of policy, both for and against the use of suspended disciplinary sanctions. The Committee accordingly recommends that the Government give consideration to a comprehensive review of the use of suspended sanctions within the police discipline system. In particular, the Committee recommends that the Government consider whether the use of suspended sanctions is justified in circumstances where the sanction is one of dismissal. The Government should also consider amending section 12(2) of the *Police Service (Discipline) Regulations 1990* to ensure that the suspended sanction remains on the subject officer's record.

Recommendation 17

The Committee recommends that the government give consideration to a comprehensive review of the use of suspended sanctions within the police discipline system – in particular, whether the use of suspended sanctions is appropriate where the sanction is dismissal.

Recommendation 18

The Committee recommends that the government consider amending section 12(2) of the *Police Service (Discipline) Regulations 1990* to ensure that a suspended sanction remains on the subject officer's record.

6.6.4 Timeframe for reviewing decisions in QCAT

Pursuant to section 33 of the *Queensland Civil and Administrative Tribunal Act 2009* (*QCAT Act*), an application for the review of a reviewable decision must be made within 28 days after the Commission is notified of the decision. In contrast, section 219G of the *Crime and Corruption Act 2001* provides that

[359] Crime and Misconduct Commission, *Setting the Standard: A Review of Current Processes for the Management of Police Discipline and Misconduct Matters*, December 2010, p 78.
[360] Fitzgerald, T.E., *Report of a Commission of Inquiry Pursuant to Orders in Council*, 1989, p 294.
[361] Aboriginal and Torres Strait Islander Legal Service (Qld) Inc., Submission No. 23, p 7.
[362] Aboriginal and Torres Strait Islander Legal Service (Qld) Inc., Submission No. 23, pp 7-8.

the Commission must apply to QCAT for review of a reviewable decision within 14 days after the day on which the decision was announced. The Commission recommends that section 219G be amended so that it is consistent with the 28-day period specified in section 33 of the *QCAT Act*.[363]

The Commission stated that the shorter time-frame for appeal under section 219G does not provide the Commission with sufficient time to receive notification of the decision (which can take up to a week), to obtain the material before the original decision-maker and to consider whether to seek a review of that decision. The Commission noted that the amendment it seeks was previously endorsed by the 8th PCMC in its 2012 three-yearly review and by the then Government in its response to the 8th PCMC's report.

6.6.4.1 Comment

The Committee concurs with the view expressed by the 8th PCMC that it is not 'a valuable exercise of legislative authority if an ability to review a decision is included in the legislation, but cannot be used effectively due to restrictive timeframes'.[364] The Commission therefore recommends that section 219G of the *Crime and Corruption Act 2001* be amended to lengthen the period for making an application to QCAT for review of a reviewable decision to 28 days.

Recommendation 19

The Committee recommends that section 219G of the *Crime and Corruption Act 2001* be amended to lengthen the period for making an application to QCAT for review of a reviewable decision to 28 days.

6.7 Corruption prevention

As noted above, the 2015 amendments reinstated the Commission's corruption prevention function. This is welcomed by the Commission and many of the persons and organisations that made submissions to this review.

However, the Commission submits that it could perform this function more effectively if it were given additional information and intelligence gathering powers. To this end, the Commission recommends that sections 55, 73 and 75 of the Act should be amended to expressly state that they also apply to the performance of the Commission's corruption prevention function.[365]

The justification given by the Commission for seeking these amendments differs from those provided by the Commission in relation to the performance of its monitoring function. In relation to corruption prevention, the Commission refers to the experience of the Queensland Audit Office (QAO), which encourages all public sector agencies to implement fraud risk assessments and routine data analytics over areas inherently susceptible to fraud.[366] The Commission notes that 'QAO considers these to be strong techniques that compliment each other as part of an effective fraud control plan' and suggests that 'these techniques may also be applied to other at risk areas of corruption'.

However, because the Commission's powers to enter premises and to compel units of public administration to provide it with information are limited to corruption investigations, the Commission presently lacks the power to compel public sector agencies to provide systems data for the purpose of making recommendations for systemic corruption prevention reforms.

6.7.1 Comment

The Committee appreciates the merits of this reasoning. An effective anti-corruption regime should not only punish corruption when it occurs, but should also endeavour to identify corruption risks in

[363] Crime and Corruption Commission, Submission No. 14, Recommendation 17, p 72.
[364] Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, p 85.
[365] Crime and Corruption Commission, Submission No. 14, Recommendation 13, p 69.
[366] Crime and Corruption Commission, Submission No. 14, p 68.

order to enable public sector agencies to implement measures which prevent or minimise the risk of corruption.

Accordingly, for the same reasons discussed above in relation to the Commission's monitoring function, the Committee recommends that the government give consideration to amending sections 55, 73 and 75 of the *Crime and Corruption Act* to expressly provide that the powers conferred on the Commission by these provisions apply to the performance of the Commission's corruption prevention function.

Recommendation 20

The Committee recommends that the government give consideration to amending sections 55, 73 and 75 of the *Crime and Corruption Act 2001* to expressly provide that the powers conferred on the Commission by these provisions apply to the performance of the Commission's corruption prevention function.

6.7.2 Sharing of information

In the course of its activities, the Commission continually receives a wide variety of information from numerous and diverse sources. Where it is appropriate to do so, the CC Act permits the Commission to disclose certain of this information to other relevant bodies. For example, section 55(2) requires the Commission to give intelligence information in the manner of its choosing to the entities it considers appropriate. Section 60 of the CC Act also empowers the Commission to give:

- evidence of, or information about, a possible offence against a law of the State, the Commonwealth or another State to an entity or a law enforcement agency the Commission considers appropriate;[367] and,
- information coming to its knowledge, including by way of a complaint, to a unit of public administration if the Commission considers that the unit has a proper interest in the information for the performance of its functions.[368]

However, before the Commission provides an agency with any information, document or thing in the Commission's possession pursuant to section 60, the Commission must give its written authority to do so.[369] The Commission submitted that this latter requirement is 'somewhat cumbersome' and may prevent the Commission from expeditiously disclosing information to a proper authority.

The Commission contended that these provisions are derived from corresponding provisions in the *Criminal Justice Act 1989* and the *Crime Commission Act 1997*, which have not been updated to reflect 'contemporary inter-agency partnering arrangements' – in particular, the principle of cooperation which was introduced with the current Act in 2001.[370] According to the Commission, those provisions are concerned more with restricting the use of confidential information than with facilitating the exchange of information in accordance with the principle of cooperation. The Commission stated that this exchange 'sits at the heart of effective investigative activity'.

The Commission commended as a 'more workable provision' section 16 of the *Independent Commission Against Corruption Act 1988* (NSW) (*ICAC Act*), which provides, among other things, that the ICAC 'may consult with and disseminate intelligence and information to law enforcement agencies, the Australian Crime Commission, the Australian Bureau of Criminal Intelligence and such other persons and bodies (including any task force and any member of a task force) as the Commission thinks appropriate'.[371] The Commission submitted that replacing the current disclosure provisions in the Act

[367] *Crime and Corruption Act 2001*, s 60(1).
[368] *Crime and Corruption Act 2001*, s 60(2).
[369] *Crime and Corruption Act 2001*, ss 60(4) and 62(1).
[370] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p 13.
[371] *Independent Commission Against Corruption Act 1988* (NSW), s 16(3).

(that is sections 55, 60-62) with a single provision such as section 16 of the *ICAC Act*, would provide 'a clear, concise, comprehensible and practical legislative framework that reflects our contemporary obligations to cooperate with other entities'.[372] The Commission emphasised that in making this recommendation, it does not seek to compromise or undermine the confidentiality of information in the Commission's possession.

6.7.2.1 Comment

The Committee considers that, subject to the provision of adequate safeguards for the protection of confidential information, the CC Act should facilitate, rather than hinder, the Commission in sharing intelligence and information germane to the activities and functions of other law enforcement agencies and units of public administration. The Committee accordingly recommends that the Government review the disclosure provisions of the Act to ensure that they reflect contemporary principles of inter-agency cooperation, while maintaining adequate protections for the protection of confidential information.

Recommendation 21

The Committee recommends that the government review the disclosure provisions of the *Crime and Corruption Act 2001* to ensure that they reflect contemporary principles of inter-agency cooperation, while maintaining adequate protections for the protection of confidential information.

6.7.3 Use of information by public officials for purposes consistent with the Act

It is a well-established legal principle that where a statute which confers a power to obtain information for a particular purpose, information so obtained cannot be used for any other purpose. In *Flori v Commission of Police*,[373] the Supreme Court of Queensland confirmed that this principle applies to a search warrant issued under section 150(1)(a) of the *Police Powers and Responsibilities Act 2000*, which permits a police officer to apply for a warrant to enter and search a place to obtain evidence of the commission of an offence.

In *Flori*, the applicant, Sergeant Ricky Flori, released to the media, without the authority of the Commissioner of Police, CCTV footage documenting the alleged excessive use of force by police officers during the arrest of a man in Surfers Paradise for offences of public nuisance and resisting arrest. A search warrant was issued in respect of Sergeant Flori's residence for the purpose of investigating possible offences against sections 92A (misconduct in relation to public office) and 408C (fraud) of the *Criminal Code*. Eight computers were seized during the execution of the search warrant, three of which were found to contain evidence implicating Sergeant Flori as being responsible for providing the CCTV footage to the media.

The QPS decided not to prosecute any disciplinary charges against Sergeant Flori, but instead to initiate disciplinary proceedings against him. Sergeant Flori then applied to the Supreme Court for a declaration that the QPS were not entitled to use, rely on or otherwise take into account property seized pursuant to the search warrant, or any data, evidence or information derived from the seized property in the disciplinary proceedings. Atkinson J granted the declaration on the basis that the search warrant was issued for the purpose of obtaining evidence of the commission of an offence. The evidence so obtained could not therefore be used for purposes other than those comprehended by the warrant.[374]

The Commission submitted that:

> It is not apparent from the judgment in Flori whether there was any argument that general law principles limiting the use of information in the possession of the Police Service to the purpose for

[372] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p 13.
[373] [2014] QSC 284.
[374] [2014] QSC 284, at [41]-[42].

> which the information was obtained may have been overridden by implication of Part 10 of the Police Service Administration Act 1990 or that information could be provided to the CCC pursuant to Part 7 of the Police Service Administration Act and sections 37, 38, 39 and 343 of the CC Act.[375]

The Commission recommended that this uncertainty should be resolved by amending sections 42 and 44 of the *Crime and Corruption Act 2001*, which describe the ways in which the Commissioner and units of public administration, respectively, must deal with complaints, 'to ensure that information provided by the CCC to the Commissioner of Police and other public officials respectively may be used and dealt with for the purpose of dealing with a complaint, including the taking of disciplinary action'.[376] According to the Commission, the purpose of this recommendation is:

> to ensure that information lawfully in the possession of the QPS, whether or not obtained by the QPS by means of compulsion under the Police Powers and Responsibilities Act 2000 or any other Act or rule of law, may be given, and used, for the purposes of the functions of the Police Service subject to well-established grounds of privilege and may also be used for the performance of functions under the CC Act. This would include the use of any information relevant to the discipline of members of the QPS. It would also acknowledge the primacy of section 343 of the CC Act in allowing any information to be given to the CCC for the performance of its functions.[377]

In respect of units of public administration other than the QPS, the Commission noted that many of these agencies have statutory powers to obtain information or evidence for law enforcement purposes. Should the exercise of those powers reveal evidence of misconduct by the holder of an appointment in a unit of public administration, the Commission submitted that 'it may be appropriate for this evidence to be available for discipline purposes'.[378]

6.7.3.1 Comment

The Committee agrees that the Commission, the QPS and units of public administration ought to be able to use information in their lawful possession for the purpose of dealing with corruption, even where the information was not specifically obtained for that purpose. The Committee therefore recommends that sections 42 and 44 of the Act be amended to ensure that the Commissioner of Police or a public official may, subject to claims of privilege, use information regarding alleged corruption provided by the Commission for the purpose of dealing with the alleged corruption, including the taking of disciplinary action.

Recommendation 22

The Committee recommends that sections 42 and 44 of the *Crime and Corruption Act 2001* be amended to ensure that the Commissioner of Police or a public official may, subject to claims of privilege, use information regarding alleged corruption provided by the Commission for the purpose of dealing with the alleged corruption, including the taking of disciplinary action.

6.8 Confidentiality of complaints

Predecessors of this Committee have extensively examined the issue of whether the making of a complaint should be subject to an obligation of confidentiality.[379] The issue was first considered in

[375] Crime and Corruption Commission, Submission No. 14, p 70.
[376] Crime and Corruption Commission, Submission No. 14, Recommendation 15, p 71.
[377] Crime and Corruption Commission, Submission No. 14, p 70.
[378] Crime and Corruption Commission, Submission No. 14, p 70.
[379] Parliamentary Criminal Justice Committee, *Report No. 18 – Review of the Operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission: Part C – A Report Pursuant to Section 4.8(1)(f) of the* Criminal Justice Act 1989-1992, August 1992, pp 49-51; Parliamentary Crime and Misconduct Committee, *Report No. 71 – Three Year Review of the Crime and Misconduct Commission*, October 2006, pp 50-1; Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Commission*, April 2009, pp 37-8; Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, pp 73-9.

1992, when the then Parliamentary Criminal Justice Committee 'attempted to catalogue some principles which the Committee will observe, as far as possible, in the discharge of its functions'.[380] These principles were not intended to be exhaustive nor binding, but were to 'guide the Committee in the processes that it adopts and the decisions it makes, in report and recommendation formulation, and generally when it undertakes its functions'. The Committee hoped that these principles would also provide guidance to others, including the Commission.

One such principle was that 'where practical, all information from parliamentarians and local councillors and candidates should be forwarded to the Commission in confidence so that a complaint procedure can not be used for political purposes'.[381] This principle was 'intended to prevent the situation where a complaint is forwarded or allegedly forwarded to the Commission and then publicised to cause embarrassment' to the subject of the complaint. The Committee observed that this had already become 'a particular problem area'.

The principle of confidentiality, as formulated by the Committee, was accepted by the Commission.[382] In the public hearings held by that Committee during the first three-year review of the operations of the Commission, the Commission submitted that 'use was likely to be made of the complaints process in this way regardless of the operation of a code of conduct, unless the principle espoused had the force of statute, thus ensuring that the duty of confidentiality be subject to appropriate sanctions'. To this end, the Commission submitted to the Committee a proposal to amend the then *Criminal Justice Act 1989* to create:

> an offence for a person who has made a complaint or given information to the Commission to wilfully disclose or cause to be disclosed to any person other than the Commission, a Commissioner or an officer of the Commission or a member of the Parliamentary Committee or any person who is an officer or employee of the Committee, that fact, or the contents of any document or the description of any thing or any other information which might enable that fact to be inferred, without the authorisation of the Chairperson or his or her delegate.[383]

According to the Commission, the proposed amendment had several objects. First, the amendment was intended to protect the privacy of any person against whom a complaint is made to the Commission, including police officers and other public servants. In so doing, it would ensure that natural justice is accorded to persons against whom complaints are made and would act as a deterrent against making complaints in order to disparage the reputation of an individual by publicising this fact. In this regard, the Commission acknowledged that 'because of its powers and position, significant stigma may attach to people publicly identified as under investigation by it'.

That the Commission had found it necessary to seek this amendment was, in the Committee's view, 'regrettable'.[384] The Committee noted, however, that 'some recent examples of publicity surrounding complaints to the Commission highlight the necessity for such an amendment'. The Committee also considered it to be 'unfortunate that recent public discussion of this issue proceeded upon the

[380] Parliamentary Criminal Justice Committee, *Report No. 13 – Review of the Operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission: Part B – Analysis and Recommendations*, December 1991, p 91.

[381] Parliamentary Criminal Justice Committee, *Report No. 13 – Review of the Operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission: Part B – Analysis and Recommendations*, December 1991, Principle 10, p 100.

[382] Parliamentary Criminal Justice Committee, *Report No. 18 – Review of the Operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission: Part C – A Report Pursuant to Section 4.8(1)(f) of the* Criminal Justice Act 1989-1992, August 1992, p 66.

[383] Parliamentary Criminal Justice Committee, *Report No. 18 – Review of the Operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission: Part C – A Report Pursuant to Section 4.8(1)(f) of the* Criminal Justice Act 1989-1992, August 1992, p 50.

[384] Parliamentary Criminal Justice Committee, *Report No. 18 – Review of the Operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission: Part C – A Report Pursuant to Section 4.8(1)(f) of the* Criminal Justice Act 1989-1992, August 1992, p 51.

fundamental misconception that the Commission had proposed the amendment with the intention of preventing public debate on matters under investigation by it'.[385]

As the Committee's comments suggest, the amendment sought by the Commission was at the time a matter of controversy and, ultimately, was not accepted by the then Government. The issue remained in abeyance until 2006 when the 6th PCMC completed its three-yearly review. The Local Government Association of Queensland submitted to the PCMC that the Act should:

> … be amended to provide that complainants are obliged to keep the existence and nature of complaints against Councillors (and other public officials) confidential until a proper and balanced investigation of the matters of complaint has occurred and the person subject of the complaint and complainant has received the CMC advice of the outcome.[386]

The Association submitted that 'confidentiality is clearly appropriate prior to the conclusion of an investigation so that the presumption of innocence (in the public's mind) is not lost'. It also recommended that breach of the obligation of confidentiality should be subject to an 'appropriate sanction', such as that imposed by section 216(3) of the then *Crime and Misconduct Act* (i.e. 85 penalty units or one year's imprisonment).

On this occasion, however, the Commission opposed the introduction of an obligation of confidence. In respect of the Government's decision in 1992 not to implement the recommendation made by the Commission to the PCJC, the Commission stated that:

> It is not difficult to understand why there would be reluctance on the part of any government to introduce such legislation, as it would leave itself open to the criticism that both the government and the CMC would be less open and accountable. There would also be significant difficulties in enforcing any such legislation if the media were to publish details asserting them to be from 'anonymous sources'. Further problems would arise in maintaining confidentiality in the course of an investigation.
>
> The Commission's view is that it would be difficult to justify such an amendment where there is a public expectation that the work of the Commission in politically controversial or sensitive matters be open and transparent. It is important that public debate is not stifled by any legislative proscription. Consequently, the Commission does not support such an amendment.[387]

The Committee decided 'on balance and having regard to the need for transparency', against recommending that the Act be amended so as to impose on complainants an obligation of confidentiality.[388] The then Government agreed, noting that 'any amendment would be criticised as reducing openness and accountability'.[389] After briefly considering the issue, in 2009 the 7th PCMC endorsed this view.[390]

The issue was again considered by the 8th PCMC in the course of its three-yearly review, which was completed in 2012. At that time, the issue re-emerged after the Commission commenced investigations into allegations of impropriety made against Mr Campbell Newman, the then candidate for the seat of Ashgrove in the 2012 State election, relating to his time in office as Lord Mayor of the Brisbane City Council. The Commission was publicly criticised for initiating the investigations before the election, given that there was little prospect of it completing the investigations prior to that time.

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[385] Parliamentary Criminal Justice Committee, *Report No. 18 – Review of the Operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission: Part C – A Report Pursuant to Section 4.8(1)(f) of the* Criminal Justice Act 1989-1992, August 1992, p 50.

[386] Local Government Association of Queensland, Submission no. 17, p 4 (emphasis in original).

[387] Crime and Misconduct Commission, Submission no. 34, p 4.

[388] Parliamentary Crime and Misconduct Committee, *Report No. 71 – Three Year Review of the Crime and Misconduct Commission*, October 2006, Recommendation 14, p 51.

[389] Queensland Government, Department of Premier and Cabinet, *Government Response to PCMC Report No. 71: Three Yearly Review of the Crime and Misconduct Commission*, tabled on 5 April 2007, p 5.

[390] Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Commission*, April 2009, p 37.

The Commission eventually determined that the allegations against Mr Newman were unsubstantiated.

Consequently, the 8th PCMC examined the issue in detail and reaffirmed the view that legislative amendment was undesirable. The Committee stated that:

> Looking at this matter from a broader perspective, however, the Committee does not consider that any amendment is required to the C&M Act, imposing a statutory obligation upon persons to keep the existence and nature of complaints against public officials confidential before finalisation. The Committee considers that enforcing such a provision would prove to be problematic given the media's ability to publish details from anonymous sources and furthermore, as stated by the CMC in previous reviews, despite its best efforts to do so, it would be difficult to enforce confidentiality throughout the course of an investigation.[391]

The Committee also considered it undesirable to place any fetters upon the ability of the Commission to make public comment during an election campaign for the purposes of correcting information that is, or is about to be, incorrectly reported to the media:

> The Committee considers that any legislative prohibition on the CMC in being able to publicly provide information on its operations during an election campaign or otherwise, if it deemed such release necessary, would fly in the face of the independence of the CMC and its status as the lead integrity organisation in Queensland. The public should be able to have confidence in the CMC to be impartial in its operations and the Committee considers that the Government should also have sufficient confidence in the CMC to maintain its impartiality and allow it to perform its functions as required. The Committee considers the ongoing requirement for openness and transparency in the CMC's operations, outweighs the need for any legislative gagging of the CMC or any politician or aspiring politician, for that matter, during an election campaign.[392]

The Committee instead recommended that the Commission should review its current media policies to determine 'whether any amendments are required to enhance the public confidence in the conduct of its operations'.[393] The Committee also recommended that the Commission 'consider developing a specific, publicly available policy on dealing with matters referred to it about serving public officers or candidates for public office during an election campaign'.[394]

In contradistinction to this approach, in 2013 Callinan and Aroney recommended that the Act be amended to create an offence 'for any person (including an officer of the CMC) to disclose that a complaint has been made to the CMC, the nature or substance or the subject of a complaint, or the fact of any investigation by the CMC'.[395] They recommended that the offence, which is based on section 56 of the *Independent Commissioner Against Corruption Act 2012* (SA), should be accompanied by a 'suitable deterrent penalty for unlawful publication or disclosure by anyone'.[396]

Under this proposal, the offence would be subject to three exceptions:

> The first exception should be that, in the case of a public investigation, fair reporting of, and debate about it, will be permissible. The second exception should be as authorised by the Supreme Court in advance of publication or disclosure if there be a compelling public interest in such publication or

[391] Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, p 78.
[392] Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, p 78.
[393] Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, Recommendation 25, pp 78-9.
[394] Parliamentary Crime and Misconduct Committee, *Report No. 79 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, Recommendation 26, p 79.
[395] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, Recommendation 8, p 216.
[396] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 217.

> disclosure. The third is the case of a person cleared or not proceeded against who authorises in writing disclosure of it. Disclosure could of course occur if otherwise required by law, such as by Court processes or Court order.[397]

Callinan and Aroney also recommended that the restriction on publication or disclosure should remain permanent in circumstances where the Commission decides to take no further action in relation to a complaint or that the allegations made in a complaint are not substantiated, unless the subject of the complaint publishes or otherwise discloses that material themselves or gives their prior written consent to do so.[398]

According to Callinan and Aroney, if 'carefully drawn' this proposed provision would:

> … continue to allow members of the public and the media, subject to the general law, to investigate, report, discuss and criticise the behaviour, performance and integrity of all Members of Parliament and public officials, and of government departments and agencies of all kinds, including the CMC itself. The provision would only apply to the identification of persons associated with complaints and investigations during the course of such investigations …[399]

The then Government indicated in its response to the Callinan and Aroney report that it accepted this recommendation in principle.[400] The Government stated that the introduction of a prohibition on the disclosure of information about a complaint made to the Commission 'is consistent with most investigative processes undertaken by police or other bodies'. The dissemination of such information can not only jeopardise any ongoing investigation by the Commission, but may also 'lead to irreparable damage to the subject of the complaint and his or her family or associates'. The Government therefore recommended that the Act should be amended to include provisions that prevent the disclosure of information about a complaint once it has been made to the Commission. However, the Government ultimately decided not to proceed with this amendment.

6.8.1 Treatment in other jurisdictions

South Australia is the only State in which an obligation of confidentiality is imposed on complainants. Section 56 of the *Independent Commissioner Against Corruption Act 2012* provides that a person must not, except as authorised by the Commissioner or a court hearing proceedings for an offence against this Act, publish, or cause to be published:

(a) information tending to suggest that a particular person is, has been, may be, or may have been, the subject of a complaint, report, assessment, investigation or referral under this Act; or

(b) information that might enable a person who has made a complaint or report under this Act to be identified or located; or

(c) the fact that a person has made or may be about to make a complaint or report under this Act; or

(d) information that might enable a person who has given or may be about to give information or other evidence under this Act to be identified or located; or

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[397] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 216.

[398] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 217.

[399] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, p 112.

[400] Queensland Government, Department of Premier and Cabinet, *Parliamentary Crime and Misconduct Committee – Inquiry into the Crime and Misconduct Commission's Release and Destruction of Fitzgerald Commission of Inquiry Documents; The Honourable Ian Callinan AC and Professor Nicholas Aroney – Review of the Crime and Misconduct Act 2001 and Related Matters: Government Response*, tabled on 3 July 2013, p 29.

(e) the fact that a person has given or may be about to give information or other evidence under this Act; or

(f) any other information or evidence publication of which is prohibited by the Commissioner.

The maximum penalty for breach of section 56 is $150,000 in the case of bodies corporate and $30,000 in the case of natural persons.

In New South Wales, there are protections against actions for defamation afforded to those who provide the Independent Commission Against Corruption with information, which are forfeited where the complainant publicises a complaint.

In Victoria, section 42(1) of the *Independent Broad-based Anti-corruption Commission Act 2011* allows the IBAC to issue confidentiality notices during an investigation to persons who have provided information to it, where the IBAC is satisfied that there are reasonable grounds that the disclosure of this information would be likely to prejudice:

(a) that investigation; or

(b) the safety or reputation of a person; or

(c) the fair trial of a person who has been, or may be, charged with an offence.

A person who is duly served with a confidentiality notice must not disclose information specified in the notice. Breach of this obligation carries a penalty of 120 penalty units or 12 months imprisonment or both.

However, a person is not prevented from disclosing information regarding a complaint prior to being issued with a confidentiality notice.

6.8.2 Submissions to this review

The Committee notes that the only submission to this Review that directly addresses this issue 'generally supports' the proposal made by Callinan and Aroney. Professor Charles Sampford describes 'the practice of publicly reporting that you are "going to the CMC"' as an 'abomination'.[401] He submits that publicising a complaint should give rise to a presumption of ulterior motives – 'generally political or economic advantage' – since 'the last thing [a complainant] should contemplate is alerting the alleged wrongdoer and thereby giving the latter an opportunity to destroy evidence, coerce potential witnesses, or conduct and share stories among potential witnesses'. Professor Sampford therefore supports 'strong sanctions', including criminal penalties and exemplary damages, 'for anyone who publicly reports that they are making a complaint for the simple reason that they are putting at risk the investigation they claim to be necessary'.[402]

However, in contrast to Callinan and Aroney, Professor Sampford submits that the complainant should be free to complain to the media after a 'reasonable interval (best defined by statute)' that the Commission has not fulfilled its statutory obligation to expeditiously assess the complaint. This interval should be sufficient to allow the Commission the 'time to consider and respond so that baseless complaints will be seen as such, and subject to defamation proceedings'.[403]

More recently, the non-government members of the Legal Affairs and Community Safety Committee commended Professor's Sampford's submission as 'sensible' and recommended that this Committee investigate as part of its five-yearly review 'a legal framework, broadly along the lines of that proposed by Professor Sampford'.[404]

[401] Professor Charles Sampford, Submission No. 15, p 7.
[402] Professor Charles Sampford, Submission No. 15, p 8.
[403] Professor Charles Sampford, Submission No. 15, pp 7-8.
[404] Queensland Parliament, Legal Affairs and Community Safety Committee, *Report No. 21 – Crime and Corruption Amendment Bill 2015*, March 2016, p 21.

6.8.3 Recent developments

The issue has been revived by the recent Queensland local government elections. The Committee notes the Commission's advice that for the period January to March 2016, the Commission received complaints in relation to 29 of the 77 local governments.[405] For the period 13 February 2016 to 26 April 2016, the Commission received a 17 per cent increase in complaints involving local governments relative to the same period in 2015, with complaints relating to local government accounting for approximately 25 per cent of all complaints relating to public sector agencies received by the Commission.[406]

The Committee understands that this increase in complaints occurred despite the Commission's attempts to discourage the use of its complaints process for political advantage and to raise public awareness of the reputational damage that can be caused by the making of baseless allegations.[407] The 'Don't Risk Your Campaign' education initiatives, which were promoted by the Commission and the Local Government Association of Queensland ahead of local government elections between 2004 and 2012, also failed to arrest an increase in complaints about candidates in the period immediately preceding the 2004, 2008 and 2012 local elections.

The fact that significant increases in complaints about the conduct of candidates in local government elections are recorded quadrennially in the lead-up to each local government election, creates a strong presumption that many of these complaints are politically motivated.

In these circumstances, the Committee accepts the Commission's view that the steps taken by the Commission to increase public awareness of these issues and to discourage the publication of complaints made or purportedly made to the Commission have not resulted in 'an effective solution' to this issue. The Committee therefore supports the Commission's decision to canvass wider public opinion on this issue.

At the joint public meeting between the Commission and the Committee on 23 May 2016, the CCC Chairperson, Mr MacSporran QC advised the Committee that the Commission is considering making a recommendation that the Act be amended to include a strict liability offence in respect of publicising that a complaint has been made to the Commission before the Commission or the Queensland Police Service has had the opportunity to assess it.[408] The offence would operate in a similar way to public interest disclosures made under the *Public Interest Disclosure Act 2010*.

The Commission's discussion paper identifies a number of considerations as being central to the question of whether it is, on balance, in the public interest to allow allegations of corrupt conduct to be made public. On the one hand, considerations of openness, transparency and accountability tend to militate against the introduction of a confidentiality requirement for complaints because 'open discourse informs the development of opinions, allowing people to participate fully in their government and hold elected and other public officials to account'.[409] So too does the implied right of freedom of political communication under the Australian Constitution.

On the other hand, several other considerations appear to support the introduction of a confidentiality requirement. These include the right to a fair trial and the potential for significant damage to the

[405] Public meeting of the Parliamentary Crime and Corruption Committee, 14 March 2016, transcript, p 5.

[406] Crime and Corruption Commission, *Public Report to the Parliamentary Crime and Corruption Committee: Activities of the Crime and Corruption Committee for the period 13 February 2016 to 30 April 2016*, 23 May 2016, p 16.

[407] Crime and Corruption Commission and Local Government Association of Queensland, 'Local Government Candidates Urged to Conduct Honest Campaigns', media release, 8 February 2016; Crime and Corruption Commission, 'Local Government Elections 2016: A Message for Candidates from Alan MacSporran, Chairman of the CCC', media release, 7 March 2016.

[408] Public meeting of the Parliamentary Crime and Corruption Committee, 23 May 2016, transcript, p 7.

[409] Crime and Corruption Commission, *Discussion Paper – Making allegations of corrupt conduct public – Is it in the public interest?*, June 2016, p 6.

reputation of the person who allegedly engaged in corrupt conduct, which with contemporary means of mass communication, can be disseminated instantaneously and widely and may remain on the public record in perpetuity. Publicising allegations of corrupt conduct can also compromise the Commission's ability to effectively exercise its statutory functions inasmuch as it provides the individuals involved in the matter with the opportunity to destroy information that might support the allegation, anticipate the investigation by fabricating a false explanation or justification, or interfere with witnesses.[410]

Although the issue is not addressed in the Commission's discussion paper, both the Commission and predecessors of this Committee have highlighted the practical difficulties involved in enforcing an obligation of confidentiality, especially in relation to complaints made anonymously.

6.8.4 Comment

The Committee commends the Commission's decision to canvass broader public opinion on this issue, consideration of which has hitherto been confined to this Committee, the Commission and the LGAQ. The Committee agrees with the Commission that attempts to develop a lasting solution to this issue have not resulted in an 'effective solution'. The Committee considers it desirable in the public interest that a more effective means of resolving this problem be identified and implemented that properly takes considerations of openness, transparency and accountability into account.

The Committee considers, however, that if the proposal now under consideration by the Commission is to be effective, consideration will also need to be given to whether amendments are also required in relation to the *Local Government Act 2009* and the *Public Service Act 2006* to ensure that a similar obligation is imposed upon complainants who refer matters to the responsible authorities under those Acts, which are then referred by the relevant CEOs to the Commission for assessment. Unless this is done, the potential for abuse of the complaints system will remain.

6.9 Post-separation disciplinary proceedings

According to the Commission, experience has shown that public servants who suspect that they are liable to be pursued for corrupt conduct often elect to resign. This does not prevent either the Commission or units of public administration from making a disciplinary finding and taking disciplinary action (in the form of a disciplinary declaration) against a former employee, provided the former employee was a member of the QPS or employed under the *Public Service Act 2008*.

In other cases, such as alleged corrupt conduct involving a former local government or university employee, or where the Commission had commenced or assumed conduct of an investigation involving suspected corrupt conduct by an employee in a unit of public administration prior to his or her resignation, the Commission may ask QCAT to make a disciplinary declaration against the employee under section 219IA of the *Crime and Corruption Act 2001*. However, the procedure involved in doing so is, according to the Commission, 'cumbersome and lengthy',[411] including as it does the following steps:

- the allegation must involve or possibly involve corrupt conduct and there must be evidence supporting the commencement of such a proceeding;[412]
- the Commission must have reported this to the CEO of the relevant unit of public administration for the purpose of taking disciplinary action;[413]

[410] Crime and Corruption Commission, *Discussion Paper – Making allegations of corrupt conduct public – Is it in the public interest?*, June 2016, pp 6-7.
[411] Crime and Corruption Commission, Submission No. 14, p 71.
[412] *Crime and Corruption Act 2001*, s 50(1).
[413] *Crime and Corruption Act 2001*, s 49(2)(f).

- the employee's former appointment must be declared by regulation to be a "prescribed appointment";[414]
- a finding of corrupt conduct must be proved against the former employee to the requisite standard;[415] and,
- QCAT must make an order that the finding would have warranted dismissal or a reduction in rank, had the former employee's appointment not ended.[416]

As the Commission has previously advised the Committee, meeting this list of preconditions involves the investment of substantial time and resources, the responsible use of which would require that there be cogent evidence of corrupt conduct 'tending toward the more egregious end of the spectrum'. Moreover, the involvement of the Governor-in-Council on a case by case basis for the purpose of declaring prescribed appointments by regulation is, in the Commission's view, unnecessary.

The Commission therefore recommended that section 50 of the CC Act be amended to deem units of public administration and appointments therein to be within the jurisdiction of QCAT for the purpose of making findings of corrupt conduct.[417] The proposed amendment would replace the present requirement for individual public sector officers to be prescribed by regulation as holding or having held a 'prescribed appointment' prior to commencing proceedings in QCAT for a disciplinary declaration against an officer.

6.9.1 Comment

The Committee agrees that requiring the Commission to obtain the approval of the Governor-in-Council to make a regulation prescribing individual, former public sector employees as holding or having held a 'prescribed appointment', as a condition precedent to applying to QCAT for a disciplinary declaration against a former employee is unnecessarily cumbersome and lengthy. The Committee therefore recommends that section 50 of the CC Act be amended to deem units of administration and appointments therein to be within the jurisdiction of QCAT for the purpose of making findings of corrupt conduct against former public sector employees.

Recommendation 23

The Committee recommends that section 50 of the *Crime and Corruption Act 2001* be amended to deem units of public administration and appointments therein to be within the jurisdiction of QCAT for the purpose of making findings of corrupt conduct against former public sector employees.

6.9.2 Post-separation disciplinary proceedings against former Commission officers

Under the *Public Service Act 2008*, the CEO of a unit of public administration is not prevented from making a disciplinary finding against a former employee in relation to a disciplinary ground that arose whilst the employee held an appointment within that unit of public administration, despite the fact that the employee has commenced employment in another unit of public administration.[418] If the previous CEO makes a disciplinary finding against the former employee, the CEO of the unit of public administration in which the former employee is currently employed may agree to take disciplinary action against the employee in respect of the previous CEO's disciplinary finding.[419] Alternatively, the previous CEO may delegate to the former employee's current CEO the authority to make a disciplinary finding about the employee.[420]

[414] *Crime and Corruption Act 2001*, ss 50(2)-(4).
[415] *Crime and Corruption Act 2001*, s 219IA(2).
[416] *Crime and Corruption Act 2001*, s 219IA(3).
[417] Crime and Corruption Commission, Submission No. 14, Recommendation 16, p 71.
[418] *Public Service Act 2008*, ss 187A(1)-(2).
[419] *Public Service Act 2008*, s 187A(4).
[420] *Public Service Act 2008*, s 187A(5).

While the CEO of the Commission may take disciplinary action against a former Commission officer, if that employee commences employment with another unit of public administration the Act does not enable the Commission's CEO to transfer, or to delegate the authority to make, a disciplinary finding about the former employee to that unit of public administration. Nor can a disciplinary finding made about a person formerly employed by a unit of public administration be transferred to the Commission in the event that the person commences employment with the Commission.

The Commission submitted that it is 'in the interests of the public sector's integrity as a whole that the CCC should be able to similarly delegate its authority to take disciplinary action, accept such a delegation or transfer/accept a disciplinary finding'.[421] The Commission therefore recommended that amendments be made to the *Crime and Corruption Act 2001* and other relevant Acts to:

- allow a disciplinary finding against a Commission officer who changes employment to another public sector agency to be transferred to the new employing chief executive;
- allow the authority to make a disciplinary finding to be delegated from the Commission to the new employing chief executive when a Commission officer changes to another public sector agency; and,
- provide those reciprocal rights to other public sector agencies whose employees change employment to the Commission.[422]

6.9.2.1 Comment

The Committee agrees that this anomaly should be remedied in the manner outlined by the Commission.

Recommendation 24

The Committee recommends that the *Crime and Corruption Act 2001* and other relevant legislation be amended to:

- allow a disciplinary finding against a Commission officer who changes employment to another public sector agency to be transferred to the new employing chief executive;
- allow the Commission to delegate the authority to make a disciplinary finding about a former Commission officer to the new employing chief executive; and
- provide the same reciprocal rights to other public sector agencies whose employees change employment to the Commission.

6.9.3 Disciplinary history of current and former Commission officers

A related amendment sought by the Commission relates to the provision of information relating to the disciplinary history of current and former Commission officers. Pursuant to section 179A of the *Public Service Act 2008*, the chief executive of a department may require an applicant for an appointment or secondment with the department to disclose particulars of any serious disciplinary action taken against the applicant. Furthermore, section 188B(1) of the *Public Service Act 2008* allows the chief executive of a department to ask the chief executive of another department for disciplinary information about a person who is or was a public service employee, provided that information is reasonably necessary for the chief executive to make a decision about:

- an appointment or continued appointment of the person to the chief executive's department; or

[421] Crime and Corruption Commission, Submission No. 14 (Second Supplementary Submission), p 6.
[422] Crime and Corruption Commission, Submission No. 14 (Second Supplementary Submission), Recommendation 2, p 6.

- a disciplinary finding, disciplinary action or disciplinary declaration the chief executive is considering in relation to the person.

The chief executive to whom the request is directed must comply with the request unless they are reasonably satisfied that giving the information may prejudice the investigations of a suspected contravention of the law in a particular case.[423]

The Commission noted that it does not presently have these powers.[424] The Commission submitted that:

> the high community expectations of persons employed at the CCC warrants this provision being available to the CCC to obtain disciplinary information (as broadly defined) in the prescribed circumstances of making a decision in relation to employment (including secondment) or disciplinary action. The disciplinary information sharing agencies should include, at least, all public service departments and the Queensland Police Service.[425]

The Commission therefore recommended that:

- provisions be introduced in the *Crime and Corruption Act 2001* and other relevant Acts to allow the sharing of disciplinary information between the Commission, public service departments, the Queensland Police Service and other public sector agencies who already have this legislative power;
- disciplinary information be given the same meaning as in section 188B(3) of the *Public Service Act 2008* and section 18L(3) of the *Ambulance Services Act 1991*; and,
- the prescribed circumstances for sharing of disciplinary information be the same as in section 188B(1)(b) and section 18K(1)(b) of the *Ambulance Services Act 1991*, with the clarification that it extends to decisions about secondment.[426]

6.9.3.1 Comment

The Committee agrees that this anomaly should be remedied in the manner outlined by the Commission. The Committee considers it essential, given the nature of the functions and powers conferred on the Commission and its employees, that employees of the Commission should exhibit exemplary integrity and character.

The Committee therefore recommends that the relevant legislation should be amended to ensure that the Commission is entitled to provide and receive disciplinary information about a current holder of, or an applicant for, an appointment with the Commission (including a secondment) that the Commission, the chief executive of a public sector department or the Commissioner of Police has about that person. The amendments should specify that the information may be requested in the same circumstances as those currently provided for in section 188B(1)(b) of the *Public Service Act 2008*.

Recommendation 25

The Committee recommends that the *Crime and Corruption Act 2001* and other relevant legislation be amended to enable the Commission to provide and receive disciplinary information about a current holder of, or an applicant for, an appointment with the Commission (including a secondment) that the Commission, the chief executive of a public sector department or the Commissioner of Police has about that person. The amendments should specify that the information may be requested in the same circumstances as those currently provided for in section 188B(1)(b) of the *Public Service Act 2008*.

[423] *Public Service Act 2008*, s 188B(2).
[424] Crime and Corruption Commission, Submission No. 14 (Second Supplementary Submission), p 4.
[425] Crime and Corruption Commission, Submission No. 14 (Second Supplementary Submission), p 4.
[426] Crime and Corruption Commission, Submission No. 14 (Second Supplementary Submission), Recommendation 1, p 5.

7. Confiscation Function

Section 56 of the CC Act provides that the Commission has a civil confiscation function. This function is outlined in the *Criminal Proceeds Confiscation Act 2002* (CPCA).

The CPCA provides for three separate schemes to achieve its objects. The Commission administers the schemes set out in Chapter 2 (Confiscation without conviction) and Chapter 2A (Serious drug offender confiscation order scheme) of the CPCA. The Office of the Director of Public Prosecutions (ODPP) administers the scheme in Chapter 3 (Confiscation after conviction).[427]

The Chapter 2A scheme commenced in September 2013 through the *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013*.

7.1 Resourcing

The Commission submitted that:

> Amendments to the CPCA (effective from 6 September 2013) to incorporate the unexplained wealth and the serious drug offender confiscation order (SDOCO) provisions coupled with the QPS's increased focus on OMCGs, have resulted in an increase in referrals for confiscation assistance (predominantly from the QPS) each year. For example, we received 66 referrals in 2012-13 compared with 122 referrals in 2014-15.
>
> The proceeds of crime team was granted three-year funding from January 2014 to December 2016 for an additional team to implement the new provisions in the CPCA and to manage the increased focus on criminal motorcycle gangs. Other internal redeployments also occurred for this purpose.
>
> The SDOCO provisions are based upon a respondent being convicted of a serious drug offence. Matters commenced under this scheme can be in process for a number of years as the confiscation proceedings are unable to proceed to trial until a respondent has been convicted. Unexplained wealth investigations by their nature are resource intensive and slow. As such it is important that the staffing levels in the team are maintained to ensure current matters are staffed to sufficiently litigate to finality.[428]

The Commission sought the Committee's support for continued funding for the additional team to manage this scheme.

7.1.1 Recent developments

The government has committed additional funds for this purpose. The 2016-17 State Budget provides additional funding for the CCC including '$3.5 million over four years and $1 million per annum ongoing to maintain a team to work in wealth orders provisions and the serious drug offender confiscation order scheme'.[429]

7.1.2 Comment

The Committee supports the work of the Commission with respect to civil confiscation and is satisfied that the additional funding committed by government will assist the Commission's operational effectiveness in this area.

7.2 Single confiscation agency

As outlined earlier, the Commission administers the non-conviction based scheme and the conviction based serious drug offender confiscation order scheme, with the DPP administering the confiscation after conviction scheme.

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[427] *Criminal Proceeds Confiscation Act 2002*, s 4.

[428] Crime and Corruption Commission, Submission No. 14, p 31.

[429] Department of Justice and Attorney-General, *2016-17 Queensland State Budget – Service Delivery Statements*, p 51.

In 2013, Callinan and Aroney recommended subject to certain conditions that the scheme presently administered by the ODPP vest in the Commission. One of those conditions was that the Commission satisfy the government that they had the legal and accounting capacity to administer the scheme.[430]

The Commission noted that this recommendation was to be considered in the next review of the CPCA, which has not yet commenced.[431] The Commission saw merit in such a proposal noting:

- the CCC is the only agency with the investigative powers (contained within the *Crime and Corruption Act 2001* and the CPCA, as well as ordinary police powers) to achieve optimal results under all proceeds of crime recovery schemes
- efficiencies would be gained with the solicitor on the record being in-house at the CCC
- the Queensland confiscation regime is the only one in Australia where the agency responsible for the administration of the scheme(s) and the solicitor on the record are in different agencies.[432]

The Commission sought the Committee's support for the implementation of the Callinan and Aroney recommendation, subject to the Commission being provided with the resources to implement it.

7.2.1 Recent developments

The Queensland Organised Crime Commission of Inquiry (COI) recommended that these amendments be made.[433] The government accepted the COI recommendation in principle, noting:

> The Queensland Government accepts the ODPP ceasing to administer chapter 3 of the *Criminal Proceeds Confiscation Act 2002* and ceasing to appear on behalf of the Crown in Criminal Proceeds Confiscation Act 2002 proceedings.
>
> Further work will be done by the Government to determine the appropriate agency to which those functions should be transferred.[434]

7.2.2 Comment

The Committee supports a single confiscation agency and notes the government's in principle support for the COI recommendation.

Recommendation 26

The Committee recommends that the government give consideration to a single confiscation agency administering the schemes under Chapter 2, 2A and 3 of the *Criminal Proceedings Confiscation Act 2002* and the relevant agency be provided with the appropriate resources to administer the schemes.

7.3 Money laundering

Under section 251 of the CPCA, the Attorney-General's written consent is required to commence or progress proceedings against a person for money laundering. This requirement is unique to Queensland.[435]

In relation to the current requirements, the Commission noted:

> In practice, the investigation of predicate offences, such as drug offences, are pursued rather than the money laundering offences. However, by investigating and ultimately prosecuting the predicate

[430] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, Recommendation 7, p 216.
[431] Crime and Corruption Commission, Submission No. 14, p 41.
[432] Crime and Corruption Commission, Submission No. 14, p 41.
[433] Byrne QC, M.J., *Queensland Organised Crime Commission of Inquiry Report*, October 2015, Recommendation 8.1.
[434] Queensland Government, *Queensland Organised Crime Commission of Inquiry's Report: Government Response*, March 2016, p 16.
[435] Crime and Corruption Commission, Submission No. 14, p 40.

> offences the money laundering activity is disrupted. Money laundering investigations tend to be complex and resource-intensive, also lending weight to the alternative avenue of investigating and prosecuting predicate offences rather than money laundering.
>
> The effect of the money laundering offence provisions under the CPCA is that, in practice, a full criminal brief in support of the money laundering offences is prepared and provided to the Attorney-General to enable consent to be obtained. This involves a considerable amount of work and resources with no guarantee that consent will be granted. There does not seem to be any demonstrated rationale for this requirement.[436]

The Commission recommended that the requirement for the Attorney-General's consent be removed. The Commission noted they had previously sought this change in in its submission to the last review. The PCMC recommended that the government consider removing this requirement.[437]

The Bar Association of Queensland (BAQ) was asked by the Committee if they had any concerns about the money laundering provisions and in particular the requirement for the Attorney-General's consent. In a supplementary submission, the BAQ commented:

> The Association notes that criminal confiscation legislation is a modern crime fighting tool that has become relatively frequently used in recent decades.
>
> The Association notes that such legislation raises rule of law issues in that it places restraints upon citizens who have not been convicted of criminal offences on the basis of suspicion that someone has a committed a criminal offence and that assets are the result of such criminal activity.
>
> The Association stresses the continuing need for safeguards in legislating and implementing criminal confiscation legislation. The use of such legislation to hinder or prevent the right of free trial is a matter that is particularly concerning.
>
> Assuming that the requirement for the consent of the Attorney-General to prosecute for the offence of money-laundering, as provided by s. 251(2) *Criminal Proceeds Confiscation Act 2002*, is unique to Queensland, it is not evident to the Association that this creates a great law enforcement disadvantage to Queensland.
>
> Queensland is not, on our understanding of the legislation, dependent on prosecuting the offence of money laundering in order to restrain or forfeit assets. In any event, it would seem that the offence of money laundering is likely to be available to prosecute less frequently than offences involving narcotics or crimes of violence.[438]

7.3.1 Recent developments

The Commission made the same recommendation to the Queensland Organised Crime Commission of Inquiry (COI) and the Taskforce on Organised Crime Legislation (Taskforce). Both the COI and the Taskforce recommended the removal of the Attorney-General's consent.[439] The government has accepted the COI recommendation noting:

> The Commission of Inquiry found that the historical reasons for requiring ministerial consent to prosecute are not present with regards the Queensland money laundering offences. The current requirement deters Queensland police from using the Queensland offence, preferring to charge the Commonwealth money laundering offences which do not require ministerial consent.[440]

[436] Crime and Corruption Commission, Submission No. 14, p 40.

[437] Parliamentary Crime and Corruption Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, Recommendation 6, p 40.

[438] Bar Association of Queensland, Submission No. 28 (Supplementary), pp 5-6.

[439] Byrne QC, M.J., *Queensland Organised Crime Commission of Inquiry Report*, October 2015, Recommendation 6.1; Queensland Government, Department of Justice and Attorney-General, *Taskforce on Organised Crime Legislation*, Recommendation 5.

[440] Queensland Government, *Queensland Organised Crime Commission of Inquiry's Report: Government Response*, March 2016, p 15.

7.3.2 Comment

The Committee notes the government has committed to removing the requirement for the Attorney-General's consent in relation to money laundering proceedings.

8. Protections for Commission Officers

8.1 Enabling Commission officers to report corrupt conduct with protection from reprisal

The Commission submitted that due to a lacuna in the definition of 'corrupt conduct', Commission officers and employees do not enjoy the same protections as other public sector employees from recrimination arising from the disclosure of alleged corrupt conduct by another Commission officer or employee. This is because the first element of the definition of 'corrupt conduct' requires that the conduct in question adversely affects, or could adversely affect, directly or indirectly, the performance of functions or the exercise of powers in a unit of public administration or a person holding an appointment in a unit of public administration.[441] Pursuant to section 20(2)(a) of the CC Act, the Commission is declared not to be a unit of public administration.

The Commission therefore submitted that a Commission officer cannot commit corrupt conduct, at least insofar as the conduct relates to the performance of functions or the exercise of powers of the Commission.[442] This does not prevent an officer of the Commission from making a complaint to the Commission about alleged misconduct by another Commission officer, nor prevent the Commission from taking disciplinary action against any officer in those circumstances.[443] Nevertheless, the Commission submitted that 'there do not appear to be adequate provisions to protect the officer who originally made such a disclosure', under the provisions of either the *Crime and Corruption Act 2001* or the *Public Interest Disclosure Act 2010* (*PID Act*).

In the former case, the Commission submitted that the protection against victimisation provided by section 212 of the CC Act is of doubtful assistance to the officer because their disclosure 'does not relate to the performance of the Commission's functions'. Nor can Commission officers avail themselves of the protections afforded by the *PID Act*, at least in relation to disclosures of suspected corrupt conduct because 'corrupt conduct' is defined by reference to section 15 of the *Crime and Corruption Act 2001*,[444] which as noted above, only applies to units of public administration or holders of appointments therein.

The Commission therefore recommended that the *Crime and Corruption Act 2001* be amended to enable Commission officers to make a lawful disclosure concerning suspected corrupt conduct and improper conduct (as defined by section 329(4) of the Act) and be protected from reprisal for doing so.

8.1.1 Comment

The Committee strongly agrees with the Commission's recommendations. While the Commission is the lead integrity agency in Queensland charged with the responsibility for dealing with corruption, this does not necessarily mean that its officers are immune from engaging in corruption. The Committee considers it desirable that its officers be provided with the same opportunity to report corrupt conduct, and the same protections for doing so, as other public servants enjoy.

The Committee therefore considers that the Act should be amended to enable Commission officers to make lawful disclosures concerning suspected corrupt conduct and improper conduct (as defined by section 329(4) of the Act) and to provide such officers with the same protections granted to employees of units of public administration under the *PID Act*.

[441] *Crime and Corruption Act 2001*, s 15(1)(a).
[442] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p 14.
[443] As to which, see *Crime and Corruption Act 2001*, Chapter 6, Part 1, Division 9.
[444] *Public Interest Disclosure Act 2010*, s 13(1)(a)(i); schedule 4, definition of 'corrupt conduct'.

Recommendation 27

The Committee recommends that the *Crime and Corruption Act 2001* be amended to enable Commission officers to make lawful disclosures concerning suspected corrupt conduct and improper conduct (as defined in section 329(4) of the Act). The amendments should also ensure that a Commission officer who makes such a disclosure is entitled to the same protections granted to public sector employees under the *Public Interest Disclosure Act 2010*.

8.2 Civil liability of Commission officers

Section 335(1) of the CC Act provides that the Commission or a Commission officer is not civilly liable for an act done, or an omission made, honestly and without negligence under the Act. The Commission submitted that this provision provides Commission officers with far less comprehensive immunity from civil liability than other public servants.[445] Pursuant to section 26C of the *Public Service Act 2008*, a State employee does not incur civil liability for engaging, or for the result of engaging, in conduct in an official capacity. In the Commission's opinion, Commission employees do not come within the definition of 'State employee' in section 26B, a view confirmed by the Public Service Commission.

Thus, while civil proceedings can be brought against Commission officers and Commission officers are potentially personally liable for negligent acts, State employees do not incur any civil liability for negligent acts in an official capacity, although the State may recover contributions from a State employee for acts involving gross negligence or engaged in other than in good faith.[446] The Commission noted that Police Service Review Commissioners, who are appointed under the *Police Service Administration Act 1990*, but are paid and indemnified by the Commission for any civil liability arising from the performance of their official duties, are in the same position as Commission officers.

The Commission therefore recommended that the relevant Act or regulation be amended to ensure that Commission officers and Police Service Review Commissioners are afforded the same protections from civil liability provided to public servants and to remove any uncertainty about the application of section 26C of the *Public Service Act*.

8.2.1 Comment

The Committee agrees that Commission officers should enjoy the same immunity from civil liability when acting in an official capacity as do other public servants. In this regard, the Committee notes that the Commission has recently been advised by the Public Service Commission that it intends to introduce amendments to the relevant legislation to ensure that the protections in the *Public Service Act* apply to Commission employees. The Committee strongly supports the Public Service Commission's action.

Recommendation 28

The Committee recommends that the relevant legislation be amended to ensure that Commission officers and Police Service Review Commissioners are afforded the same protections against civil liability provided to public servants.

[445] Crime and Corruption Commission, Submission No. 14 (First Supplementary Submission), p 15.
[446] *Public Service Act 2008*, s 26C(3).

9. External accountability of the Crime and Corruption Commission

9.1 Parliamentary Crime and Corruption Committee

The Committee is established under the CC Act.[447] The Committee consists of seven members, with four members nominated by the Leader of the House and three members nominated by the Leader of the Opposition. [448]

Under the CC Act, the Chair of the Committee must be a member nominated by the Leader of the House.[449] At various times since 2011, the committee has been chaired by a non-government or independent member. Such convention arose as a result of a recommendation of the Committee System Review Committee (CSRC).[450]

The CSRC and the PCMC in its last review recommended that the Act be amended to provide that the chair of the Committee must be a member nominated by the Leader of the Opposition.[451]

This issue has been the subject of some debate in both the current and the previous Parliament.

The Committee of the Legislative Assembly recently conducted a review of the committee system. The Committee made no recommendation in relation to the recommendations of the CSRC and the PCMC, but noted and endorsed the recent appointment of a non-government Chair to the Committee.[452]

9.1.1 Role and functions of the Committee

The functions of the Committee include:

- monitoring and reviewing the performance of the Commission's functions;
- reporting to the Legislative Assembly where appropriate on matters relevant to the Commission or matters relevant to the Commission's performance of its functions or exercise of its powers;
- examining the Commission's annual report and other reports;
- reporting on any matter relevant to the Commission's functions referred to it by the Legislative Assembly;
- participating in the selection of commissioners and the CEO;
- reviewing the activities of the Commission by 30 June 2016 (then every five years) and reporting on any further action that should be taken in relation to the Act or the functions, powers and operations of the Commission;
- periodically reviewing the structure of the Commission, including the relationship between the types of commissioners and the roles, functions and powers of the commission, the chairperson and the CEO and reporting about the review including any recommendations about changes to the Act;
- issuing guidelines and giving directions to the Commission as provided under the Act.[453]

[447] *Crime and Corruption Act 2001*, s 291.
[448] *Crime and Corruption Act 2001*, s 300(1).
[449] *Crime and Corruption Act 2001*, s 300(2).
[450] Committee System Review Committee, *Review of the Queensland Parliamentary Committee System*, December 2010, p 23.
[451] Parliamentary Crime and Corruption Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, Recommendation 34, p 162.
[452] Committee of the Legislative Assembly, *Report No. 17 – Review of the Parliamentary Committee System*, February 2016, p 31.
[453] *Crime and Corruption Act 2001*, s 292.

9.1.2 Monitoring and reviewing the performance of the functions of the Commission

The Committee actively monitors and reviews the performance of the Commission's functions by various means including:

- holding regular committee meetings;
- carefully examining the confidential reports provided by the Commission which provide detailed information about the activities of the Commission during the relevant period;
- considering the confidential minutes of meetings of the Commission and its executive;
- holding regular public and private (in camera) meetings with the Commission and senior officers during which the committee may question the Commission about its activities;
- receiving and considering complaints against the Commission and its officers;
- reviewing Commission reports;
- requesting reports from the Commission on matters arising through complaints, the media or other means;
- conducting inquiries into specific or general matters relating to the Commission;
- conducting (either itself or through the Parliamentary Commissioner) audits of various registers and files kept by the Commission concerning the use of its powers;
- meeting regularly with the Parliamentary Commissioner to discuss the Commissioner's activities.

9.1.3 Public meetings of the Committee

The PCMC was criticised about the secretive nature of its oversight of the Commission during the course of its inquiry into the (then) CMC's release and destruction of Fitzgerald Inquiry documents. The PCMC accepted this constructive criticism. While the PCMC noted that some information should not be in the public domain, it considered 'that it can, and it should, open some of its oversight functions to the public.'[454]

The Committee noted:

> 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.[455]

Additionally, Callinan and Aroney recommended that:

> …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.[456]

[454] 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, p 87.
[455] 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, p 87.
[456] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, Recommendation 16, p 219.

On 30 May 2013, the PCMC wrote to the Attorney-General in relation to this recommendation, stating:

> 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.
>
> Given the sensitive nature of many of the matters dealt with by the CMC, the Committee considers some matters in private in order for the Committee to satisfy itself that the CMC is using its resources efficiently and effectively. The in camera meetings with the CMC are supported by a full, confidential report from the CMC on its activities during the reporting period. It is not appropriate to discuss some issues in public and the Committee is best placed to determine which issues are suitable for public hearings and which should remain confidential.

In the government response to the PCMC Report No. 90 and to the Callinan and Aroney report, 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.[457]

The explanatory notes to the Bill introducing the 2014 amendments provided:

> Transparency and accountability of the Commission
>
> The Bill includes amendments to promote accountability and transparency of the commission's decision-making, operations and activities by:
>
> - requiring parliamentary committee meetings with the commission be held in public, except where the committee considers the confidential and sensitive nature of the information being discussed needs protection or may jeopardise ongoing investigations;
>
> …
>
> The parliamentary committee currently holds public meetings with the commission except for discussing confidential or sensitive information. The proposed amendment to require public meetings formalises the current practice.[458]

However, the actual provision, section 302A is broader than the explanatory notes indicate.

Section 302A provides:

> (1) A meeting of the parliamentary committee must be held in public.
>
> (2) However, the parliamentary committee may decide that a meeting or a part of a meeting be held in private if the committee considers it is necessary to avoid the disclosure of—
>
> a. confidential information or information the disclosure of which would be contrary to the public interest; or

[457] Queensland Government, Department of Premier and Cabinet, *Parliamentary Crime and Misconduct Committee – Inquiry into the Crime and Misconduct Commission's Release and Destruction of Fitzgerald Commission of Inquiry Documents; The Honourable Ian Callinan AC and Professor Nicholas Aroney – Review of the Crime and Misconduct Act 2001 and Related Matters: Government Response*, tabled on 3 July 2013.
[458] Crime and Misconduct and Other Legislation Amendment Bill 2014, explanatory notes, p 6.

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 functions or intelligence function.

Therefore, the Act requires that any meetings, not only meetings with the Commission, must be held in public unless the relevant criteria are met. The then Attorney-General confirmed that was the intention of the provision during the debate on the Bill.[459]

The CC Act overrides Standing Order 207 (Public and private meetings), which provides:

> Persons other than members and officers of a committee may attend a public meeting of a committee but shall not attend a private meeting except by express invitation of the committee, and shall always withdraw when the committee is deliberating.[460]

During this Parliament, the Committee has sought the advice of the Clerk of the Parliament when there has been disagreement within the Committee as to whether particular matters ought to be considered in public or private.

In advising the Committee, the Clerk offered the following comments:

> …the traditional rule that Committee[s] should deliberate on issues in private has been maintained in the face of the overall trend towards openness of parliamentary proceedings over the last 200 years because:
>
> a. private deliberations enable committees to work in a more collegiate and bipartisan fashion than open proceedings. The "theatre" of parliament is left at the door of committees working in private to achieve the outcomes delegated by the parliament to the committee. I have said before that the committee system is the "jewel" of parliament, softening the adversary nature of parliament;
>
> b. private deliberations enable members to work without the interference or pressure from others, including those in their own party; and
>
> c. private deliberations prevent the deliberative processes in committee eroding the dignity of the committee through the adversary process often displayed in the parliament.
>
> That being said, the Parliament has made the decision to place a higher threshold on the PCCC to conduct private meetings. In my view it is incumbent on all Members of the PCCC to ensure that the public proceedings of the committee enable all members to express their view on issues in moderation and without the combativeness and theatre usually reserved for the floor of Parliament. The dignity of the committee is at risk if this does not occur. In the final analysis public disputation does not reflect well on the committee nor eventually on individual members.[461]

The Committee has dealt with the requirement to meet in public, by adopting a protocol for meetings. The protocol requires that the Chair will consult with the Deputy Chair on items to be included on the agenda and the items proposed to be considered in public or private.

At the beginning of each committee meeting, the Committee then adopts the agenda, effectively making a positive decision, as required by the Act to determine the matters to be dealt with in private.

9.1.3.1 Comment

At a practical level the requirement in section 302A of the CC Act means that some matters dealt with by all other parliamentary committees in private deliberative meetings are dealt with in public. For example, confirming minutes, noting correspondence, and noting and authorising the tabling of reports, such as reports of the Parliamentary Commissioner. It also means that on occasions where the

[459] Queensland Parliament, Record of Proceedings, 7 May 2014, pp 1389-90.
[460] Standing Order 207 – Standing Rules and Orders of the Legislative Assembly.
[461] Laurie, N.J., Clerk of the Parliament, email dated 14 July 2015.

Committee does not have any joint meetings with the Parliamentary Commissioner or the Commission that the public component of a meeting may take as little as five minutes in order to deal with these matters. There is the potential that such meetings may give a false impression that the Committee spends its time dealing with procedural and trivial matters, rather than carrying out its important oversight functions.

9.1.4 Participating in the appointment of Commissioners and the CEO of the Commission

As outlined earlier in this report, the Committee participates in the selection of Commissioners and the CEO of the Commission.

Before nominating any person for appointment as Chairperson, Deputy Chairperson, Ordinary Commissioners and the CEO, the Minister must consult with the Committee. The Minister may only nominate a person for appointment to these roles if the nomination is made with the bipartisan support of the Committee.[462] Bipartisan support means either unanimous support, or the support of a majority of members other than a majority consisting wholly of members of the party or parties in government.[463]

As discussed earlier, the 2016 amendments require the Committee to also provide its bipartisan support for any acting appointments to these positions, where such an appointment is more than three months.[464]

The Commission is comprised of five members. The CC Act provides that a quorum for a commission meeting is any three commissioners. However, if a report is to be presented to the Commission for adoption, the quorum is any four commissioners.[465]

The Committee notes that at the present time, there are two vacancies for Ordinary Commissioners and no persons have been appointed to act in those positions.[466] Thus the Commission is presently constituted by only three of the five members required.

The Commission has raised concerns about the current vacancies with the Committee.

The Committee notes that the last PCMC review included the following recommendations:

> The Committee recommends that the [Minister] review the recruitment and selection processes for Commissioners to ensure sufficient time is allocated to allow a process to run its course, including factoring in an appropriate timeframe for seeking the bipartisan support of the Committee.
>
> The Committee recommends the Government take a more active role in promoting the importance of CMC Commissioners to ensure the highest quality candidates are attracted to applying for the positions without the need for the Government to seek out or head-hunt applicants to apply.[467]

In supporting these recommendations, the government advised that the Minister would 'review the current recruitment and selection processes to ensure the quality of future commissioners continues to be of the highest standard and the recruitment process allows for new appointments to be made in a timely manner.'[468]

[462] *Crime and Corruption Act 2001*, s 228.
[463] *Crime and Corruption Act 2001*, schedule 2, definition of 'bipartisan support'.
[464] *Crime and Corruption Act 2001*, s 237.
[465] *Crime and Corruption Act 2001*, s 264.
[466] One position has been vacant since 1 March 2016 and the other since the additional position was established on 5 May 2016.
[467] Parliamentary Crime and Corruption Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, Recommendations 36 and 37, p 170.
[468] Queensland Government, *Parliamentary Crime and Corruption Committee, Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission: Government Response*, p 15.

9.1.4.1 Comment

The Committee notes that the Committee's role in the appointment of Commissioners, in particular the Chairperson of the Commission, has been the subject of much debate and criticism in the previous and current Parliament.

The Committee acknowledges that delays in appointing persons to these roles, caused by either the Committee or the Minister, may impact on the Commission being able to perform its functions effectively.

9.1.5 Complaints against the Commission and its officers

One of the ways the Committee fulfils its monitoring and reviewing role is to consider complaints about the conduct or activities of the Commission or its officers. Such complaints are received in two ways:

- complaints received from external parties, including the general public; and
- notifications made by the Commission pursuant to section 329 of the CC Act.

There are a range of options available to the Committee if it decides to take action on a complaint, concern or notification. The Committee may do one or more of the following:

- ask the Commission to give a report on the matter;
- ask the Commission to investigate and give a report on the matter;
- ask the police service or another law enforcement agency to investigate and give a report on the matter;
- ask the Parliamentary Commissioner to investigate and give a report on the matter;
- refer the matter to the director of public prosecutions;
- take other action the Committee considers appropriate.[469]

Such action may only be taken if the decision is made with the bipartisan support of the Committee.[470]

9.1.6 Complaints from parties external to the Commission

Many of the complaints the Committee receives about the Commission come directly from parties external to the Commission. The Committee only accepts complaints in writing in order to efficiently identify and consider complaint matters and to prevent misunderstanding or misinterpretation of the relevant facts or circumstances.

There is often misunderstanding by the complainants about the Committee's role in relation to their complaints.

The Committee's jurisdiction is to monitor and review the actions of the Commission and its officers. The Committee has no role in relation to any other organisation, nor does it carry out original investigations into allegations of corrupt conduct or police misconduct.

As part of its monitoring and reviewing role the Committee receives and considers complaints to determine whether the Commission or any of its officers has acted inappropriately. The Committee does not act as an appeal body against Commission determinations, nor may it substitute its conclusions for that of the Commission in relation to a matter dealt with by the Commission.

When complaints are received, an assessment is made to ensure the complaint falls within the Committee's jurisdiction.

[469] *Crime and Corruption Act 2001*, s 295(2).
[470] *Crime and Corruption Act 2001*, s 295(3).

If a complaint falls within the Committee's jurisdiction, a report is requested from the Commission. Such reports include information about how the Commission dealt with the complaint, along with details of correspondence between the Commission and the complainant.

The Committee considers the material received from the complainant and the Commission and determines whether the Commission has acted inappropriately in the handling of the complaint.

Issues the Committee considers in determining whether or not the Commission has acted inappropriately include (but are not limited to):

- timeliness in the handling of complaints and investigations;
- whether the Commission made appropriate inquiries before determining not to pursue a matter;
- whether the Commission considered all relevant facts and material;
- whether a determination by the Commission to refer a matter back to the relevant public sector agency to deal with was appropriate;
- whether the Commission was responsive and timely in its communications with complainants and with subject officers;
- whether the Commission's conclusions and determinations are appropriate; and
- whether the Commission acted within its legislative powers.

9.1.6.1 Comment

In the vast majority of cases the Committee has not found that the Commission has acted inappropriately. However, on occasions the Committee has commented on or made recommendations about the actions of commission officers. The Committee has the ability to report to the Legislative Assembly and comment as necessary where the Committee considers that certain matters should be brought to the Assembly's attention.[471]

The Committee considers there is ongoing value in receiving external complaints as part of its monitoring and reviewing role.

However, the Committee acknowledges that complainants are not always satisfied with the role the Committee has in reviewing complaints.

In the last review, the PCMC noted:

> …in order for the CMC to maintain its independence, it would be inappropriate for the Committee or the Parliamentary Commissioner, through the Committee, to be able to reconsider the findings or determinations of the CMC in relation to any particular matter. Any conclusions reached by the PCMC or the Parliamentary Commissioner are currently able to be referred to the CMC for consideration, but would not be binding on the CMC. The Committee considers that the appropriate mechanism for any appeal of a CMC decision or finding is through the Queensland judicial system.
>
> The Committee notes its role is that of an oversight committee with the primary function of monitoring and reviewing the activities of the CMC; the Committee should not be considered as an alternative avenue to the courts for disaffected complainants to seek relief.[472]

The Committee supports the view expressed by the PCMC and considers that its current powers are appropriate to fulfil its oversight function.

[471] *Crime and Corruption Act 2001*, s 292(b).

[472] Parliamentary Crime and Misconduct Committee, *Report No. 86 – Three Yearly Review of the Crime and Misconduct Commission*, May 2012, p 172.

9.1.7 Complaints from the Commission under section 329

The 2014 amendments significantly changed the section 329 requirements under which the Commission is required to notify the Committee. Such change was recommended by the PCMC in Report No. 90.[473]

Prior to the changes in 2014, section 329 placed a duty on the Commission to notify the Committee as follows:

> 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.

The definition of improper conduct was defined as:

> (a) disgraceful or improper conduct in an official capacity, or
>
> (b) disgraceful or improper conduct in a private capacity that reflects seriously and adversely on the commission, or
>
> (c) conduct that would, if the officer were an officer in a unit of public administration, be official misconduct.

Section 15 defined 'official misconduct' as follows:

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

In relation to the destruction of Fitzgerald Inquiry documents which was notified to the PCMC under section 329, the PCMC noted that this issue was 'apparently not communicated internally within the CMC to the CMC Chairperson' until well after the issue arose.[474]

The PCMC was also concerned that the then section 329 assumed that the Chairperson would make an assessment of the conduct and only where that assessment lead to particular conclusions that the obligation arose to report it to the Committee.[475]

The PCMC found that:

> Section 329 in its current form leaves too much dependent upon the value assessments by the Chairperson. It is only upon the assessment by the Chairperson that an obligation arises to report to the Committee.
>
> This section should be amended so that it places a clear duty on the CMC Chairperson to notify the Committee of improper conduct or conduct that might amount to improper conduct. The definition should also expressly include conduct that amounts to, or might amount to, serious maladministration.[476]

The PCMC went on to recommend significant expansion of the provision.

Section 329 now requires that the relevant notifier (either the Chairperson, Deputy Chairperson or CEO), must notify the Committee and the Parliamentary Commissioner of all conduct of a person that

[473] 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 20, p 90.
[474] 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, pp 88-89.
[475] 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, p 89.
[476] 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, Finding 21, p 89.

they suspect involves, or may involve, improper conduct. The notifier must disregard the intention of the person in engaging in the conduct.

Improper conduct was redefined to mean:

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

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

(c) conduct that would, if the 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.

The protocol between the Committee and the Commission in relation to reporting such conduct was updated to reflect these changes.[477]

9.1.7.1 Comment

The amendments to section 329 have led to a significant increase in notifications to the Committee. In 2013-14 the Committee received 13 notifications and in 2014-15 the Committee received 13 notifications. In 2015-16 to date, the Committee has received more than double the notifications it received in the two previous financial years. Given the changes to the notification requirements are still relatively new, the Committee considers that it is too early to make an assessment as to whether there ought to be any refining of this provision. However, the Committee will continue to monitor the notifications from the Commission.

9.1.8 Use of Committee or Parliamentary Commissioner reports in disciplinary proceedings

Another of the 2014 amendments arising from the PCMC's Report No. 90 relates to the use of the Committee's or the Parliamentary Commissioner's reports in disciplinary proceedings.

The PCMC noted that as its proceedings were subject to parliamentary privilege, the evidence provided during the course of its inquiry could not be used in other proceedings, such as criminal prosecutions or disciplinary proceedings.

As a result, the PCMC recommended that 'an appropriate, independent investigation of issues relating to the dissemination and destruction of the Fitzgerald Inquiry material be established with a view to identifying possible disciplinary action or breaches of the *Crime and Misconduct Act 2001*'.[478] This recommendation was accepted and an independent investigation was conducted.

[477] Crime and Corruption Commission, 'Protocols governing the reporting of improper conduct complaints against officers of the Crime and Corruption Commission', September 2014.
[478] 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 1, p 18.

The PCMC also recommended amendments to the Act to enable an investigation report and findings of the Parliamentary Commissioner, to be used by the Commission as grounds for disciplinary action and an indication of whether disciplinary action is warranted, despite sections 8 and 9 of the *Parliament of Queensland Act 2001*. The PCMC also recommended the amendment of section 318 to remove the requirement for the Parliamentary Commissioner to obtain the bipartisan support of the Committee before holding hearings.[479]

Section 323A was subsequently inserted and section 318 amended in the 2014 amendments to give effect to the recommendation.

The PCMC noted in Report No. 90, 'that nothing in these recommendations seeks to derogate from the role of the Chairperson in determining if grounds for disciplinary action are established or what disciplinary action is warranted and imposed, or the Commission's authority to sanction the Chairperson's recommendation'.[480]

As a result of the 2014 amendments, the CEO has responsibility for disciplinary matters.

9.1.8.1 Comment

The Committee considers that the amendments made in 2014 in relation to disciplinary proceedings were reasonably necessary in light of the PCMC's Inquiry. The Committee expects, as contemplated by the PCMC, that only the most serious matters would be investigated by the Committee, with or without the assistance of the Parliamentary Commissioner.

9.2 Office of the Parliamentary Crime and Corruption Commissioner

The Committee is assisted in its role of monitoring and reviewing the Commission by the Parliamentary Crime and Corruption Commissioner (Parliamentary Commissioner). Under the Act, the Parliamentary Commissioner is appointed for a term of two to five years.[481]

9.2.1 Functions of the Parliamentary Crime and Corruption Commissioner

Under section 314 of the *Crime and Corruption Act 2001*, the Committee may require the Parliamentary Commissioner to:

- audit records, operational files and other material held by the Commission;
- investigate complaints made against, or concerns expressed about, the conduct or activities the Commission and its officers;
- independently investigate allegations of possible unauthorised disclosure of confidential information;
- verify the Commission's reasons for withholding information from the Committee;
- verify the accuracy and completeness of Commission reports to the Committee; and
- perform other functions that the Committee considers necessary or desirable.

The Parliamentary Commissioner has further responsibilities under the *Crime and Corruption Act 2001* and the *Police Powers and Responsibilities Act 2000*, including: conducting an annual review of intelligence data in the possession of the Commission and the Queensland Police Service;[482] conducting regular inspections of records to determine the extent of the Commission's compliance

[479] 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 21, p 92.
[480] 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 21, p 92.
[481] *Crime and Corruption Act 2001*, s 309.
[482] *Crime and Corruption Act 2001*, s 320.

with legislative requirements relating to surveillance device warrants and controlled operations; and conducting regular audits of the Commission's records relating to assumed identities.

The Parliamentary Commissioner also has statutory duties under the *Telecommunications Interception Act 2009* which include:

- regularly carrying out inspections of the records of the Commission to determine the extent of the Commission's compliance with the legislative requirements relating to telecommunications interception; and
- providing reports on inspections to the responsible Minister and the Committee.

9.2.2 2014 amendments

The 2014 amendments amended the CC Act to require the Commission to notify the Parliamentary Commissioner, as well as the Committee, of any conduct by a commission officer that involves or may involve improper conduct.

The Parliamentary Commissioner was also granted own motion powers as part of the 2014 amendments following a recommendation of Callinan and Aroney.[483] The Parliamentary Commissioner may investigate a matter on their own initiative if certain criteria are met.[484] If the Parliamentary Commissioner decides to investigate a matter or conduct a preliminary assessment they must notify the Committee of the decision.[485]

The Parliamentary Commissioner regularly provides the Committee with details of preliminary assessments in relation to section 329 notifications from the Commission. The Parliamentary Commissioner has not commenced any own motion investigations to date.

9.2.3 Comment

This Committee, like its predecessors, appreciates the assistance and expertise provided by the Parliamentary Commissioner. In particular, the Committee notes the significant assistance provided by the office of the Parliamentary Commissioner during the course of the PCMC Inquiry into the (then) CMC's release and destruction of Fitzgerald Inquiry documents.[486]

The Committee supports the continuation of the office. The Committee does not consider that any amendments are required in relation to the Parliamentary Commissioner's functions and powers.

9.2.4 Proposed amendment to the Telecommunications Interception Act 2009

As noted above, the Parliamentary Commissioner has statutory duties under the *Telecommunications Interception Act 2009* (TI Act). The Parliamentary Commissioner proposed an amendment to the TI Act in relation to the keeping of particular records, which he noted had previously been raised with the Legal Affairs and Community Safety Committee in December 2014. The Parliamentary Commissioner explained:

> Section 66(2) of the Commonwealth's *Telecommunications (Interception and Access) Act 1979* provides the mechanism whereby certain persons (or class of person) may be authorised to receive information obtained by interceptions under telecommunications interception warrants issued to an interception agency.
>
> Pursuant to section 23(2) of the *Telecommunications Interception Act* (TIA), the Parliamentary Commissioner, as the inspecting entity for the Crime and Corruption Commission (CCC), must inspect

[483] Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 2013, Recommendation 11, pp 196-197.
[484] *Crime and Corruption Act 2001*, s 314(4).
[485] *Crime and Corruption Act 2001*, s 314(7).
[486] 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.

the CCC's records at least twice during each financial year to find out the extent to which CCC officers have complied with sections 14 to 16 and 18 to 20 of the TIA.

Section 14(h) of the TIA presently requires that the chief officer of an eligible authority must cause to be kept in the authority's records, each authorisation by the chief officer of the agency under section 66(2) of the Commonwealth Act. There is no mention in the TIA of the other category of authorisations referred to in section 66(2) of the Commonwealth Act, namely authorisations made by *"an authorising officer of an agency for whom an appointment under subsection (4) is in force".*

Such authorisations are permitted pursuant to amendments made to section 66 of the Commonwealth *Telecommunications (Interception and Access) Act* in 2011 – subsequent to the enactment of Queensland's TIA. Pursuant to section 66(4), inserted by the amendments, the CCC Chairman may appoint in writing an officer of the CCC to be an authorising officer for the purposes of the section. Section 66(2) was concurrently amended to allow the CCC Chairman *"or an authorising officer of an agency for whom an appointment under subsection (4) is in force"* to authorise a person or class of persons to receive information obtained by interceptions under warrants issued to the CCC.

In light of these amendments to the Commonwealth Act, I recommend that section 14(h) of the TIA be amended to require that *"each authorisation by the chief officer or an authorising officer under section 66(2) of the Commonwealth Act"* must be kept in the authority's records. I also recommend that, where an authorisation under section 66(2) has been made by an authorising officer, the chief officer of an eligible authority must cause to be kept in the authority's records, the written appointment of the authorising officer under section 66(4) of the Commonwealth Act.

9.2.5 Comment

The Committee considers the proposed amendment is appropriate to ensure that all the relevant authorisations are required to be kept in the Commission's records. The Committee also considers it appropriate that the written appointment of authorising officers should be kept.

Recommendation 29

The Committee recommends that section 14(h) of the *Telecommunications Interception Act 2009* be amended to require all authorisations under section 66(2) of the *Telecommunications (Interception and Access) Act 1979* (Cth) and all written appointments of authorising officers under section 66(4) be kept in the authority's records.

9.3 Oversight by the Public Interest Monitor

The Public Interest Monitor (PIM) has a role in the oversight of the Commission, particularly in relation to the Commission's applications for surveillance device warrants and covert search warrants.

The PIM is required to:

- monitor compliance by the Commission in relation to matters concerning applications for surveillance warrants and covert search warrants;
- appear at any hearing of an application to a Supreme Court judge or magistrate for a surveillance warrant or covert search warrant, and to test the validity of the application;
- gather statistical information about the use and effectiveness of surveillance warrants and covert search warrants; and
- whenever it is considered appropriate, provide the Commission and the Committee with a report on the Commission's non-compliance with the Act.[487]

[487] *Crime and Corruption Act 2001*, s 326.

The PIM must prepare an annual report on the use of surveillance warrants and covert search warrants, which must be tabled by the Minister.[488]

9.4 Performance accountability to the Minister

The Commission must develop, adopt and submit a budget to the Minister, currently the Attorney-General and Minister for Justice and Minister for Training and Skills. The budget and any amendments to the budget must be approved by the Minister.[489]

The Minister is responsible for ensuring the Commission operates to best practice standards.[490] To assist the Minister in this regard, the Commission reports on the efficiency, effectiveness, economy and timeliness of its systems and processes when and in the way required by the Minister.[491]

9.5 Scrutiny by relevant portfolio committee

Portfolio Committees in relation to their relevant portfolio area, may:

- consider Appropriation Bills;
- consider other legislation and proposed legislation introduced into Parliament; and
- perform a role in relation to public accounts and public works as provided by the *Parliament of Queensland Act 2001*.[492]

For these purposes, the Commission falls under the portfolio area of the Legal Affairs and Community Safety Committee (LACSC). When the LACSC considers the Appropriation Bills and estimates for its area of responsibility, it may directly question the chief executive of the Commission on matters relevant to the examination of the Appropriation being considered.[493]

The LACSC also has discretion to exercise its role in relation to public accounts, allowing the committee to assess the integrity, economy, efficiency and effectiveness of government financial management by examining government financial documents. It is through this process that the LACSC may examine the Commission's annual report as one of the various reports within its portfolio area of responsibility.[494]

As noted in the last review by the PCMC, the portfolio committee's jurisdiction in relation to the Commission's annual report would be limited to matters relating to financial management by the Commission and would not include an ability to delve into operational matters.

9.5.1 Comment

The Committee agrees with the former committee, that while there may be some overlap between its role, the role of the Minister and the role of the relevant portfolio committee in the oversight of the Commission, there is no conflict between the jurisdictions of the three entities.

[488] *Crime and Corruption Act 2001*, s 328.
[489] *Crime and Corruption Act 2001*, s 259.
[490] *Crime and Corruption Act 2001*, s 260(1).
[491] *Crime and Corruption Act 2001*, s 260(2).
[492] *Parliament of Queensland Act 2001*, s 92.
[493] Standing Order 181 and schedule 7 - Standing Rules and Orders of the Legislative Assembly.
[494] *Parliament of Queensland Act 2001*, s 94.

Appendix 1 – List of submissions

Sub #	Submitter
1	Parliamentary Crime and Corruption Commissioner
2	Department of Transport and Main Roads
3	Stanwell Corporation Limited
4	Department of Agriculture and Fisheries
5	Tablelands Regional Council
6	Professor Timothy Prenzler
7	Department of Infrastructure, Local Government and Planning
8	Ergon Energy
9	CONFIDENTIAL
10	Department of State Development
11	CONFIDENTIAL
12	Mr Philip Nase
13	Accountability Round Table
14	Crime and Corruption Commission Queensland
15	Prof Charles Sampford
16	Together Queensland (branch of the A.S.U.)
17	Local Government Association of Queensland (LGAQ)
18	Lockyer Valley Regional Council
19	Whistleblowers Action Group Queensland Inc
20	Moreton Bay Regional Council
21	Legal Aid Queensland
22	Queensland Rail
23	Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
24	Office of the Director of Public Prosecutions
25	Queensland Law Society

Sub #	Submitter
26	Queensland Council for Civil Liberties
27	Public Service Commission
28	Bar Association of Queensland
29	Ms Renee Eaves
30	Queensland Advocacy Incorporated

Appendix 2 - Witnesses at the public hearings and meetings

PUBLIC HEARINGS

Monday, 12 October 2015	
Crime and Corruption Commission	Mr Alan MacSporran QC – Chairperson Mr Sydney Williams QC – Deputy Chairperson Mr David Kent QC – Acting Ordinary Commissioner Ms Soraya Ryan QC – Acting Ordinary Commissioner Mr Paxton Booth – Acting Executive Director Ms Kathleen Florian – Acting Chief Executive Officer Mr Michael Scott – Acting Executive Director, Crime Mr Rob Hutchings – Director, Legal Services

Monday, 26 October 2015	
	Prof Timothy Prenzler
	Hon Philip Nase
Queensland Police Union	Mr Ian Leavers – President
Bar Association of Queensland	Ms Elizabeth Wilson QC – Chair, Criminal Law Committee
Queensland Law Society	Mr Shane Budden – Manager, Advocacy and Policy Mr Adam Dwyer – Criminal Law Committee Member

Monday, 9 November 2015	
Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd	Mr Shane Duffy
Council for Civil Liberties	Mr Terry O'Gorman
Local Government Association of Queensland	Mr Greg Hallam -Chief Executive Officer
Office of the Director of Public Prosecutions	Mr Michael Byrne QC – Acting Director

Monday, 30 November 2015	
Crime and Corruption Commission	Mr Alan MacSporran QC - Chairperson Mr Paxton Booth – Acting Executive Director Mr Michael Scott – Acting Executive Director, Crime Ms Kathleen Florian – Acting Chief Executive Office Mr Rob Hutchings – Director, Legal Services Ms Angela Pyke – Director, Financial Investigations
Public Service Commission	Ms Kate Hastings – Acting Executive Director Mr Peter McKay – Deputy Commissioner
Queensland Police Service	Commissioner Ian Stewart Asst Commissioner Maurice Carless – State Crime Command Asst Commissioner Clem O'Regan – Ethical Standards Command Dep Commissioner Steve Gollschewski – Strategy, Policy and Performance Dep Commissioner Brett Pointing – Operation Resolute
Accountability Round Table	Dr David Solomon AM
	Professor Charles Sampford – Director, Institute for Ethics, Governance and Law

PUBLIC MEETING

Monday, 13 June 2016	
Crime and Corruption Commission	Mr Alan MacSporran QC - Chairperson Mr Forbes Smith – Chief Executive Officer

Appendix 3 – Previous review reports by predecessor committees

The first PCJC of the 46th Parliament

- Report No. 9: *Review of the Committee's operations and the operations of the Criminal Justice Commission Part A, Submissions, Volume 1 – Public submissions, Volume 2 - CJC Submissions and Minutes of Evidence taken on 6 and 13 June 1991*, tabled in July 1991
- Report No. 13: *Review of the operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission*, tabled in December 1991
- Report No. 18: *Review of the operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission. Part C - A report pursuant to section 4.8(I)(f) of the Criminal Justice Act 1989-1992*, tabled in November 1992

The second PCJC of the 47th Parliament

- Report No. 26: *A report of a review on the activities of the Criminal Justice Commission pursuant to s.118(1)(f) of the Criminal Justice Act 1989*, tabled in February 1995

The third PCJC of the 48th Parliament

- Report No. 38: *Report on the accountability of the CJC to the PCJC*, tabled in May 1997
- Report No. 45: *A report of a review of the activities of the Criminal Justice Commission pursuant to s.118(1)(f) of the Criminal Justice Act 1989*, tabled in June 1998

The fourth PCJC of the 49th Parliament

- Report No. 55: *A report of a review of the activities of the Criminal Justice Commission pursuant to s.118(1)(f) of the Criminal Justice Act 1989*, tabled in March 2001

The first PCMC of the 50th Parliament

- Report No. 64: *Three Year Review of the Crime and Misconduct Commission*, tabled on 15 March 2004

The second PCMC of the 51st Parliament

- Report No. 71: *Three Year Review of the Crime and Misconduct Commission*, tabled on 9 October 2006.

The seventh PCMC of the 52nd Parliament

- Report No. 79: *Three Year Review of the Crime and Misconduct Commission*, tabled on 20 April 2009.

The eighth PCMC of the 53rd Parliament

- Report No. 86: *Three Yearly Review of the Crime and Misconduct Commission*, tabled on 10 May 2012.

Appendix 4 – Organisational chart of the Commission

Current as at 31 May 2016