



Department of Justice and Attorney-General
Office of the Director-General

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Dear Mr Berry

Thank you for your letter dated 20 March 2014 regarding the referral of the Crime and Misconduct and Other Legislation Amendment Bill 2014 (the Bill) to the Legal Affairs and Community Safety Committee (the Committee).

I am pleased to offer the assistance of the Department of Justice and Attorney-General (DJAG) in the Committee's consideration of the Bill and note that the Committee is required to report to the House on the Bill by 30 April 2014.

Mrs Leanne Robertson, Director, Strategic Policy, DJAG will be the Committee Secretariat's first point of communication with respect to this inquiry. Mrs Robertson may be contacted on [REDACTED] or at [REDACTED].

I note you have requested that DJAG obtain the Committee's approval prior to consultation with any submitters. While at this stage it is not known if the Crime and Misconduct Commission (CMC) will be making a submission to the Committee, it is essential that DJAG continue to liaise with and consult the CMC with regards to the Bill and its implementation, including submissions made to the committee.

As requested, please find enclosed a Parliamentary Committee briefing note (with two attachments) to assist the Committee's inquiry process. The briefing note provides details of the purpose of, and proposals in, the Bill, the outcomes of relevant consultation and the application of fundamental legislative principles.

I trust the enclosed material is of assistance.

Yours sincerely

A handwritten signature in blue ink, appearing to read "John Sosso". The signature is stylized and fluid.

John Sosso
Director-General
Enc.

Parliamentary Committee Briefing Note

For the Legal Affairs and Community Safety Committee

Crime and Misconduct and Other Legislation Amendment Bill 2014

Background and Policy Intent

Crime and Misconduct Commission

- The Fitzgerald Commission of Inquiry Report (July 1989) recommended the establishment of an independent statutory entity to be '*permanently charged with the monitoring, reviewing, coordinating and initiating reform of the administration of criminal justice*' as well as having those '*criminal justice functions not appropriately carried out by the police or other agencies*'.¹ The functions of this new entity were to include '*the investigation of official misconduct in public institutions*'.²
- The *Criminal Justice Act 1989* (since repealed) implemented the Fitzgerald Commission of Inquiry recommendation and in 1989, the Criminal Justice Commission (CJC) was established. At this time, the functions of the CJC included research, education, training and prevention in relation to criminal law and official corruption (in public administration). The CJC was also tasked with the investigation of organised or major crime as well as official corruption in units of public administration.
- The Fitzgerald Commission of Inquiry Report recommended the statutory entity comprise a full time chairman and four part time commissioners. The role of chairman was seen as more demanding with responsibility for the day to day operations of the commission, as well as many of the complex legal decisions that were to be made, including presiding over hearings. The *Criminal Justice Act 1989* provided that the 'commission' comprises the five commissioners but that the chairman alone (or if the chairman elects one or more other commissioners, those commissioners) may discharge the functions or exercise the powers of the commission. In addition, the part time commissioners were required to advise and assist the chairman and staff of the commission in relation to the proper performance of the commission's functions and responsibilities.
- In 1997, the *Crime Commission Act 1997* removed the CJC's functions relating to major or organised crime and overseeing of intelligence activities of the police and created the Queensland Crime Commission (QCC) that was now responsible for the prevention, research and investigation of major or organised crime. The CJC functions consequentially only related to official corruption in units of public administration.
- In 2001, the QCC and CJC were merged to establish the Crime and Misconduct Commission (CMC). The CMC is an independent statutory body established by the *Crime and Misconduct Act 2001* (CM Act) with its primary functions to combat major crime and enhance public sector integrity in Queensland. The CMC investigates both crime and official misconduct and has oversight of both the police and public sector for police misconduct and official misconduct. In addition, the CMC is responsible for the Queensland witness protection program; helps recover proceeds of crime; conducts research of crime, policing or other relevant matters; and is tasked with prevention activities to reduce the incidence of crime and official misconduct.

¹ *Report of a Commission of Inquiry Pursuant to Orders in Council*, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, G E Fitzgerald, Chairman, 3 July 1989, page 308

² *Ib id*, page 309

- The CMC is the only integrity agency in Australia with this range of functions. In Australia, the CMC's peer agencies and their main functions are:
 - Independent Commission Against Corruption (ICAC), New South Wales – to investigate, expose and prevent corruption involving or affecting public authorities and public officials.
 - Police Integrity Commission (PIC), New South Wales – to detect, investigate and prevent police corruption, serious police misconduct and other police misconduct.
 - Independent Broad-based Anti-corruption Commission (IBAC), Victoria – identify, investigate, expose and prevent serious corrupt conduct and police misconduct.
 - Victorian Office of Police Integrity (VOPC), Victoria – investigate police corruption and serious misconduct.
 - Integrity Commission (IC), Tasmania – reduce incidence of public sector corruption
 - Independent Commissioner Against Corruption (ICAC-SA) – identify corruption in public administration; investigate and refer corruption for prosecution; reduce incidence of corruption in public administration.
 - Corruption and Crime Commission (CCC-WA), Western Australia – combat and reduce the incidence of organised crime, and improve continuously the integrity of, and to reduce the incidence of misconduct in the public sector.³
 - Australian Commission for Law Enforcement Integrity (ACLEI) - detects, disrupts and deters corrupt conduct in the Australian Crime Commission, Australian Customs and Border Protection, Australian Federal Police, the CrimTrac Agency and certain other Australian Government law enforcement agencies.
 - Australian Crime Commission (ACC), Commonwealth – combat serious and organised crime – with national focus.
 - New South Wales Crime Commission (NSWCC) – to reduce the incidence of illegal drug trafficking, organised and other crime.

- To allow the CMC to effectively perform its various functions, it has extensive coercive powers under the CM Act including: powers to require the production of documents; search, seize and surveillance powers; and the power to conduct hearings and require witnesses to attend and answer questions or produce documents.

- The CM Act provides the CMC's upper governance structure comprises five commissioners (the commission) appointed by the Governor in Council on recommendation by the Minister with the bipartisan approval of the parliamentary committee and who are: a full time chairperson (responsible to the commission for the proper performance of the commission's functions and administration) and four part time commissioners. The chairperson is also the commission's chief executive officer (CEO).

³ The Western Australian Corruption and Crime Commission is not responsible for confiscation of proceeds of crime or witness protection. In addition, the crime function is limited to approving special powers for the Western Australia police service to investigate certain offences committed in the course of organised crime.

- A person is eligible for appointment as chairperson if qualified for appointment as a judge. One of the part time commissioners must be a lawyer of five years standing with a demonstrated interest in civil liberties. The other part time commissioners must have the qualifications or experience in one or more of the following areas: public sector management and review; criminology; sociology; or research related to crime or crime prevention.
- The CM Act also provides for two Governor-in-Council appointed Assistant Commissioners who are responsible to the chairperson for the proper performance of the commission's crime and misconduct functions respectively.
- Under CM Act, a person may make a complaint about or give information or matter involving official misconduct to the CMC. In addition, a public official (the person responsible for the management of a unit of public administration) is required to notify the CMC of a complaint when the public official suspects the conduct involves or may involve official misconduct. The CMC may also become aware of official misconduct when it is conducting activities related to its functions, such as information obtained during a telecommunications interception operation. The CM Act does not include any requirements on how a complaint is made to the CMC.
- Upon receipt of a complaint, information or matter involving official misconduct, the CMC has a number of options available for how it will deal with the matter. The CMC may investigate the complaint involving official misconduct or it may refer the complaint to the public official (under the devolution principles – see section 34 of the CM Act), and monitor how the public official deals with the complaint as considered appropriate by the CMC (see sections 47 and 48 of the CM Act). The CMC may also decide not to take any action in respect of the complaint of official misconduct.
- The CMC Annual Report for 2012-2013 states the CMC assessed 4578 complaints of official misconduct across the public sector. In the 2012-2013 year, the CMC retained 58 complaints for investigation, referred 3688 to the public official/agency to deal with and took no further action in relation to 832 complaints⁴.
- Given the important role the CMC has to not only combat major crime but to ensure the State's public institutions are held to high ethical and professional standards, together with the CMC's wide investigative and coercive powers, the oversight of the CMC has been entrusted to the Parliamentary Crime and Misconduct Committee (parliamentary committee). The functions of the parliamentary committee include: monitoring and reviewing the performance of the CMC; approving the appointment of commissioners (bipartisan approval required), participating in the removal of commissioners; and undertaking comprehensive three yearly reviews of the CMC's current activities and operations.
- The CM Act also establishes a Parliamentary Crime and Misconduct Commissioner (parliamentary commissioner) who as well as being responsible to undertake certain audits and reviews of CMC records and registers, may be engaged by the parliamentary committee to investigate certain complaints about CMC officers.

Public reviews of the CMC

- In October 2012, the Government appointed an Independent Advisory Panel consisting of the Honourable Ian Callinan AC and Professor Nicholas Aroney (Callinan/Aroney) to review the *Crime and Misconduct Act 2001* and related matters.

⁴ The total number of complaints provided here is greater than the number provided in the previous sentence. The CMC Annual Report 2012-2013 states this is due to complaints carried forward from the earlier reporting period.

- Callinan/Aroney received more than 60 written submissions and sought information from certain key interested persons, including the CMC, to inform its review. A copy of the Callinan/Aroney report was tabled in the Legislative Assembly on 18 April 2013. The report had some confidential information removed prior to its tabling. The report can be accessed at: <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2447.pdf>
- During the period Callinan/Aroney were conducting their review, it was revealed that certain confidential Fitzgerald Commission of Inquiry documents had been publicly released, following incorrect classification by the CMC, or destroyed. On 8 March 2013, the Attorney-General moved a motion in the Parliament pursuant to section 292(d) of the *Crime and Misconduct Act 2001* that the PCMC inquire into and report by 5 April 2013 on the incorrect classification and release; or destruction of these documents and related matters.
- In March 2013, the PCMC held public hearings and on 5 April 2013, the PCMC tabled its report No. 90, *Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Commission of Inquiry documents*, in the Legislative Assembly. The report can be accessed at: <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2362.pdf>
- The Callinan/Aroney report contains 17 recommendations aimed at ensuring the CMC operates more effectively and is able to focus on its primary major crime and misconduct functions.
- The PCMC report contains 24 recommendations, many of which are aimed at improving the internal practices, processes and culture within the CMC and other public sector agencies for the protection of confidential historical information. The recommendations also address organisational and administrative changes to the CMC.

Government Response to the public reviews of the CMC

- On 3 July 2013, the Queensland Government tabled its response in the Legislative Assembly to the two recent reviews of the CMC: the Callinan/Aroney review of the CM Act and related matters; and the Parliamentary Crime and Misconduct Committee's inquiry into the CMC's release and destruction of Fitzgerald Commission of Inquiry documents. The Government Response can be accessed at: <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2923.pdf>
- The Government Response indicated the Government's position about whether or not the recommendation was accepted. It also noted, for the recommendations from the Callinan/Aroney report (apart from recommendations 7 and 9 that relate to confiscation of proceeds of crime and Standing Orders respectively) and recommendations 2, 4, 18, 19 and 21 of the parliamentary committee's report (that relate to similar matters raised in recommendations in the Callinan/Aroney report), that an Implementation Panel (the Panel) is established to oversee and direct the consideration and implementation of those recommendations.
- It is anticipated the implementation of the accepted recommendations in the Government Response will lead to an improvement in:
 - public confidence in the CMC;
 - timeliness of the investigation of complaints;
 - operational and corporate governance structures within the CMC;
 - the current culture within the CMC;
 - CMC internal complaints management systems for misconduct matters;

- internal processes and practices in the CMC; and
- management of personal conduct and work performance of Queensland public service employees.

Implementation Panel

- The Panel comprised the Director-General, Department of Justice and Attorney-General (Chair); Director-General, Department of the Premier and Cabinet (DPC); Commission Chief Executive, Public Service Commission (PSC); and Acting Chairperson, CMC. The Panel was required to report to the Premier and the Attorney-General and Minister for Justice on the progress of implementation of the recommendations and provide advice on how best the intention of the recommendations will be achieved.
- In accordance with recommendation one of the Callinan/Aroney report and as part of the Panel's remit, the PSC was tasked with the administrative review of the CMC. The PSC engaged Mr Mick Keelty AO APM to assist the PSC undertake the administrative review of the CMC. On 19 November 2013, Mr Keelty provided his report of his review of the CMC to the Panel Chair, with other panel members also sent a copy of the report. On 20 November 2013, Mr Keelty's report was tabled in the Legislative Assembly by the Attorney-General and Minister for Justice. A copy of Mr Keelty's report can be accessed at: <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T4088.pdf>
- The Panel has met on a regular basis to discuss the implementation of the recommendations and how the recommendations' intentions are best achieved. Legislative amendments were identified to give effect to the accepted recommendations in the Government Response.

Amendments to the Public Service Act 1998

- Recommendations in the Callinan/Aroney Report sought reforms to refocus responsibility of conduct in public sector agencies to line managers and ultimately chief executive officer's to be dealt with promptly; with the PSC having a role in monitoring and auditing of agency responses. The PSC has been leading a range of capability building initiatives across the public sector, implementing the Government's goal to have ...*the best, most responsive public sector in the nation.*
- The PSC has developed a new *Conduct and Performance Excellence* (CaPE) service designed to promote and support excellence in the management of conduct and performance in the Queensland public sector. It will: provide specialist advice and support to agencies, upon request, on the management of conduct and performance; set, and strategically monitor, benchmarks (timeliness) and standards (quality) for agencies' handling of these matters; and review individual cases as required, with the aim of building capability. CaPE will contribute to the development of capability within agencies to ensure they have a high standard of human resource and managerial skill. It will also work closely with the commission to ensure matters are addressed effectively within the appropriate jurisdiction.
- CaPE complements the ongoing initiatives of the PSC to further enable capability development within agencies.

The amendments in the Bill

- The Crime and Misconduct and Other Legislation Amendment Bill 2014 (the Bill) proposes amendments to the CM Act and the *Public Service Act 2008* (the PSA) to:

- reform the upper governance structure of the CMC (which will be renamed the *Crime and Corruption Commission* and generally referred to from this point in this Briefing Note as the commission);
 - change the definition of ‘official misconduct’ in the CM Act to raise the threshold for what matters are captured within that definition and rename the defined conduct as ‘corrupt conduct’;
 - rename the ‘misconduct function’ in the CM Act to ‘corruption function’; which will result in the following new titles: ‘*Crime and Corruption Act 2001*’; ‘Crime and Corruption Commission’; ‘Parliamentary Crime and Corruption Committee’ and ‘Parliamentary Crime and Corruption Commissioner’;
 - improve the complaints management system of the commission to refocus it on more serious cases of corruption and reduce the number of complaints the commission is to deal with and investigate;
 - remove the commission’s responsibilities for the ‘prevention’ of corruption in units of public administration;
 - ensure the commission’s research function is more focussed and relevant to its functions;
 - strengthen the transparency and accountability of the commission by expanding the role of the Parliamentary Crime and Corruption Commissioner (parliamentary commissioner) in his oversight of the commission, and requiring meetings between the commission and the Parliamentary Crime and Corruption Committee (the parliamentary committee) to be held in public as much as possible;
 - clarify the grounds for discipline and what disciplinary action may be taken by the commission in relation to conduct of commission officers;
 - make transitional arrangements to continue the current acting chairperson’s appointment and certain other appointments; and provide transitional arrangements for the ending of other appointments;
 - implement recent recommendations of public reports about the commission’s investigation of alleged official misconduct at the University of Queensland and to make other unrelated minor amendments to the CM Act; and
 - improve the management of personal conduct and work performance of Queensland public service employees.
- The Bill also makes consequential amendments to the CM Act, the PS Act and other Queensland legislation and regulations to support the above policy objectives.

Proposed new upper governance structure for the commission

- The Bill establishes a new upper governance structure for the commission. Under the Bill the commission comprises five commissioners who are:
 - a full time legally qualified chairman responsible to the commission for performing the commission’s functions and exercising the commission’s powers;

- a legally qualified part-time deputy chairman;
 - two part-time ordinary commissioners with the qualifications, skill or standing appropriate to assist the commission perform its functions; and
 - a full-time CEO who is responsible to the commission for the administration of the commission.
- Under the Bill, commissioners are appointed by the Governor in Council for a term of up to five years and may be reappointed for further terms not more than five years. The maximum term of appointment for a commissioner is ten years. The requirement for bipartisan approval by the parliamentary committee of the appointment of a commissioner is removed by the Bill. However, the Minister is required to consult with the parliamentary committee prior to the appointment or reappointment of any of the commissioners.
 - The Bill allows the chairman to appoint sessional commissioners to help the chairman perform the commission's functions or exercise the commission's powers by conducting hearings, examining witnesses or conducting specific investigations.
 - The role and powers of assistant commissioners in the CM Act have been transferred to 'senior executive officers', who are senior officers appointed by the commission, and not the Governor in Council. Senior executive officers have the same role and powers as that of assistant commissioners.
 - The commissioners, sitting as the commission, set the commission's strategic direction and provide leadership to the commission. The chairman is responsible for, and is to report to the commission on, all operational matters but is not bound by directions from the commission except in relation to the commission's strategic direction.
 - Under the Bill, the CEO is pivotal to the effective management of the commission and as such is responsible for:
 1. the proper administration of the commission;
 2. the employment, management and discipline of commission staff;
 3. the management of the commission's documents (including the Fitzgerald Commission of Inquiry documents);
 4. the preparation of and compliance with the commission's budget under section 259 of the CM Act, including responsibility under the *Financial Accountability Act 2009*; and
 5. setting benchmarks for assessing and investigating complaints about corruption and ensuring the benchmarks are met by commission staff.
 - The CEO is to report to the commission on the above listed matters and is bound by the directions from the commission on those matters. The CEO may also issue directions to commission staff as to how they decide whether a complaint involves a more serious case of corrupt conduct or a case of systemic corrupt conduct within a unit of public administration. However, in issuing the direction, the CEO is subject to the direction and control of the chairman.
 - The Bill statutorily delegates relevant commission functions and powers to the chairman and CEO. The chairman and CEO may sub-delegate these functions and powers to appropriately qualified commission officers in accordance with the provisions of the CM Act.

- To ensure the reforms to the upper governance structure of the commission are working effectively, the Bill amends section 292 of the CM Act to include an additional function for the parliamentary committee to periodically review the structure of the commission, including the relationship between the types of commissioners and the roles, functions and powers of the commission, chairman and chief executive officer and for each review to table in the Legislative Assembly a report about the review, including any recommendations for changes to the CM Act.

Change in the definition of ‘official misconduct’ in the CM Act to ‘corrupt conduct’

- The Callinan/Aroney report found that the definition of ‘official misconduct’ has a wider application when compared with the definitions contained in other interstate anti-corruption legislation; and that the threshold for what constitutes official misconduct should be narrowed (refer to Chapter 1, *Comparative Analysis* of the Callinan/Aroney report). Recommendation 3A of the Callinan/Aroney report proposed a change to the definition of ‘official misconduct’ to raise the threshold for what conduct is regarded as official misconduct, which involved a rearrangement of the current drafting of the current definition and changing the wording from ‘*could, if proved*’ to ‘*would, if proved*’.
- Comparing the proposed definition in the Bill with the other jurisdictions (see **Attachment 2**) the ICAC Act definition is most similar. However, the proposed definition in the Bill is “tighter” than the ICAC Act definition, which means it has a higher threshold for what conduct would be considered corrupt conduct because:
 - the proposed definition uses the conjunction ‘*and*’ between the subsections, while the ICAC Act definition uses ‘*or*’. Therefore, in the proposed definition each of the elements in each of the subsections must be satisfied, whereas in the ICAC Act definition the conduct need only satisfy one of the subsections;
 - the proposed definition requires that the intent of the conduct is either for a benefit or detriment, whereas the ICAC Act definition does not have this requirement;
 - the proposed definition includes the additional requirement for conduct comprising ‘a breach of trust’ to be undertaken either ‘knowingly or recklessly’ whereas the ICAC Act definition does not have this requirement; and
 - the proposed definition states that if the conduct could fall within the type of offences/behaviours in subsection (2), it is only corrupt conduct if all the elements in subsection (1) are also met. In contrast the list of offences included in the definition in the ICAC Act may independently comprise corrupt conduct.
- Renaming the ‘misconduct’ function: As a result of the new term ‘corrupt conduct’, the commission’s misconduct function will now be known as the ‘corruption function’ and accordingly the Bill provides for the following new titles: ‘*Crime and Corruption Act 2001*’; ‘Crime and Corruption Commission’; ‘Parliamentary Crime and Corruption Committee’ and ‘Parliamentary Crime and Corruption Commissioner’.
- Commission’s new complaints management system: Callinan/Aroney were of the view the commission’s focus should be on investigating serious cases of corrupt conduct. In addition to changing the definition of ‘official misconduct, Callinan/Aroney also recommended a number of other strategies designed to reduce the number of complaints the commission has to deal with (refer to recommendations 3B-3E of the report).
- Consistent with the goal to reduce the number of matters referred to, and investigated by the commission, the Bill:

1. raises the threshold of when public officials are to notify the commission of corrupt conduct so that notification is only required when the public official *reasonably suspects* corrupt conduct (this is being done by amendment to section 38, which currently only requires the public official to *suspect* the conduct involves or may involve official misconduct);
 2. expands the use of section 40 directions issued to units of public administration to ensure only the more serious corrupt conduct matters will be referred to the commission. Directions under section 40 will now also include what complaints need or need not be notified to the commission as well as when and how complaints are to be notified to the commission;
 3. requires the commission must only investigate the more serious cases of corrupt conduct (amendments to sections 5 and 35);
 4. expands the grounds upon which the commission may dismiss or take no action in relation to a complaint to also include when the complaint is: not made in good faith; made for a mischievous purpose; made recklessly or maliciously; not within the commission's jurisdiction; not in the public interest or has been dealt with by another entity (amendment to section 46(2)(g)); and
 5. enlarges the grounds upon which the commission may prosecute a person in relation to making a complaint that is: vexatious; not made in good faith; made for a mischievous purpose; or made recklessly or maliciously (new section 216A).
- The Bill amends section 36 of the CM Act to require a complaint must be made by way of a statutory declaration, except if the commission determines exceptional circumstances exist (such as: a fear of retaliation for making the complaint; the literacy level of a complainant or his or her competency in English; or that the complainant has a disability that affects the person's ability to make the complaint by statutory declaration). The Government considers this amendment will ensure complaints are made for genuine purposes.
 - The requirement for a statutory declaration applies only to complaints made under section 36 of the CM Act and does not apply to notifications made by public officials under sections 47 or 48 of the CM Act or to any information or matter given to the commission under section 36 of the CM Act.

Commission's prevention and research functions

- Callinan/Aroney recommended (recommendation 4) that the commission's prevention function for misconduct should cease, except for such advice and education as may be appropriate and incidental to matters uncovered or found by the CMC in the course of an investigation. Callinan/Aroney were of the view that this would allow the commission to focus on investigating serious cases of corrupt conduct.
- To implement this recommendation, the Bill amends section 23 of the CM Act and makes consequential amendments to other provisions in the CM Act to remove the commission's function for the prevention of corruption in units of public administration. To ensure the commission may make the necessary recommendations to an agency following an investigation, the Bill includes amendments to section 35 of the CM Act. These amendments will allow the commission to assess the appropriateness of systems and procedures used by a unit of public administration to deal with complaints about corruption and to provide advice and recommendations to a unit of public administration about dealing with complaints about corruption in an appropriate way.

- Callinan/Aroney were of the view that ‘*non-specific research by the CMC is a distraction, and not such as to justify the expense and resources needed for it.*’ (recommendation 12). Callinan/Aroney recommended that the commission only undertake research that is referred to the commission by the Government but the commission may make submissions to undertake research in response to an emergent issue.
- The Bill does not remove the commission’s research function. However, to ensure research stays focussed and is relevant, amendments in the Bill will require research to be undertaken in accordance with a three yearly research plan that is approved by the Minister and which:
 1. supports the commission’s functions;
 2. is required to be undertaken by the commission under an Act; or
 3. is referred to the commission by the Minister.
- Also, the commission may ask the Minister to approve an amendment to the research plan to allow research for an emergent issues that it relevant to any of its functions.

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 (recommendation 16 of the Callinan/Aroney report); and
 - enlarging the powers of the parliamentary commissioner by:
 - allowing the parliamentary commissioner to investigate complaints on his or her own initiative (recommendation 11 of the Callinan/Aroney report);
 - removing the requirement for the bipartisan approval by the parliamentary committee for the parliamentary commissioner to hold hearings (recommendation 21 of the parliamentary committee report); and
 - allowing reports of the parliamentary commissioner to be used by the commission’s chief executive officer in deciding whether to take disciplinary action, and what disciplinary action should be taken, against commission officers (recommendation 21 of the parliamentary committee report).
- 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 and implements recommendation 11 of the Callinan/Aroney report.
- The Bill also amends section 292(f) of the CM Act to extend the interval at which the parliamentary committee conducts its statutory review of the activities of the commission from every three years (which coincides with the parliamentary terms) to every five years.
- The parliamentary committee has in its last two (2) reports of its review of the commission under section 292(f) (in 2009 and 2012), noted that this time frame does not allow sufficient time for recommendations to be implemented and monitored before the next review is to occur and recommended a five (5) year interval between reviews is more appropriate.

- Currently, any work conducted by the parliamentary commissioner is afforded the protection of parliamentary privilege because the work is undertaken at the direction of the parliamentary committee. However, the investigation and report conducted under the parliamentary commissioner's new own motion investigation powers will not be protected by parliamentary privilege. The Bill provides for additional protections to the parliamentary commissioner that are consistent with those provided for commission staff.
- The Bill also amends section 329 of the CM Act to require the chairman, deputy chairman or CEO to notify the parliamentary commissioner, as well as the parliamentary committee, of any conduct by a commission officer that involves or may involve improper conduct. Also the definition of 'improper conduct' in this section is amended by including additional types of conduct that will fall within the definition. This amendment implements recommendation 20 of the parliamentary committee report.

Disciplinary proceedings for commission staff

- The Bill inserts new provisions in the CM Act to clarify the disciplinary action the chief executive officer may take in relation to conduct of commission staff, including senior officers, persons employed under section 254 of the CM Act, persons seconded under section 255 of the CM Act and persons engaged under section 256. Senior officers include the senior executive officers who are appointed under the amended section 245 of the CM Act – the senior executive officer (crime) and senior executive officer (corruption). The grounds for disciplinary action and the disciplinary action that may be taken are broadly modelled on certain provisions applying to public sector employees and other government employees such as ambulance officers.
- Commission officers are either employed under a written contract of employment or subject to the *Crime and Misconduct Commission Employees Award – State 2012*. The new disciplinary provisions will apply to both existing and future contract and award employees but will not apply to the employee if the conduct occurred prior to commencement of the new provisions.
- Although the Bill does not include specific appeal procedures in respect of disciplinary action, commission officers have access to the industrial dispute resolution mechanisms provided under their award and also pursuant to Chapter 7 of the *Industrial Relations Act 1999*.
- Officers may also have access to unfair dismissal proceedings (an application for re-instatement) under Chapter 3 of that Act. Commission officers who are on a contract are also able to seek a remedy based on breach of contract.

Amendments to the CM Act to implement recommendations of public reports

- Section 38 of the CM Act obliges public officials (defined to mean the Ombudsman, a chief executive officer of a unit of public administration (including the Commissioner of Police), or a person who constitutes a corporate entity that is a unit of public administration) to notify the commission when corrupt conduct is reasonably suspected (as amended by the Bill). When the public official is the subject of suspected corrupt conduct, the application of section 38 is problematic. This issue was highlighted by the CMC in their September 2013 report, *An examination of suspected official misconduct at the University of Queensland*.
- To address this issue, the Bill includes an amendment that requires agencies to develop a policy that sets out how the agency will manage a complaint that involves the public official of that agency. The policy is to be developed in consultation with the commission.

- The parliamentary committee noted in their September 2013 Report No. 92, *Complaint about the CMC investigation into the University of Queensland*, that section 58 of the CM Act currently limits the commission's ability to fully review the appropriateness of how an agency manages misconduct of its officers when a judicial officer is a member of the decision-making body of that agency. The parliamentary committee recommended an amendment to section 58 of the CM Act, which is included in the Bill, to allow the commission to investigate a decision making body of an agency when a judicial officer is a member of that decision-making body.

Other amendments to the CM Act

- The Bill includes an amendment to section 308(1) to provide discretion to the Speaker as to when the Speaker is to appoint an acting parliamentary commissioner. Currently, the Speaker must appoint an acting parliamentary commissioner whenever the parliamentary commissioner is absent from Queensland (even when for example in Tweed Heads for a short period appearing in a criminal trial).
- In such circumstances the parliamentary commissioner is still able to perform his or her duties and it is not necessary for the Speaker to appoint an acting parliamentary commissioner. This amendment was requested by the parliamentary commissioner.
- The CM Act establishes a Crime Reference Committee (CRC) that is responsible for making the general and specific crime references to the commission. The general or specific crime references authorise the commission to conduct crime investigations. The CRC's membership includes two community representatives. The Bill removes the requirement for the Minister to consult with the Leader of the Opposition prior to the appointment of a community representative to the CRC. There is no perceived benefit in obtaining approval from the Leader of the Opposition for the appointment of community representative members to what is an internal approving authority for the crime and intelligence activities of the commission.
- The Bill amends section 4 of the CM Act to clarify the primary and secondary purposes of the CM Act. The redrafting of this section makes it clear the commission's primary purpose is to combat and reduce the incidence of major crime. The commission's corruption function is stated as the secondary purpose.

Transitional provisions for the CM Act

- Clauses 80 and 81 provide transitional arrangements for: the ending of existing commissioner and acting commissioner appointments; and continuation of certain commissioner appointments. Clause 81 also includes provisions to clarify the transitional arrangements for certain other amendments in the Bill. For the transitional provisions in clauses 80 and 81 of the Bill, the reference to the commencement day means the day that clause 81 of the Bill commences. Clause 81 commences on proclamation. A summary of the main transitional provisions in the Bill is set out below.
- Continuation of acting chairperson appointment: Clause 80 inserts a new section 397 to the CM Act that extends the appointment of current Acting Chairperson beyond the current end date for the person's appointment despite the provisions in the *Acts Interpretation Act 1954* which provide that acting appointments cannot be for more than 12 months. Once passed, this particular amendment will apply retrospectively taking effect from the day the Bill is introduced into the Legislative Assembly. In addition, Clause 81 (new section 402) provides that upon commencement, the current Acting Chairperson of the CMC is the acting chairman of the CCC until 31 October 2014 or the appointment of a chairman of the CCC – whichever date is earlier.

- Continuation of part time commissioner appointments: Clause 80 inserts a new section 398 to the CM Act that applies to any current part-time commissioner or acting part-time commissioner appointments. Upon the ending of the person's appointment, the person's appointment will continue until the commencement day on the same terms and conditions. This provision has a retrospective operation to commence on the day the Bill is introduced.
- Commissioner appointments ending: Upon commencement, all commissioners' appointments will end (including acting chairperson, part-time commissioners and acting part-time commissioners' appointments). However, as referred to above, the Bill includes a deeming provision for the continuation of the chairperson's appointment as the chairman until 31 October 2014 or until a chairman is appointed (whichever is the earlier).
- If a person who was a part-commissioner or acting part-time commissioner prior to commencement is appointed as a commissioner under the new provisions, the term that the person has been appointed for as a commissioner or acting commissioner is to be taken into consideration when determining the total period the person has been appointed in that position.
- Appointment of commissioners to commence post introduction of the Bill: The *Acts Interpretation Act 1954* allows for any action or decision to be made for the appointment of a person to a position if the action or decision occurs post the assent of the provision.
- However, the Bill validates (new section 405) any action that may be taken to appoint a commissioner (such as advertising, selection process, and GIC appointment) that may occur prior to assent of the appointment provisions in the Bill.
- Assistant commissioner appointments: Upon commencement, assistant commissioner appointments will end and their contracts of employment will end. From commencement the person who was an assistant commissioner will commence as the senior executive officer (crime) or (corruption) – as designated.
- The person is deemed to be employed under the contract under which the person was previously employed before commencement and the person has the same employment terms, conditions and entitlements as the person had applying to them prior to commencement. Continuity of service and all entitlements apply and it is not to be considered a termination of employment.
- The term of the person's appointment as an assistant commissioner is to be taken into consideration when determining the person's total term of appointment as a senior officer under section 247.
- Acting assistant commissioner appointments: Upon commencement, an acting assistant commissioner appointment ends. If the person is appointed as a senior officer, the period of appointment for which the person acted as assistant commissioner is to be taken into consideration when determining the person's total term of appointment as a senior officer under section 247.
- Validating actions of previous commissioners and assistant commissioners: The Bill includes provisions that will validate and continue any hearings or investigations being conducted by a commissioner or assistant commissioner prior to commencement and allow the hearing or investigation to continue.
- Existing complaints (a complaint made before, but not finalised at commencement): An existing complaint is to be dealt with by the CCC or public official in accordance with the provisions as in force after commencement except as follows:
 - the person who has made the complaint need not make the existing complaint in a statutory declaration;
 - the offence provision in section 216 continues to apply to an existing complaint; and
 - the new offence provision, section 216A, does not apply to existing complaints.

- Where an existing complaint that involved official misconduct, will after commencement not involve corrupt conduct, the CCC or public official is to take no action on that complaint as corrupt conduct under the CM Act. However, the public official must continue to deal with the complaint in accordance with any other Act or requirement.
- Any action by the commission or public official in relation to a complaint that prior to commencement was official misconduct and that after commencement is no longer corrupt conduct is validated.
- Research plan: The Bill states a research plan is to be prepared for the period comprising the period starting from the commencement and ending at the end of the financial year in which the commencement happens and the following two financial years.
- Investigations of judicial officers: The Bill provides that new section 58(2A) only applies to conduct engaged in by a judicial officer after commencement.
- Role and functions of the parliamentary commissioner: The Bill provides that the parliamentary commissioner may initiate an own motion investigation under the new section 314(4) only in relation to conduct that was engaged in on or after the commencement day. Also, the parliamentary commissioner may hold a hearing about a matter without the bi-partisan approval of the parliamentary committee only in relation to a matter that comes to the parliamentary commissioner's knowledge on or after the commencement day. In addition, a report of the parliamentary commissioner may only be used in a disciplinary matter under section 323A when the investigation of the matter started after the commencement day.

Amendments to the Public Service Act 2008

- The PSC's proposed *Conduct and Performance Excellence* (CaPE) service, supported by the amendments to the *Public Service Act 2008* (PS Act) contained in the Bill, will achieve the objective of enabling improvement in the management of work performance and personal conduct in the Queensland public service by:
 1. authorising the PSC to have functions of review in relation to departments' current or completed cases of conduct and performance matters;
 2. enabling the Commission Chief Executive (CCE) of the PSC to request certain information in relation to agency performance, workforce and disciplinary matters;
 3. enabling the giving, receiving and recording of information between the PSC, commission and other agencies, and to ensure that the way any information is given, received or recorded occurs appropriately;
 4. including provisions regarding confidentiality of information and protection from liability for giving information. These amendments will enable the CCE to enter into an agreement about giving and receiving information with certain external agencies; and
 5. requiring agencies to maintain a complaints management system, to demonstrate Government's commitment to effective complaints management systems which are flexible and are managed at agency level.
- As noted above, the PSC has been leading a range of capability building initiatives across the public sector, implementing the Government's goal to have ...*the best, most responsive public*

sector in the nation. CaPE complements these initiatives, and the proposed legislative amendments emphasise and further enable capability development within agencies.

Approach in other jurisdictions

Upper Governance Structure of the Commonwealth and interstate integrity agencies

- **Attachment 1** provides an overview of the legislative upper governance structure in the Commonwealth and interstate integrity agencies referred to above, as well as indicating who is responsible for the performance of the functions or exercising the powers for the respective agency. In New South Wales, Victoria, South Australia and Western Australia, the respective integrity agencies are governed by one person with the ability of that person to appoint a deputy or assistant, or the relevant Act provides for the appointment of a deputy/assistant or chief executive officer to assist the chairperson/commissioner.
- The Commonwealth ACC comprises the chief executive officer (CEO), examiners and staff. The CEO is responsible for the management and administration of the ACC and co-ordinates and controls the ACC's operations and activities. The examiners undertake hearings and lead investigations and operations. The ACC Board primarily sets the national crime intelligence priorities, authorises intelligence operations and approves special intelligence operations and investigations. The Board also reports to the Intergovernmental Committee (comprising the relevant Commonwealth, State and Territory Ministers) on the ACC's performance.
- In Tasmania, the IC comprises the Integrity Board, any member of the Integrity Board, the chief executive officer (CEO), the staff of the Integrity Commission and any other person who may be an investigator, assessor, authorised person or other person appointed to assist the IC. In this structure, the CEO is responsible to the Board for the general administration, management and operations of the IC, while the Board has an oversight role of the activities and direction of the IC and is to report to the respective Minister and parliamentary committee on the operations of the IC and relevant legislation.
- Therefore, Tasmania and Queensland are the only jurisdictions that have a separate body (the Integrity Board/Commission) specifically responsible for the overall performance of functions and exercise of powers of the respective integrity agency, with the functions and powers of the agency primarily undertaken by the 'head' of that agency (that is, the CEO in Tasmania and the chairperson in Queensland). However, in Tasmania, the Chief Commissioner of the Board (who is chairperson of the Board) is separate to the IC's CEO. In Queensland, the chairperson of the commission is also the CEO of the commission.
- Appointment process of commissioners (or their interstate or Commonwealth equivalents): All jurisdictions include legislative provisions requiring involvement of the relevant parliamentary committee in the appointment process of the commissioner/chief executive officer/chairman (except for the appointment of the Integrity Commissioner under the *Law Enforcement Integrity Commissioner Act 2006*). All jurisdictions apart from Integrity Commissioner, Tasmania and the Chief Executive Officer, ACC provide that the respective parliamentary committee must approve the relevant appointment or have a right of veto. The relevant parliamentary committee in Tasmania and the Commonwealth are to be consulted on the appointment.

Parliamentary (or other) oversight of interstate integrity agencies

- **Attachment 1** details the parliamentary or other oversight of the interstate integrity agencies. In New South Wales and Western Australia the oversight of the respective integrity agency falls under the responsibility of a parliamentary committee and a separate body similar to the

parliamentary commissioner. The NSW and Western Australian models appear to allow their equivalents to the parliamentary commissioner to act on 'own motion' powers. In Victoria, while there is some oversight by a parliamentary committee, there is also a separate office of the Victorian Inspectorate to oversee a number of state integrity bodies. The Victorian Inspectorate also appears able to act on 'own motion' powers. Oversight in South Australia and Tasmania is by parliamentary committee alone.

- Reports by oversight agencies: The oversight bodies such as the Victorian Inspectorate, the Western Australian Parliamentary Commissioner, and Inspector of ICAC can make a report to the head of the CMC equivalent body. This report may include a recommendation about what action should be considered in relation to the conduct investigated.⁵ However, parliamentary privilege does not apply to these reports, except for Victoria and New South Wales, and then only when the report is tabled in their respective Parliaments.⁶
- The Victorian Inspectorate and the Western Australian Parliamentary Inspector have the power to make recommendations to other agencies. Under the *Victorian Inspectorate Act 2011* (the Victorian Inspectorate Act), the Victorian Inspectorate may make recommendations to the Chief Commissioner of Police; the Director of Public Prosecutions; the Australian Federal Police; the Auditor-General; the Victorian WorkCover Authority; or another prescribed person or body. This is a similar approach to the requirements imposed on a Queensland coroner who, in the course of investigating a death, forms a reasonable suspicion that a person has committed an offence must refer the matter to the appropriate prosecuting authority (in the case of an indictable offence – the Director of Public Prosecutions (DPP)).
- The Victorian Inspectorate Act also provides that reports of the Victorian Inspectorate tabled in parliament must not include: a finding or opinion that a specified person is guilty of or has committed, is committing or is about to commit, any criminal offence or disciplinary offence; a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence. It would appear that the intention of these provisions is to ensure that the decision to take any further enforcement action is left to the appropriate authority.

Interstate complaints management systems

- Definition: **Attachment 2** details the relevant legislative provision in each of relevant interstate public sector integrity agencies for the conduct which falls within the scope of that interstate integrity agency. The conduct is defined as official misconduct or corrupt conduct. The elements comprising the conduct are relatively similar across jurisdictions with some variations or nuances, including the use of different drafting techniques.
- Statutory Declarations: No interstate jurisdiction with a similar integrity body as the CMC imposes a statutory declaration requirement for complaints or has any limit on the form or manner in which a complaint can be made to their respective integrity body; apart from Victoria, which requires a complaint to be written unless IBAC determines there are exceptional circumstances; and Tasmania, which requires a written complaint but allows anonymity.
- Dealing with complaints: In New South Wales, the ICAC may dismiss or discontinue an investigation if the complaint is: trivial; the conduct is too remote in time to justify an

⁵ *Independent Commission Against Corruption Act 1988*, section 57B(5); *Police Integrity Commission Act 1996*, section 89(1A); *Corruption and Crime Commission Act 2003*, sections 195(1)(d); 196(3)(f) and (g).

⁶ *Victorian Inspectorate Act 2011*, sections 17(2) & (3), 87; *Corruption and Crime Commission Act 2003*, sections 197 & 199; *Independent Commission Against Corruption Act 1988*, section 77A

investigation; or is frivolous, vexatious and not made in good faith. Also, when making a complaint to ICAC, it is an offence for a person to willfully make any false statement to or mislead, or attempt to mislead, the ICAC.

- In Western Australia, the CCC when deciding whether the complaint warrants action is to consider: the seriousness of the allegation or conduct; whether the allegation is frivolous, vexatious or made in good faith; whether the matter has been previously investigated by another agency; or if further action is not justified or not in the public interest. Further, the CCC may prosecute a person if the person has made a complaint knowing the content is false or misleading; or it is made maliciously or recklessly.
- In Victoria, the IBAC, may in its absolute discretion determine a complaint does not warrant an investigation if: the subject matter is trivial or unrelated to its functions; the complaint is frivolous or vexatious; the complaint lacks substance or credibility; the subject matter has already been investigated and dealt with by another agency; the subject matter is too remote in time to justify an investigation; the complaint was not made genuinely or made primarily for a mischievous purpose; or the conduct does not warrant investigation. It is also an offence for a person to willfully make a statement that the person knows to be false or misleading in a material particular.
- In Tasmania, the Chief Executive of the Integrity Commission may dismiss a complaint if the complaint: is frivolous or vexatious; not made in good faith; lacks substance or credibility; does not relate to a function of the Commission; is not in the public interest to investigate; is not justified in investigating on the basis of the use of resources; or there is unjustifiable delay in bringing the complaint.
- In South Australia, the ICAC can not take action if the complaint is assessed as: trivial, vexatious or frivolous; been previously dealt with by another agency; or there is another good reason why no action should be taken. Also, it is an offence to make a complaint knowing there are no grounds for making the complaint.
- Focus of the agency on serious matters: New South Wales, Victoria and Western Australia include legislative provisions to ensure the integrity agency remains focussed on serious matters. Under section 12A of the ICAC Act, ICAC is required, when it is exercising its functions, as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct. The IBAC under section 60(2) of the IBAC Act must not conduct an investigation about corrupt conduct unless it is reasonably satisfied that the conduct is serious corrupt conduct. The CCC (WA) under section 7B(3) of the CCC Act (WA) is to investigate cases of misconduct, particularly serious misconduct.
- Prevention and education: All the interstate integrity agencies (apart from the New South Wales Crime Commission and the Commonwealth's Australian Crime Commission) are required under their respective legislation to undertake prevention, education or training activities to help reduce the incidence of corruption and/or build the capacity of public sector agencies to deal with and prevent corruption (refer to **Attachment 1**). Callinan/Aroney also recognised that educative functions have generally been conferred on anti-corruption bodies in each State.
- Research: Queensland, Victoria and Tasmania are the only jurisdictions to include specific legislative provisions requiring their respective agencies (CMC, IBAC and IC) to undertake research to support their functions. In Queensland, the research function applies to crime and official misconduct. However, for the other jurisdictions, the respective integrity body may be able to undertake research to a limited extent on the basis of general provisions included in their

respective legislation that allows that body to either do all things necessary or incidental to carry out their respective functions or to make inquiries or evaluate agencies to assist agencies in the reduction of corruption (refer to **Attachment 1** for details of these provisions).

Interstate comparison on managing work performance and personal conduct of public servants

Jurisdictional approaches to overseeing or managing work performance and personal conduct matters concerning public servants vary. Most States have an independent integrity agency which has as part of its role the oversight and investigation of misconduct/corruption issues relating to the public sector (e.g. ICAC in NSW, or the CCC in Western Australia). Additionally, Public Service Commissions (or the equivalent) across Australia take responsibility for putting in place systems and processes for ensuring their employees understand and carry out their responsibilities under relevant Codes of Conduct and legislation, and for processes for investigating work performance and personal conduct matters which are not within the ambit of the independent integrity agencies.

The application to the Bill of the Fundamental Legislative Principles

- The Committee is referred to pages 10 to 16 of the Explanatory Notes to the Bill where potential breaches of the fundamental legislative principles are identified and justified.

Consultation

- DJAG consulted with all government departments when preparing the Queensland Government Response to the two CMC reviews.
- Public submissions were sought by Callinan/Aroney as part of their review. While no public hearings were conducted by Callinan/Aroney, advertisements were placed in the *Courier-Mail* and in the Australian newspapers drawing attention to the review and its terms of reference and calling for submissions from any interested parties. Letters were also written by Callinan/Aroney to those whom they considered might have some particular interest in the review inviting them to lodge a submission, or to meet with the reviewers to discuss the review. Callinan/Aroney also met with the then Chairperson and Assistant Commissioners of the commission and sought further information by exchange of correspondence with the CMC.
- The Parliamentary Committee held public hearings in relation to their inquiry and obtained information under their coercive powers from the CMC (and other witnesses) but did not call for any public submissions. Given the nature of their inquiry, public submissions were not appropriate or necessary.
- The Acting Chairperson of the CMC is a member of the Implementation Panel established to oversee and direct the consideration and implementation of the accepted recommendations in the Government Response.
- The Chief Justice, Chief Judge, Chief Magistrate, President of the Court of Appeal and President of the Queensland Civil and Administrative Tribunal were consulted about the amendment to section 58 of the CM Act.
- The Parliamentary Commissioner was consulted about the amendments in the CM Act to enlarge his oversight powers of the commission.
- The Queensland Ombudsman was consulted about the definition of corrupt conduct, the new complaints management system of the CMC and the new management system for the conduct and performance of Queensland public service employees.

- The PSC consulted with the LGAQ about whether the new conduct management system should apply to local government. The LGAQ advised that there was no need for the new system to apply to local government as they have sufficient systems in place to support councils who need guidance on managing employee issues, either directly, or by referral to the LGAQ's legal firm. The LGAQ noted they would monitor how this was working and if any issues developed, then further consideration of options to resolve these issues could occur at that stage.