

**Complaint about the CMC
investigation into the University of
Queensland**

Report No. 92

Parliamentary Crime and Misconduct Committee

September 2013

Parliamentary Crime and Misconduct Committee

Chair	Mrs Liz Cunningham MP, Member for Gladstone
Deputy Chair	Mrs Jo-Ann Miller MP, Member for Bundamba
Members	Mr Michael Crandon MP, Member for Coomera Mr Jon Krause MP, Member for Beaudesert Mr Ian Kaye MP, Member for Greenslopes Ms Jackie Trad MP, Member for South Brisbane Mr Peter Wellington MP, Member for Nicklin
Staff	Ms Amanda Honeyman, Research Director Mr Peter Rogers, Principal Research Officer Ms Marion Bell, Executive Assistant
Contact details	Parliamentary Crime and Misconduct Committee Parliament House George Street Brisbane Qld 4000
Telephone	+61 7 3406 7207
Fax	+61 7 3210 6011
Email	pcmc@parliament.qld.gov.au
Web	www.parliament.qld.gov.au/pcmc

Acknowledgement

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Chair's foreword

The Committee determined to bring this matter to the attention of the House for a number of reasons.

Firstly, to bring to the attention of the House the Committee's views on the appropriateness of section 58 of the *Crime and Misconduct Act 2001* (CM Act). Section 58 of the CM Act provides that the Crime and Misconduct Commission (CMC) cannot investigate the conduct of a judicial officer unless that conduct could amount to misconduct which would warrant the judicial officer's removal from judicial office.

This results in difficulties for the CMC to investigate or to even consider the conduct of judicial officers when they are acting in non-judicial roles within units of public administration. Section 58 of the CM Act limits the CMC in its investigations that relate the conduct of judicial officers in non-judicial roles where that conduct may not be in the public interest but falls short of misconduct which would warrant removal from office.

The Committee considers that section 58 does not meet the public interest or community expectations that officers of units of public administration should be held accountable.

The Committee makes one recommendation in this report, to amend section 58 of the CM Act to balance the need to protect judicial officers from malicious or vexatious complaints while ensuring that judicial officers in non-judicial roles in units of public administration are held accountable for their actions and conduct when occupying non-judicial roles.

It is important to note that there was never any suggestion of wrongdoing, in any respect, on the part of Justice Daubney.

Secondly, the Committee acknowledges the independence of the CMC. While the Committee oversees the conduct of the CMC in its investigations, the Committee is not involved in those investigations nor does it have a role in determining the CMC's findings as a result of such investigations.

The Committee, along with the wider community, expects that the CMC will act with the highest standards of fairness and impartiality, in accordance with section 57 of the CM Act. It is with regret, that the Committee notes in this report the poor standard of the CMC's initial draft report.

It is important to note that the initial draft report provided to the University was a draft, upon which the CMC sought comment from those adversely mentioned in that draft. The CMC made significant amendments following the complaints to the Committee and the final report is appropriate and fair.

I thank the Committee members for their diligent consideration of this matter and the Committee secretariat for their invaluable assistance.

I commend the report to the House.



Mrs Liz Cunningham MP
Chair

1. Introduction

This report of the Parliamentary Crime and Misconduct Committee (the Committee) outlines the Committee's consideration of complaints about the Crime and Misconduct Commission's (CMC) handling of its investigation and review regarding the University of Queensland and the subsequent CMC public report.

1.1 The Committee

The Committee monitors and reviews the performance of the functions of the CMC. The Committee is established under the *Crime and Misconduct Act 2001* (CM Act) as a bipartisan committee of the Queensland Legislative Assembly. It has the following functions:

- to monitor and review the performance of the CMC's functions;
- to report to the Legislative Assembly where appropriate on any matters relevant to the Commission, the performance of the Commission's functions or the exercise of the powers of the Commission;
- to examine reports of the CMC;
- to participate in the appointment of commissioners;
- to conduct a review of the activities of the CMC at the end of the Committee's term (the Three Year Review); and
- to issue guidelines and give directions to the CMC where appropriate.

The Committee also receives and deals with complaints and other concerns about the conduct or activities of the CMC or an officer or former officer of the CMC.

1.2 The Parliamentary Crime and Misconduct Commissioner

The Committee is assisted in its oversight process by the Parliamentary Crime and Misconduct Commissioner (the Parliamentary Commissioner), Mr Paul Favell. Mr Favell was appointed as Parliamentary Commissioner on a part-time basis in August 2011.

The Parliamentary Commissioner has a number of functions under the CM Act. These include, as required by the Committee:

- conducting audits of records kept by, and operational files held by, the CMC;
- investigating complaints made about, or concerns expressed about, the CMC;
- independently investigating allegations of possible unauthorised disclosure of information that is, under the CM Act, to be treated as confidential;
- reporting to the Committee on the results of carrying out the functions of the Parliamentary Commissioner; and
- performing other functions the Committee considers necessary or desirable.

To assist in the performance of these functions, the Parliamentary Commissioner has wide powers. Any decision by the Committee to ask the Parliamentary Commissioner to investigate or review and report on a matter must have the bipartisan support of the Committee.

The Parliamentary Commissioner assisted the Committee in this matter by investigating and reporting to the Committee on the veracity of the complaints received by the Committee, pursuant to a request from the Committee under section 295(2)(d), and in accordance with section 293(3), of the CM Act.

The Parliamentary Commissioner has further responsibilities under the CM Act and the *Police Powers and Responsibilities Act 2000*, following amendments made by the *Cross-Border Law Enforcement Legislation Amendment Act 2005*.

These include:

- inspecting the records of the CMC to determine the extent of the CMC's compliance with legislative requirements relating to surveillance device warrants, retrieval warrants and emergency authorisations;
- reporting to the Committee at six monthly intervals on the results of such inspections;
- inspecting the records of the CMC at least once every 12 months to determine the extent of the CMC's compliance with legislative requirements relating to controlled operations;
- reporting annually on the activities of the CMC under the controlled operations provisions to the Chair of the Committee; and
- auditing the CMC's records relating to assumed identities at least once every six months.

The CMC was declared an eligible agency under the Commonwealth telecommunications legislation on 7 July 2009; the Parliamentary Commissioner is the inspection entity under the *Telecommunications Interception Act 2009*. As the inspection entity, the Parliamentary Commissioner must conduct six-monthly inspections of the CMC's telecommunications interception records and provide an annual report to the Attorney-General.

2. Crime and Misconduct Commission investigation and review regarding the University of Queensland

In December 2011, the CMC commenced an investigation into the forced offer of entry to a student into the 2011 Bachelor of Medicine, Bachelor of Surgery (MBBS) program at the University of Queensland (UQ). The recipient of the placement was the daughter of Professor Paul Greenfield, the then UQ Vice-Chancellor.

On 25 January 2012, the CMC publicly announced it would commence an investigation into the matter. The media release advised that the CMC would focus on three aspects:

Reviewing the University of Queensland's handling of a complaint concerning improper enrolment, first referred to the CMC by the University of Queensland's Chancellor on 4 October 2011. This will focus on broader aspects surrounding the University's handling of and response to allegations concerning the Vice Chancellor and Senior Deputy Vice Chancellor, including the University's public responses to date.

Carrying out inquiries into a related complaint by a member of the public regarding the commission of possible criminal offences in the matter. This complaint has recently been referred to the CMC by the Queensland Police Service. Due to the seriousness of the allegations, the CMC is obliged to commence an investigation to ascertain whether or not any criminal offence has been committed by any persons associated with the making of the forced offer.

*Commencing a quality review of the University's overall management of official misconduct matters to help restore public confidence in the institution's ability to deal with related allegations.*¹

On 28 May 2012, the CMC announced that it would release a public report of its investigation.²

On 14 February 2013, following the conclusion of the CMC investigation, Mr Warren Strange, CMC Assistant Commissioner, Misconduct, wrote to Professor Peter Høj, Vice Chancellor, UQ, enclosing a copy of the CMC's initial draft investigation report for his consideration and comment prior to publication. The CMC sought UQ's comments by 1 March 2013. The letter also stated that the CMC intended to publish its report by tabling the report in Parliament in accordance with section 69 of the CM Act. [Section 69 of the CM Act requires a direction from the Committee to the CMC to provide the report to the Speaker for tabling.]

3. Complaints about the CMC draft public report

3.1 Complaint from the University of Queensland

On 8 March 2013, the Committee received a complaint from the UQ Senate. Individual Senate members and the Chancellor provided individual statements in support of the complaint.

The UQ Senate complained about certain matters detailed in the draft report and asserted that the draft report was the result of a flawed and unfair investigation by the CMC.

Given the independence of the CMC, the Committee was reluctant to become involved in a draft report on a CMC investigation. This was particularly so because the CMC had requested, in accordance with procedural fairness, that UQ and persons adversely mentioned in the report provide comments to the CMC on its first draft report. This did not occur, UQ did not provide the CMC with any comments on the draft report, as requested, and instead the UQ Senate chose to lodge a complaint with the Committee.

3.2 Complaint from Justice Daubney

Justice Daubney is a member of the UQ Senate. On 8 March 2013, the Committee received a complaint from Justice Daubney in relation to the CMC's investigation and review of UQ as it related to his conduct. In addition to the complaints raised by the UQ Senate, Justice Daubney complained that the CMC initial draft report:

- was the product of a process which was not impartial or fair;

¹ Crime and Misconduct Commission, Media Release, *CMC launches wide-reaching review in response to University of Queensland matter — 25.01.2012*, 25 January 2012, available at: <http://www.cmc.qld.gov.au/news-and-media/media-releases/cmc-launches-wide-reaching-review-in-response-to-university-of-queensland-matter-2014-25.01.2012>

² Crime and Misconduct Commission, Media Release, *CMC to prepare public report on University of Queensland investigation — 28.05.2012*, 28 May 2012, available at: <http://www.cmc.qld.gov.au/news-and-media/media-releases/cmc-to-prepare-public-report-on-university-of-queensland-investigation-2014-28.05.2012>

- contained material misstatements of the facts and omitted or ignored important facts known to the CMC;
- made serious allegations about Justice Daubney's conduct as a member of the ad-hoc Senate Sub-Committee, and of the Senate, based upon the misstatements and omissions and none of the allegations were put to him for his response, in fact the CMC did not speak to him at all; and
- could only be understood as concluding that Justice Daubney was party to unethical and misleading conduct.

Justice Daubney's complaint focusses on the CMC's conduct as it relates to him as a judicial officer. Section 58 of the CM Act governs CMC investigations regarding judicial officers:

58 Independence of holders of judicial office

(1) The commission, when performing its functions or exercising its powers in relation to the procedures and operations of State courts or in relation to the conduct of a judicial officer, must proceed having proper regard for, and proper regard for the importance of preserving, the independence of judicial officers.

(2) To the extent that a commission investigation is, or would be, in relation to the conduct of a judicial officer—

(a) the commission's authority to conduct the investigation is limited to investigating misconduct of a kind that, if established, would warrant the judicial officer's removal from office; and

(b) the investigation must be exercised in accordance with appropriate conditions and procedures settled in continuing consultations between the chairperson and the Chief Justice.

(3) A commission hearing in relation to the conduct of the judicial officer must be conducted by the chairperson.

(4) The functions and powers of the commission are to be performed and exercised by the chairperson who is to be taken to constitute the commission for the investigation.

(5) In this section—

judicial officer means—

(a) a judge of, or other person holding judicial office in, a State court; or

(b) a member of a tribunal that is a court of record.

By letter dated 15 April 2013, the CMC advised the Committee that its investigation, as it related to Justice Daubney, was in his capacity as a member of the UQ Senate and was not an investigation contemplated by section 58 of the CM Act (**Appendix 1**).

4. The Parliamentary Commissioner's report

The Committee considered its position in relation to considering the complaints. On the one hand, the Committee has a role in the oversight of the conduct of the CMC and thus its jurisdiction was enlivened. (The UQ Senate and Justice Daubney had complained about the conduct of the CMC in its investigation and in preparing the draft report which the complainants considered was not fair.)

On the other hand, the CMC is an independent body and the Committee does not see any appropriate role for itself in directing the CMC as to the drafting or content of a public report of the CMC on an investigation or review.

The Committee's role in considering public reports of the CMC is two-fold – firstly in considering whether to provide a direction to the CMC to provide a report to the Speaker, thereby requiring that report to be tabled in the Legislative Assembly. Secondly, the Committee reviews reports of the CMC and can report to the Legislative Assembly on any matters the Committee considers should be brought to the attention of the House, as per section 292(c) of the CM Act.

On 19 April 2013, the Committee requested the Parliamentary Commissioner investigate the veracity of the complaints, report to the Committee and outline the options open to the Committee in this matter, pursuant to section 295(2)(d) of the CM Act.

The Parliamentary Commissioner addressed the validity of each complaint in his report, received by the Committee on 29 April 2013. A redacted copy of the report is attached at **Appendix 2**.³ In brief, the Parliamentary Commissioner concluded that:⁴

- The complaints made by the Chancellor, the Vice Chancellor and the UQ Senate have veracity.
- The CMC did not have proper regard to section 58 of the CM Act and any report should not report on the conduct of the judicial member of the Senate.
- The initial CMC draft public report was unfair because:
 - It contained inaccuracies;
 - It drew questionable conclusions of law and fact;
 - There were questions concerning the scope of and authorisation for the report;
 - It did not establish a proper basis for publication;
 - There was a lack of procedural fairness;
 - It was not in the public interest for it to be tabled in the Legislative Assembly.

The Committee considered the Parliamentary Commissioner's report and determined to provide it to the CMC for its consideration. The Committee advised the UQ Senate and Justice Daubney of its actions in this regard and urged them to provide comments on any amended draft report directly to the CMC.

³ The Committee considered that producing the full Parliamentary Commissioner report was not appropriate given that it related to a draft CMC report provided to the University for comment in accordance with natural justice. That draft report was amended in light of the complaints made to the Committee and the Parliamentary Commissioner's report. It is likely that the CMC would have amended the report to some extent had the University chosen to comment to the CMC rather than complaining directly to the Committee without first responding to the CMC's request for comment.

⁴ Parliamentary Crime and Misconduct Commissioner, *Report on the Investigation of the Crime and Misconduct Commission's report into Executive Conduct at the University of Queensland*, April 2013, at 36 (See Appendix 2).

On 2 July 2013, the CMC advised the Committee that it considered the information in the Parliamentary Commissioner's report and made significant amendments to the draft public report.⁵

The Committee has not received any further complaint from the UQ Senate about the revised draft public report and has therefore taken no further action on this matter.

4.1 Findings in relation to Justice Daubney's complaint

In his report to the Committee, dated 29 April 2013, the Parliamentary Commissioner considered Justice Daubney's complaint regarding section 58 at pp. 21 to 26 of his report and stated:

...the [CMC] investigation evolved into an investigation about the conduct of the Senate of the University of Queensland which had, as a member, a judicial officer, albeit that the conduct of the judicial officer being investigated was conduct which was not part of the Justice acting as a judicial officer.

Section 58 is so not restricted to conduct as part of a judicial function.

In my view the draft report does not display the regard required by section 58(1).

If it is an investigation of the conduct of a judicial officer, the requirements of section 58(2), (3) and (4) have not been complied with.

"Investigate" is defined in Schedule 2 of the CM Act to mean "examine and consider". The evolved investigation, apparent from a fair reading of the draft report, seems to include at least a consideration of the conduct of Justice Daubney, albeit as a member of the Senate and the sub-committee.

Section 58 does not restrict its operation to the conduct of a judicial officer as a judicial officer and at least arguably any investigation or consideration of the "conduct of a judicial officer" is restricted to investigating misconduct of a kind that is established would warrant the judicial officer's removal from office.⁶

[The Parliamentary Commissioner provided advice on the circumstances in which a judge can be removed from office, i.e. the conduct which could be investigated by the CMC, at pp. 22 to 24 of his report.]

The Parliamentary Commissioner concluded:

In my opinion, the position of the CMC does not properly interpret section 58 of the CM Act.

⁵ By letter dated 2 July 2013, from Dr Ken Levy, CMC Acting Chairperson. Additionally, on 5 July 2013, the Acting Chairperson provided the Committee with a copy of the amended draft report which was provided to the University for comment, and addressed some matters in the Parliamentary Commissioner's report with which the CMC disagreed.

⁶ Ibid, at 22-23.

Accordingly, the evolved consideration by the CMC of the conduct of Justice Daubney as a member of the Senate of the University of Queensland or the sub-committee should not have occurred and should not be a subject of a report.⁷

The Committee requested a response from the CMC regarding the Parliamentary Commissioner's advice that the CMC investigation, or review, as it related to Justice Daubney's conduct was not in accordance with section 58 of the CM Act.

4.2 CMC responses to the section 58 complaint

The CMC did not accept the Parliamentary Commissioner's advice in respect of section 58 of the CM Act. By letter dated 25 June 2013, the CMC advised the Committee that section 58 did not apply as the CMC did not consider any allegations of official misconduct against Justice Daubney (**Appendix 3**).

In his letter to the Committee the CMC Acting Chairperson advised the Committee that the CMC never contemplated, nor did it undertake an 'investigation' into the conduct of Justice Daubney. The reference to an 'investigation' in the former CMC Acting Chairperson's letter was a mistake. The CMC further advised that its consideration of Justice Daubney's conduct was part of its review of how UQ handled the misconduct allegations. No investigation relating to Justice Daubney's conduct was undertaken by the CMC. The CMC considered that section 58 of the CM Act did not apply to its review.

Additionally, the Committee received a memorandum from Mr Philip Nase, CMC part-time Commissioner, in which he outlines his views in response to the concerns raised about section 58 of the CM Act. A redacted copy of Mr Nase's memorandum is attached at **Appendix 4**.⁸

Justice Daubney's legal representatives contacted the Committee on several occasions to express their client's ongoing concern about the CMC's interpretation of section 58.

5. CMC legal advice on section 58

As part of its oversight of the CMC, the Committee receives copies of the minutes of the Commission meetings (the CMC minutes). The 'Commission' comprises the CMC Chairperson and the part-time Commissioners. On 3 July 2013, the Committee received the CMC minutes for the Commission meetings of 12 April, 19 April, 10 May, 24 May and 7 June 2013.

The CMC received legal advice prior to 10 May 2013.⁹ The CMC minutes reflect Ms Florian's advice to the Commission, on 10 May 2013, that the legal advice was adverse to the CMC in three respects:

Ms Florian reported that a copy of the public report had been sent to people adversely mentioned in the report, and UQ, for their comments. A number of complaints were

⁷ Ibid, at 25.

⁸ The Committee redacted Mr Nase's memorandum to the extent that it relates to the content of the initial CMC draft report. The Committee does not consider it appropriate to refer to information from the initial draft CMC report which has since been significantly amended.

⁹ The Committee does not know the exact date the legal opinion was received by the CMC and has deduced it was received prior to 10 May 2013, as it was discussed in the Commission meeting on 10 May 2013.

forwarded to the PCMC who in turn forwarded the content on to the CMC. An opinion on several issues relating to this matter was sought. Three queries came back adverse to the CMC:

- *Senate member Daubney shouldn't have been investigated, due to status as a judicial officer;*
- *...; and*
- *The concerns referred to the PCMC were valid and he considered that we should not proceed with publication of the draft report.*

Following discussion it was considered that there may be some misunderstanding of the facts and statutory provisions in ... opinion provided to the CMC. For example, ... appears to have incorrectly taken the view that the CMC This is not the case. In relation to the reference to Justice Daubney being investigated – this is not the case. It is therefore imperative to identify those parts of the opinion believed to be incorrect, outline those matters and request an amended report taking those matters into account.

Mr Strange added that the PCMC had referred UQ's complaint to the Parliamentary Commissioner for consideration; a report from the Parliamentary Commissioner has now been received. While the report differs from ... opinion, it finds validity in many of the complaints raised with the PCMC in terms of how the report is written and the fairness or otherwise of the draft report. Again, there are some areas of misunderstanding.¹⁰

On 9 August 2013, the Committee wrote to the CMC Acting Chairperson to request an explanation as to why the CMC failed to bring legal advice to the attention of the Committee and to explain why and how the CMC considered the legal advice it received was incorrect (**Appendix 5**). The Committee also advised the CMC that it intended to report to the House on this matter.

The Committee received the CMC response on 22 August 2013 (**Appendix 6**). In that response, the CMC Acting Chairperson advised that the CMC had sought further advice. The CMC was unable to obtain further advice from that person, however, the CMC Acting Chairperson advised that there was a number of matters about which the provider of the initial advice may have held a different opinion to his initial opinion.

On 16 August 2013, the CMC sought legal advice on the matters requested in the Committee's letter of 9 August 2013. A copy of the opinion was provided to the Committee and is attached to the CMC Acting Chairperson's letter at **Appendix 6**. The CMC has not provided the Committee with a copy of its advice.

¹⁰ The Commission minutes also reflect that Mrs Judith Bell, a former CMC part-time Commissioner and member of the UQ Senate, withdrew from Commission meetings upon discussion of this matter.

6. The amended CMC public report

On 6 September 2013, the Committee received a letter from the CMC Acting Chairperson of the CMC enclosing the CMC's final version of the public report on its investigation of this matter and requesting that the Committee provide a direction to the CMC to table the report in accordance with section 69 of the CM Act.

The Committee considered the final version of the report. While the Committee remained concerned at the CMC's consideration of Justice Daubney's conduct, contrary to section 58 of the CM Act, the amended draft report is a fair report of the CMC's investigation and subsequent review.¹¹

The Committee is satisfied that it is in the public interest to issue the section 69 direction to the CMC to table its report.

The Committee considers that it has discharged its responsibilities in relation to this matter by reporting to the House on its oversight of the CMC's conduct in relation to the investigation.

7. Committee comments

The Committee is not an arbitration or negotiation tool to be used to settle differences between the CMC and those it investigates. Whilst the Committee acknowledges that in this instance some concerns raised by the Senate were valid, the proper process to be followed by the University was to put those concerns to the CMC in the first instance as part of the finalisation of the draft report. If the Senate held residual concerns after it had provided its comments to the CMC, then it would be appropriate to complain to the Committee.

The Committee would not have been able to satisfy itself that it would be appropriate to issue a direction to the CMC to table the draft report if the CMC failed to draft a report which was impartial and fair in accordance with section 57 of the CM Act. However, while the initial CMC draft public report was clearly not suitable for publication, it is important to note that the CMC did not seek a direction from the Committee to table that draft report.

The Committee notes that the CMC significantly amended the initial draft report upon receipt of the complaints to the Committee from the UQ Senate and Justice Daubney and following consideration of the Parliamentary Commissioner's report. The Committee considers this an appropriate and logical outcome.

7.1 CMC's failure to acknowledge it acted contrary to section 58 of the Act

The CMC's review of the way in which UQ handled the allegations of misconduct in relation to the forced offer was not in accordance with section 58 of the CM Act. Schedule 2 of the CM Act defines 'investigate' as including 'examine and consider'. The Committee accepts that this definition would include a review.

Of concern to the Committee is the CMC's continued failure, notwithstanding several legal advices, to acknowledge it had not acted in accordance with the legislation. The Committee

¹¹ Crime and Misconduct Commission, *An examination of suspected official misconduct at the University of Queensland*, September 2013.

understands that legal opinion on matters will often differ. However, despite the independent legal advice to the CMC that its consideration of Justice Daubney in this matter fell afoul of section 58 of the CM Act, the Parliamentary Commissioner's report, and in light of the complaints made to the Committee by Justice Daubney, the CMC failed to formally apprise the Committee of this legal advice.

Conversely, the CMC remained resolute in its defence of its consideration of Justice Daubney in his role as a member of the Senate.

The Committee relies on frank advice from the CMC and considers that in this instance it was not appropriate for the CMC to withhold the legal advice and to not explain to the Committee why it did not accept the advice.

The Committee considers it was wholly unacceptable for the CMC to withhold this information.

7.2 The appropriateness of section 58

Section 292(b)(ii) of the CM Act provides that a function of the Committee is to bring to the attention of the Legislative Assembly any concerns the Committee has in relation to matters relevant to the performance of the CMC's functions or the exercise of the CMC's powers.

The Committee has a concern in relation to the impact of section 58 of the CM Act upon the CMC's ability to effectively and appropriately investigate and review the actions and conduct of those working in units of public administration.

The Committee concurs with Mr Nase's view that judicial officers, who wish to participate in public life in roles outside of their judicial role, should be held accountable for their actions in that role. Clearly, this accountability should be balanced with safeguards to ensure that vexatious or vindictive complaints are not progressed against judges by those who are merely unhappy with a judge's actions and decisions in their judicial capacity.

It is important to stress that the CMC never contemplated, reviewed or even considered any allegations of misconduct on the part of Justice Daubney. This, however, is not the issue here.

The issue is that conduct of a judicial officer, particularly when not acting in a judicial capacity, cannot be investigated (which under Schedule 2 of the CM Act includes *examine and consider*) by the CMC unless that conduct could amount to misconduct which would warrant the removal of the judge from judicial office.

The CMC report on the UQ matter, tabled in the Legislative Assembly, does not consider or comment on the role of Justice Daubney as a member of the UQ Senate as section 58 of the CM Act prohibits it from doing so. As a member of the UQ Senate charged with dealing with the misconduct allegations regarding the forced offer, Justice Daubney played a key role in how UQ handled those allegations.

Section 58 of the CM Act severely limits the ability of the CMC to appropriately and effectively review the way in which UQ handled those allegations simply because a judicial officer is a member of the UQ Senate.

Section 58 of the CM Act, as it is presently drafted, does not provide sufficient accountability of judicial officers when acting in a capacity other than a judicial capacity, e.g. on a board or decision making body of a unit of public administration. It follows that, should a unit of public administration wish to avoid scrutiny of its actions, it need only appoint a judicial officer to a board or committee etc. Where any such actions are not in the public interest, but fall short of

official misconduct, section 58 of the CM Act curtails the CMC's ability to review or investigate such conduct.

The Committee considers this position untenable and contrary to the expectations of the Queensland community.

Recommendation

The Committee recommends that the Attorney-General and Minister for Justice amend section 58 of the *Crime and Misconduct Act 2001* to reflect both the need to protect judicial officers from frivolous, baseless and vexatious complaints along with the expectation that judicial officers are held accountable when acting in a non-judicial capacity in units of public administration.

Appendix 1

**Letter from Mr Warren Strange, Acting Chairperson,
Crime and Misconduct Commission, 15 April 2013**

CRIME AND MISCONDUCT COMMISSION



GPO Box 3123
Brisbane Qld 4001

Level 2, North Tower
515 St Pauls Terrace
Fortitude Valley, Qld

Tel: (07) 3360 6060
Fax: (07) 3360 6333

Toll Free:
1800 061 611

Email
mailbox@cmc.qld.gov.au

www.cmc.qld.gov.au

Your Reference: C.13/14
Our Reference: MI-11-3068
Contact Officer: PCB

IN-CONFIDENCE

15 April 2013



Mrs Liz Cunningham MP
Chair
Parliamentary Crime and Misconduct Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mrs Cunningham

RE: Complaints regarding Draft Report – “An Investigation into Executive Conduct at the University of Queensland”

I refer to correspondence dated 11 March 2013, which was received by the Crime and Misconduct Commission by email on 11 April 2013 from Amanda Honeyman, A/Research Director in relation to the above stated matter.

As requested the Crime and Misconduct Commission (CMC) is providing an initial response to the complaints received by the Parliamentary Crime and Misconduct Committee (the Committee) on behalf of the Honourable Justice Martin Daubney and the Senate of the University of Queensland.

Attached to this letter are a number of pieces of correspondence between the CMC and the University of Queensland. The attached correspondence is not exhaustive of the communications between the University and the CMC,¹ but it relates to the issues central to the above complaints. I have included correspondence between the University and the CMC in relation to three key events:

- First, the original written notification received from the University and the CMC's initial reply (**Appendix A**). Both of these communications were emails dated 4 and 5 October 2011 respectively.
- Secondly, a series of communications commencing on 11 November 2011 at which time the CMC first raised a number of concerns regarding the University's handling of the matter; up to 31 January 2012 by which time the CMC had advised the University that the CMC would, amongst other matters, be undertaking an investigation into the allegations of the forced offer (**Appendix B**).

REDACTED


Of course the CMC will provide any other correspondence you consider necessary in order to assist with the Committee's consideration of this matter.

¹ Other correspondence includes requests to the University for information as part of the CMC's investigation and the University informing the CMC of its progress regarding the implementation of its Integrity and Accountability Reform Program.

With respect to the operation of section 58 of the *Crime and Misconduct Act 2001* the CMC's position is that Justice Daubney's role as a judicial officer (and any issues of judicial independence) did not arise in these matters; it was his role as a member of the Senate Sub-Committee that was the subject of the CMC's inquiries and its Draft Report. The CMC's initial view is that our investigation, so far as it related to Justice Daubney, as a member of the Senate Sub-Committee, is not one contemplated by section 58.

The CMC is preparing a full response to the issues raised in the Committee's letter and that response will be provided as soon as possible.

Yours sincerely



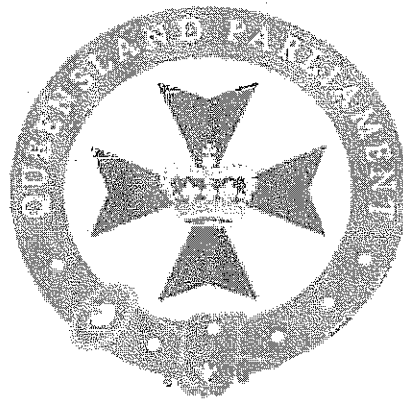
WARREN STRANGE
Acting Chairperson

Encls.

Appendix 2

Parliamentary Commissioner's Report, April 2013

**REPORT ON THE INVESTIGATION OF THE
CRIME AND MISCONDUCT COMMISSION'S
REPORT INTO EXECUTIVE CONDUCT AT THE
UNIVERSITY OF QUEENSLAND**



**OFFICE OF THE
PARLIAMENTARY CRIME & MISCONDUCT COMMISSIONER**

APRIL 2013

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REDACTED

INTRODUCTION

In December 2011 the Crime and Misconduct Commission (CMC) commenced an investigation of issues relating to the conduct of senior officers of the University of Queensland (UQ) with regard to the “forced offer” for entry into the 2011 Bachelor of Medicine, Bachelor of Surgery course which had been made to the daughter of Professor Paul Greenfield, who was at the time of the offer, the Vice Chancellor of the University. A “forced offer” refers to the process whereby an offer to a student to enrol in a course is made manually rather than the usual process of having a computer program select prospective students based on certain prerequisites such as academic results or other pre-conditions.

Under a covering letter dated 14 February 2013 the CMC provided a draft report of its investigation entitled “*An Investigation into Executive Conduct at the University of Queensland*” to the (new) Vice Chancellor and other relevant parties including the Chancellor and members of the UQ’s Senate. The covering letter advised, in part, that:

Subject to receiving the relevant direction from the Parliamentary Crime and Misconduct Committee, the CMC intends to publish the report by tabling the report in Parliament in accordance with section 69 of the Crime and Misconduct Act 2001 (the CM Act).

The CMC has a statutory duty to act independently, impartially and fairly, in the public interest, having regard to the purposes of the CM Act. Accordingly, for the purposes of procedural fairness, I enclose a copy of the report for your consideration prior to any publication.

If you have any comments upon the content of the report, the CMC will consider those comments prior to determining the final form of the report. Comments are required by close of business 1 March 2013.

On 8 March 2013 the Committee received two written complaints concerning the CMC’s draft report. One complaint was made by lawyers acting on behalf of the Honourable Justice Martin Daubney who is and was at all relevant times a member of the University’s Senate and a Justice of the Supreme Court of Queensland. The other complaint was made by lawyers acting on behalf of University and attached separate submissions from the current Vice-Chancellor, the Chancellor, the Senior Deputy Vice-Chancellor, the Deputy Chancellor, three members of the University Senate and the Chief Executive Officer.

The University has not provided any comment to the CMC concerning the draft report, rather, it has made its complaint to the Committee.

TERMS OF REFERENCE

Under a covering letter dated 19 April 2013, the Parliamentary Crime and Misconduct Committee (the Committee) provided to me copies of the two complaints received concerning the CMC's draft report along with other relevant material in relation to the complaints.

The Committee considered the matter at a meeting on 19 April 2013 and resolved that:

[I]n accordance with section 295(3) of the Crime and Misconduct Act 2001 to request that [the Parliamentary Crime and Misconduct Commissioner] investigate this matter and report to the Committee, pursuant to section 295(2)(d) of that Act, on the veracity of the complaints made by the Senate and by Justice Daubney, and the options open to the Committee to proceed in this matter.

The Committee requested that I provide my report to the Committee on 29 April 2013.

Pages 3 to 20 redacted

REDACTED

3 Section 58 of the CM Act

The solicitors for Justice Daubney raise a concern with the conduct of the CMC which they contend "*arises because of the terms of s. 58 of the CM Act and the fact that Justice Daubney is and was at the relevant times a judge of the Supreme Court.*" They refer to advice from them and from Mr SC. I have not asked for or been provided with that advice.

Section 58(1) requires the commission when:

- (a) performing its functions; or

(b) exercising its powers:

- i. in relation to the procedures and operations of state courts; or
- ii. in relation to the conduct of a judicial officer;

to proceed having

(a) proper regard for the independence of judicial officers, and;

(b) proper regard for the importance of preserving the independence of the judicial officer.

“Judicial officer” relevantly means a judge of a State Court.

The functions of the Commission are set out in Sections 23, 24 and 33 of the CM Act.

In this matter the Commission was purporting to carry out its function under Section 33 and in particular its misconduct function, *“to ensure a complaint about or information or matter involving misconduct is dealt with in an appropriate way.”*

In carrying out that particular function the Commission was required to have regard to the four principles of cooperation, capacity-building, devolution and public interest as set out in Section 34 of the CM Act.

Section 35 of the CM Act sets out some ways the Commission may perform its misconduct functions.

Here the Commission was not exercising its power in relation to the procedures and operations of a State Court or in relation to the conduct of a judicial officer as a judicial officer.

It was however performing one of its functions and as such was required to proceed having proper regard for the independence of judicial officers and proper regard for the importance of preserving the independence of the relevant judicial officer.

There is no indication in the draft report that the Commission appreciated that requirement nor had such regard.

If the Commission investigation is or would be in relation to the conduct of a judicial officer, the Commission is restricted in what it could investigate and how it could conduct the investigation. If such an investigation is to involve a hearing, such a hearing must be conducted by the Chairperson. The function and powers of the Commission in those circumstances are to be performed and exercised by the Chairperson who is taken to be the Commission for the investigation.

A question which arises here is whether, in conducting an investigation about a complaint involving misconduct by a person or persons who is/are not a judicial officer, the Commission is exercising its powers in relation to the conduct of a judicial officer.

If the investigation was restricted to an investigation about a non-judicial officer, section 58(2) would not be engaged.

Here, however, the investigation evolved into an investigation about the conduct of the Senate of the University of Queensland which had, as a member, a judicial officer. As such, the investigation involved, in part, an investigation of the conduct of the judicial officer, albeit that the conduct of the

judicial officer being investigated was conduct which was not part of the Justice acting as a judicial officer.

Section 58 is so not restricted to conduct as part of a judicial function.

In my view the draft report does not display the regard required by section 58(1).

If it is an investigation of the conduct of a judicial officer, the requirements of section 58(2), (3) and (4) have not been complied with.

“Investigate” is defined in schedule 2 of the CM Act to mean “examine and consider”. The evolved investigation, apparent from a fair reading of the draft report, seems to include at least a consideration of the conduct of Justice Daubney, albeit as a member of the Senate and the sub-committee.

Section 58 does not restrict its operation to the conduct of a judicial officer as a judicial officer and at least arguably any investigation or consideration of the “conduct of a judicial officer” is restricted to investigating misconduct of a kind that is established would warrant the judicial officer’s removal from office.

, Acting Director, Office of the Assistant Commissioner Misconduct, has indicated that no consultation with the Chief Justice occurred “*as there were no issues affecting the conduct of judicial duties.*” I am advised that the functions and powers of the Commission here were performed and exercised by persons who were not the Chairperson.

Section 61 of the *Constitution of Queensland 2001* provides that a judge may not be removed from an office other than under that section.

Section 60 provides that a judge holds an office as a judge indefinitely during good behaviour.

Section 61(2) provides a judge may be removed from office by the Governor in Council on an address of the Legislative Assembly for;

- (a) proved misbehaviour justifying removal from the office; or
- (b) proved incapacity to perform the duties of office.

A judge’s misbehaviour justifying removal from an office is proved only if the Legislative Assembly accepts a finding of a tribunal, stated in a report of the tribunal, that, on the balance of probabilities, the judge has misbehaved in a way that justifies removal from the office.

In Queensland the First Report of the Parliamentary Judges Commission of Inquiry in 1988 advised the Legislative Assembly whether any behaviour of a Supreme Court Justice since his appointment as a Judge of the Supreme Court either of itself or in conjunction with other behaviour warranted his removal from office as a Judge of the Supreme Court.

Of the specific matters considered by the Commission of Inquiry, some were other than the Judge’s conduct in his role as a Justice of the Supreme Court.

The Commission considered what standard of behaviour is required or proper for the holder of the office of a Judge of the Supreme Court of Queensland.

In that regard it advised:

1.5.7. *The Commission believes that the most useful guidance to a decision of the question what behaviour would warrant the removal of a judge is to be had from the "Special Report" of the Parliamentary Commission of Inquiry dated 5 August 1986, which deals with the meaning of misbehaviour for the purposes of s. 72 of the Constitution (see para 1.5.4). It is true that in that report the Commissioners (Sir George Lush, Sir Richard Blackburn OBE and The Honourable Andrew Wells QC) were dealing with a statutory provision whereas in this instance the Commission is dealing with custom or convention adopted here along with the British system of parliamentary governments and the separation of powers. However, having read the report of the 5 August 1986, this Commission states its view that in Australia, or at any rate in Queensland, misbehaviour of a judge as defined and adopted in that report does not differ from the kind of behaviour that would warrant the removal of a Judge of the Supreme Court within the meaning of s. 4 of the Act.*

1.5.8. *Much of the reasoning expressed in the report of 5 August 1986 which resulted in the Commissioners there reaching their decisions as to the meaning of judicial misbehaviour is applicable in the present case. The Commission adopts it. It is content to set out three passages from that report:*

(i) *Sir George Lush said (p. 18):*

"Judges... cannot, however, be protected from the public interest which their office tends to attract. If their conduct, even in matters remote from their work, is such that it would be judged by the standards of the time to throw doubt on their own suitability to continue in office, or to undermine their authority as judges or the standing of their courts, it may be appropriate to remove them."

(ii) *Sir Richard Blackburn said (p. 32):*

"The material available for solving this problem of construction suggests that 'proved misbehaviour' means such misconduct, whether criminal or not, and whether or not displayed in the actual exercise of judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question."

(iii) *Mr Wells said (p. 45):*

"Accordingly, the word 'misbehaviour' must be held to extend to conduct of the judge in or beyond the execution of his judicial office, that represents so serious a departure from standards of proper behaviour by such a judge that it must be found to have destroyed public confidence that he will continue to do his duty under and pursuant to the constitution."

1.5.9. *The Commission therefore expresses its view that before an opinion can be reached that behaviour of a Judge of a Supreme Court warrants his removal from office, the behaviour must be such that, having regard to all the relevant surrounding circumstances, no right thinking member of the community could regard the fact of its having taken place as being consistent with the continued proper performance by the judge of judicial duties, and hence with the holding of judicial office. Put another way, if the behaviour is such that, in the circumstances, the judge would, in the eyes of right thinking members of the community, no longer be fit to continue to remain a judge, then the judge has fallen below the standard demanded of members of the judiciary.*

1.5.10 *The members of the Commission therefore are required to apply community standards in their task of forming an opinion as to whether any behaviour of Mr Justice Vasta warrants his removal from office as a Judge of the Supreme Court. The Commission recognises and accepts that the community requires the standards of behaviour of the judiciary to be set and maintained at a very high level indeed. Judges themselves, as well as the community, expect that the standard of behaviour of members of the judiciary should be a very high one. On the other hand, to adopt too stringent a standard, or too pharisaical an approach, would imperil the independence of the judiciary, which would be eroded if a judge might too readily be removed from office. Moreover, there may be judicial misbehaviour which ought not to be condoned, and indeed may be deserving of censure, even severe censure, but which would not warrant the removal of a judge from office. Questions of degree may be involved, and minds may differ in making what is in effect a moral and social judgment on such a matter.*

1.5.13. *In making a decision to address the Crown for the removal of a judge, the members of the legislature must bear in mind that the independence of the judiciary is a fundamental principle of government in this State and in Australia generally. The power given to the Legislature should never be exercised in order to remove a judge because of political, religious or racial antagonism, or because he is unpopular, or because the media generally, or some pressure group, have launched attacks upon him. The only ground for the exercise of the power is that the Legislature has formed a collective opinion that the judge is not fit to remain in office.*

It is not necessary for me to further refer to the report.

I have referred to it above to demonstrate that the interpretation by the CMC of the requirements of section 58 is not correct. In my view, the evolved investigation was subject to the requirements of section 58.

There is nothing to suggest that any conduct by Justice Daubney was such as to warrant his removal.

The Acting Chairperson of the CMC in his letter to the Chairperson of the Committee dated 15 April 2013 advised of the CMC's position with respect to the operation of section 58 as follows:

"Justice Daubney's role as a judicial officer (and any issues of judicial independence) did not arise in these matters; it was his role as a member of the Senate Sub-Committee that was the subject of the CMC's inquiries and its Draft Report. The CMC's initial view is that our investigation, so far as it related to Justice Daubney, as a member of the Senate Sub-Committee, is not one contemplated by section 58."

In my opinion, the position of the CMC does not properly interpret section 58 of the CM Act.

Accordingly, the evolved consideration by the CMC of the conduct of Justice Daubney as a member of the Senate of the University or the sub-committee should not have occurred and should not be a subject of a report.

Options open to the Committee to proceed in this matter

Section 69 Commission reports to be tabled

In his covering letter to Professor Peter Høj of 14 February 2013 enclosing the copy of the CMC draft report, the Acting Chairperson of the CMC states that "*Subject to receiving the relevant*

direction of the Parliamentary Crime and Misconduct Committee, the CMC intends to publish this report by tabling the report in Parliament in accordance with section 69 of the Crime and Misconduct Act 2001."

A clear course available to the Committee if it agrees with my assessment that parts of the draft report are unfair and inappropriate, is to refuse to direct that the report be given to the Speaker pursuant to section 69(1)(b) of the Act. The Committee might consider offering the CMC the opportunity to redraft its report, perhaps with the benefit of a copy of this report, and invite the CMC to resubmit an amended version of the report for the Committee's consideration. The Committee may consider whether in the circumstances further identified here any report is appropriate.

REDACTED

Pages 27 to 35 redacted

CONCLUSION

Professors Greenfield and Keniger provided versions of the events in which their respective culpability was minimised such that they may have been capable of defending misconduct charges or, at the very least rendering any disciplinary action protracted, expensive and publicly damaging. With this in mind the Executive made what might be considered a pragmatic decision to accept the resignations of the two persons who, on the face of the evidence, were most culpable for the forced offer. Initially at least, it seems that the CMC was supportive of this decision. Of course, accepting the resignations in the absence of any formal findings of wrongdoing on the part of either Professor Greenfield or Keniger meant that the University needed to be very careful about how they publicly described the resignations. The fact that the CMC considered that the University may have been unduly favourable in its public pronouncements about the resignations does not mean that the Executive did not have due regard to integrity, accountability and transparency.

In conducting this investigation I have reviewed all of the material provided by the committee and material provided by the CMC at my request. I have also requested information from the CMC concerning the conversation said by the Chancellor to have been had with the then Chairperson of the CMC. I also requested information from the Chief Justice concerning matters relevant to Section 58 and 65 of the CM Act. I have not received a response to that request.

The complaints made by the Chancellor, the Vice Chancellor and the Senate of the University of Queensland have veracity.

The Commission has not had proper regard to section 58 of the CM Act and any report should not report on the conduct of the judicial member of the Senate.

The draft report is unfair in the respects identified in their report because:

- a. It contains inaccuracies;
- b. It draws questionable conclusions of law and fact;
- c. There are questions concerning the scope of and authorisation for the report;
- d. It does not establish a proper basis for publication;
- e. There has been a lack of procedural fairness;
- f. It is not in the public interest for it to be tabled in the Legislative Assembly.

The Committee has a discretion as to whether it will direct the report be given to the Speaker.

Appendix 3

**Letter from Dr Ken Levy, Acting Chairperson, Crime and
Misconduct Commission, 25 June 2013**

CRIME AND MISCONDUCT COMMISSION

GPO Box 3123
Brisbane Qld 4001

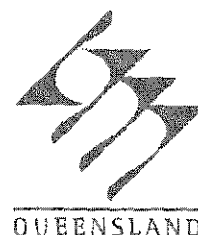
Level 2, North Tower
515 St Pauls Terrace
Fortitude Valley, Qld

Tel: (07) 3360 6060
Fax: (07) 3360 6333

Toll Free:
1800 061 611

Email
mailbox@cmc.qld.gov.au

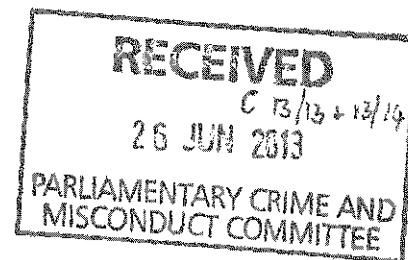
www.cmc.qld.gov.au



Our Reference: MI-11-3068 / 13/065602
Contact Officer: Paxton Booth

25 June 2013

Mrs Liz Cunningham MP
Chair
Parliamentary Crime and Misconduct Committee
Parliament House
George Street
BRISBANE QLD 4000



Dear Mrs Cunningham

RE: UNIVERSITY OF QUEENSLAND INVESTIGATION

I refer to correspondence dated 24 May 2013 and your request for further information in relation to Justice Daubney's complaint regarding section 58 of the *Crime and Misconduct Act 2001* (the CM Act) and the conduct of the Crime and Misconduct (CMC) during the investigation.

The complaint made of behalf of Justice Daubney is that section 58 means "*he cannot be, as he wishes to be, treated equally with his fellow sub-committee and Senate members.*" and "*the Commission's authority to conduct the investigation was constrained by s 58(2). The Commission had no authority to conduct the investigation insofar as it related to the conduct of Justice Daubney.*"

I also note the advice of Mr Paul Favell, Parliamentary Crime and Misconduct Commissioner with respect to this complaint. On pages 21 - 25 of Mr Favell's advice he makes a number of statements about the conduct of the CMC and the operation of section 58 of the CM Act. While, as we have previously advised we have accepted much of the advice provided by the Parliamentary Commissioner, in respect of this issue, there are two matters in particular with which the CMC does not agree.

The two main points made by _____, on behalf of Justice Daubney, and/or by Mr Favell are:

- (i) the CMC's investigation breaches section 58 of the CM Act
- (ii) the CMC did not properly consider section 58(1) of the CM Act

The first point we make is that the comments about the possible application of section 58. Both _____ and Mr Favell misunderstand the nature of the review carried out by the CMC. The review into the way in which the University dealt with the nepotism allegation was quite different from the criminal investigation conducted into an allegation of a possible breach of section 92A (Criminal Code) by the Vice-Chancellor and the Senior Deputy Vice-Chancellor. The CMC did not at any stage undertake an investigation into the conduct of Justice Daubney, and accordingly is not in breach of the requirement in 58(2). This point is developed further below.

Does the review breach section 58(2) of the CM Act?

The first point requires a consideration of Mr Favell's statement that "*Here, however, the investigation evolved into an investigation about the conduct of the Senate of the University of Queensland which had, as a member, a judicial officer. As such, the investigation involved, in part, an investigation of the conduct of the judicial officer, albeit that the conduct of the judicial officer being investigated was conduct which was not part of the Justice acting as a judicial officer.*" (emphasis added)

In December 2011 the CMC resolved to conduct four separate tasks, with respect to the University of Queensland, all of which were approved on the same date. Two of those tasks are relevant for the purposes of this letter. The first was a misconduct investigation into a complaint made by a member of the public to the Queensland Police Service (QPS). That complaint was referred by the QPS to the CMC, pursuant to the obligation under section 38 of the CM Act to notify complaints or information that may involve official misconduct relating to the commission of possible criminal offences. The second was a review of the broader aspects surrounding the University's handling of the allegations relating to a forced offer to a potential student where there was an apparent conflict of interest. In undertaking that review the CMC was looking at, amongst other things, how and when officers of the University were informed of the allegations against Professors Greenfield and Keniger; and the University's response to the allegations including the public responses that were made.

A brief history of the relevant events and the CMC's actions will assist in explaining how the CMC exercised its functions under the CM Act.

The investigation undertaken by _____, at the request of the Senate sub-committee was completed prior to the notification of the matter by Mr Story to the CMC. The CMC assessed the information from Mr Story and advised the Senate to continue to deal with the matter, in the manner outlined in the Investigation Report and in _____ email (sections 33, 35(1), 34(c) and 46(1)(b) of the CM Act). This was notified to _____ on 5 October 2011 and formally noted by the Misconduct Assessment Committee (MAC) on 7 October 2011. (see attached Misconduct Assessment Report).

On 19 December 2011 the QPS referred complaints of possible criminal offences to the CMC in relation to the forced offer.

On 21 December 2011 a meeting was held between the Commissioners¹, the Acting Chairperson and other CMC officers regarding what future action the CMC might take in relation to University of Queensland matter involving the forced offer. At that meeting, four matters, including the two referred to above, were accepted as an appropriate course of action. Those decisions were adopted by MAC on 22 December 2011.

The decisions were communicated to the Acting Vice-Chancellor by letter on 23 January 2012.

On 25 January 2012, the CMC issued a media release to the same effect.

On 3 February 2012 the CMC wrote to the Acting Vice-Chancellor confirming that the criminal investigation was a discrete part of the CMC's further actions in relation to the University of Queensland and that the CMC was also conducting a broader review.

The CMC has jurisdiction to deal with a complaint about misconduct by itself (sections 33, 35(1)(e)). The CMC also has jurisdiction to conduct a review of the broader aspects surrounding the University's handling of the allegations relating to the forced offer under both its prevention function (section 23 and 24) and misconduct function (sections 33(a), 34(d) 35(1)). While the review has been referred to in recent correspondence as an investigation, this is not the case. The attached documents noting the

¹ With the exclusion of Commissioner Judith Bell, who did not take part in any discussions or decisions because she was also a member of the Senate.

decisions on 21 and 22 December 2011, the correspondence to the Acting Vice-Chancellor on 23 January 2012 and 3 February 2012, the media release on 25 January 2012 and the draft public report,² all confirm that this aspect of the CMC's inquiry was a review, not an investigation.

It is important to note that the review was not an investigation into suspected official misconduct into the complaint about the forced offer, or indeed into any possible or suspected misconduct arising from the forced offer. The investigation did not "*evolve into an investigation about the conduct of the Senate of the University of Queensland.*"³

At no time was the Senate or any of its members (other than Professor Paul Greenfield), suspected of official misconduct with respect to the way in which they dealt with the allegations about the forced offer. There was no investigation, as that term is used in the CM Act by the CMC of the Senate, the Senate Sub-Committee and in particular, Justice Daubney.

The suggestion that the "CMC's investigation" was contrary to section 58(2) of the CM Act is based on a misunderstanding of the CMC's powers and the nature and purpose of the review undertaken. The focus of the *review* was on the broader aspects of the way in which the University dealt with the allegations of misconduct. However, it is clear that even now the University does not believe it has any public duty to the community beyond the simple mandate in section 10 of the *University of Queensland Act 1988* to act in its view of the best interests of the University. The report is, in the broadest sense, intended to be educative, not only for this particular University, but for the University sector as a whole. We emphasise again the review was not an investigation "*in relation to the conduct of a judicial officer*"; and, the criminal investigation which did take place into the forced offer did not relate in any way to Justice Daubney. The CMC did not exercise any powers against Justice Daubney, he was not interviewed as part of the investigation, nor was he relevant to the review by the CMC, either personally or in his capacity as a judicial officer.

The only exposure of Justice Daubney to the CMC's review was incidentally when the CMC questioned other members of the University Senate and staff members about the membership and actions of the Senate Sub-committee, of which Justice Daubney was a member. The specific conduct of Justice Daubney during the relevant period was not examined at any time by the CMC. The only material gathered by the CMC in which Justice Daubney's name appears is:

- he was nominated as a member of the Senate Sub-Committee by Mr John Story when Mr Story was interviewed.
- some emails which have been provided to the CMC by the University include emails from Justice Daubney to Mr Story (in response to emails from Mr Story). The content of those emails from Justice Daubney have not formed any part of the CMC's draft public report.

No allegations of official misconduct or misconduct under the University's own policies have ever been raised by the CMC against Justice Daubney.

The CMC's draft public report which was circulated as part of procedural fairness did note that Justice Daubney was a member of the Senate Sub-Committee. It did not otherwise refer to Justice Daubney. The revised draft report will be amended to remove any reference to Justice Daubney being a member of the Senate Sub-Committee ensuring that Justice Daubney is not identified or mentioned in the report.

Was the application of section 58(1) of the CM Act considered by the CMC?

In relation to the CMC performing any of its functions it is required to proceed having proper regard for the independence of judicial officers and for the importance of preserving the independence of the

² Page 61, Discussion of the University's response to the forced offer, point 1.

³ Advice of Mr Favell, page 22

relevant judicial officer. Mr Favell states *"There is no indication in the draft report that the Commission appreciated that requirement nor had such regard."*⁴

The CMC is accustomed to receiving complaints about the conduct of judicial officers from the public (and sometimes by referral by the Chief Justice). In this matter we were conscious that one member of the subcommittee was a Justice of the Supreme Court. Because we did not state in the report that we were conscious of the scope and meaning of 58(1) does not mean we were ignorant of the section or that it was disregarded.

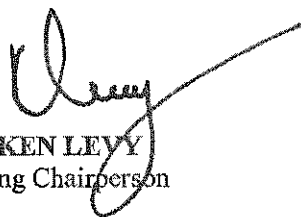
The CMC's first draft report made no comments which pertained to Justice Daubney, or what role he played in the matter other than an incidental reference that he was a member of the Senate Subcommittee. At no time did the CMC form the view that Justice Daubney's conduct could possibly amount to misconduct. In our submission, proper regard for the independence of judicial officers and for the importance of preserving the independence of the relevant judicial officer was considered in preparing the first draft public report. As discussed above, the CMC did receive from the University emails between Justice Daubney and Mr Story. Neither the content nor the existence of these emails has been referred to in the draft public report.

Mr Favell also comments that *"In my view the draft report is capable of conveying the meaning that Justice Daubney was party to unethical and misleading conduct."*⁵

I am advised that it was not the CMC's intention to infer in the first draft report that Justice Daubney's actions as part of the Senate sub-committee were unethical or misleading. The next draft of the public report is almost complete and addresses this concern. That said, any factual analysis of these events could lead a reader to conclude that the University leadership made an error of judgement in how this matter was handled. These errors of judgement however, do not amount to misconduct or official misconduct on the part of the leadership of the University.

I trust this information is of assistance.

Yours sincerely



DR KEN LEVY
Acting Chairperson

Encl.

⁴ Page 22 of Mr Favell's advice

⁵ Page 21 of Mr Favell's advice

Appendix 4

**Memo from Mr Philip Nase, Commissioner (Part-time),
Crime and Misconduct Commission,
19 July 2013**

C 12013

CRIME AND MISCONDUCT COMMISSION

GPO Box 3123
Brisbane Qld 4001

Level 2, North Tower
515 St Pauls Terrace
Fortitude Valley, Qld

Tel: (07) 3360 6060
Fax: (07) 3360 6333

Toll Free:
1800 061 611

Email
mailbox@cmc.qld.gov.au

www.cmc.qld.gov.au



Our Reference: PGN/rag

IN-CONFIDENCE

19 July 2013

E-MAILED
17-7-13

Mrs Liz Cunningham MP
Chair
Parliamentary Crime and Misconduct Committee
Parliament House
George Street
BRISBANE QLD 4000

RECEIVED
19 JUL 2013
PARLIAMENTARY CRIME AND
MISCONDUCT COMMITTEE

Dear Mrs Cunningham

**RE: REPORT OF THE PARLIAMENTARY CRIME AND
MISCONDUCT COMMISSIONER ON COMPLAINTS ABOUT A
DRAFT REPORT ON THE UNIVERSITY OF QUEENSLAND**

I have prepared my own reply to Mr Favell's Report for the Committee's consideration.

If the Parliamentary Committee decides to table Mr Favell's Report I ask that the Committee also consider tabling my reply.

Yours sincerely

PHILIP NASE
Commissioner

Encl.

IN-CONFIDENCE

Memorandum

A response to a report by the Parliamentary Commissioner, Mr Favell on complaints to the Parliamentary Committee by the University of Queensland and others

Introduction

This memorandum is written in response to a report by Mr Favell to the Parliamentary Committee on complaints from the University of Queensland (the University) and others about a draft report of an investigation into the conduct of the Vice Chancellor and Senior Deputy Vice Chancellor and a review of the way in which the University dealt with the allegations against the Vice Chancellor and Senior Deputy Vice Chancellor.

While the views and opinions in the memorandum are my own they are based on a reasonably detailed knowledge of the history of the allegations against the Vice Chancellor and Senior Deputy Vice Chancellor, the investigation, the review, and the preparation of the draft report. I also participated in the discussions and decisions of the Commission when those matters came before it. I disagree with many of the conclusions reached by Mr Favell and I believe his report calls for an informed response and correction.

The following discussion takes the reader through an examination of a number of issues, including what information was disclosed to us (CMC) by the University, and the public statements made by the University about the act of nepotism at the heart of the allegations and about the resignations of the Vice Chancellor and Senior Deputy Vice Chancellor. Although the truth is at times difficult to make out I believe it is possible to reach a reasonably clear understanding of the essential facts behind each issue.

REDACTED

Finally, Judge Daubney's complaint will be examined. The Daubney complaint raises a number of separate issues, but underpinning his complaint is a misunderstanding of the nature and purpose of the review. The focus of the review was on the way in which issues of misconduct should be dealt with in a publicly funded Institution. The focus of the review was not on misconduct or ethical misbehaviour by the Senate but on issues of governance. The Judge, if I may comment without disrespect, is altogether too sensitive when he says the report 'could only be understood as concluding that he was a party to unethical and misleading conduct'. However, even if one could reasonably take the view the Judge had been party to unethical (which we do not assert) or misleading conduct, the mere fact he happens to be a Judge does not make him immune from fair criticism if he chooses to participate in public life.

² s 57 CM Act

The difference between the Senate and the CMC is that the Senate, as I understand it, asserts that the statutory obligation on it to act in the way that appears to it most likely to promote the University's interests (s10 UQ Act) exhausts its obligations, while the CMC asserts that in addition to the statutory obligation to promote University's interests, the University's governance should align with the ethical values of the *Public Sector Ethics Act 1994* and the general principles of open government stated in the preamble to the *Right to Information Act 2009*. A view consistent with a 2002 study of the NSW University sector by the Independent Commission against Corruption (ICAC).³

REDACTED

³ *Degrees of risk: A corruption risk profile of the New South Wales university sector*, Independent Commission against Corruption, Sydney, New South Wales. August 2002. The ICAC study found that many people working at Universities did not identify with the broader ethos of public service or recognise that they owed a public duty to the community; it identified a lack of awareness of conflict of interest issues, and a continuing culture of keeping problems quietly 'in-house', and hidden away from public scrutiny.

Pages 4 to 24 redacted

REDACTED

The Daubney submission

There are three elements to the submission on behalf of Judge Daubney:

- (1) The claim the CMC breached s 58(1) CM Act;
 - (2) The claim the CMC breached s 58 (2) CM Act; and
-

(3) The claim that the CMC, in its draft report, says or suggests or implies that Judge Daubney was a party to unethical and misleading conduct.

The third point can be dealt with shortly. The fact the judge thinks the draft report 'could only be understood as concluding that he was a party to unethical and misleading conduct' is immaterial. The mere fact he happens to be a judge does not make him immune from fair criticism if he chooses to participate in public life. As a former judge I find the attempt to privilege a judge from criticism only because he is a judge offensive, and one that does no favour to the judiciary. In any event if there is any criticism implicit in the account of what happened, it is not directed at any person but the Senate as a whole. The draft report does not make any findings of fact against the judge. I think he is mentioned in passing once as a member of the sub-committee.

Section 58 (1) CM Act

Sub-section 58(1) CM Act imposes an obligation on the Commission to proceed having 'proper regard for, and proper regard for the importance of preserving, the **independence** of judicial officers'. The word in bold print 'independence' is the operative word in the sub-section.

There was nothing done in the course of the review, or said in the draft report, that touches on the **independence** of Judge Daubney as a judicial officer. I cannot see how his **independence** as a judge is touched by anything said or done by the CMC in the course of the review or the draft report.

Mr Favell observed in his Report that 'There is no indication in the draft report that the Commission appreciated that requirement nor had such regard'. Mr Favell's observation is beside the point if it is not possible to identify anything said or done that is arguably in breach of the sub-section. The sub-section does not say the CMC must include a statement of compliance with the section in any report.

Section 58(2) CM Act

This sub-section limits the range of misconduct that may be investigated by the CMC and establishes a protocol for any investigation into alleged misconduct by a judicial officer. The CMC is only authorised to investigate misconduct that could warrant removal from office (s 58 (2) (a)); and the

sub-section specifies that the conditions and procedures of any investigation are to be settled in consultation between the Chairperson and the Chief Justice (s 58 (2) (b)).

The submission is based on a misunderstanding of the nature and purpose of the review carried out by the CMC. The CMC carried out two quite separate exercises: an investigation into possible breaches of the criminal law, and a review into the way in which the University dealt with the allegations of misconduct against its Vice Chancellor and Senior Deputy Vice Chancellor. The focus of the review was on the way in which issues of misconduct should be dealt with in a publicly funded Institution. The focus of the review was not on misconduct or ethical misbehaviour by the Senate but on issues of governance. The statutory power to conduct the review is found in the CMC's general prevention (ss 23,24) and misconduct (ss 33(a), 34(d), 35(1)) functions. The review was not an investigation into misconduct. At no time has the CMC considered or investigated an allegation of misconduct against the Chancellor, the Senate, the Senate subcommittee, or Judge Daubney.

Sub-section 58 (2) has no relevance to a review of the way in which a unit of public administration has dealt with, or deals with, misconduct because the sub-section only applies to investigations into alleged misconduct.

Because of the nature and purpose of the review we had no interest in the actions or role of any member of the Senate or the sub-committee, and in particular we had no interest in the actions or role of the Judge in the events. The entire focus of the review was on the way in which issues of misconduct should be dealt with in a publicly funded Institution. To repeat, the focus of the review was not on misconduct or ethical misbehaviour by the Senate but on issues of governance, and that is the reason the reviewers did not speak to the Judge or other members of the subcommittee. The Chancellor provided an explanation of the issues which was sufficient for the purposes of the review⁵⁰.

If the Judge wishes to 'stand shoulder to shoulder' with members of the Senate as he says, the section does not prevent him from doing so; if on the other hand he prefers to remain anonymous

⁵⁰ I understand have difficulty with the idea the review conducted was not an investigation into alleged misconduct by Judge Daubney. But there was no allegation of misconduct against Judge Daubney or any other member of the Senate (apart from the allegation of nepotism against Greenfield). One has only to ask the question "what misconduct?" to confirm the nature of the exercise.

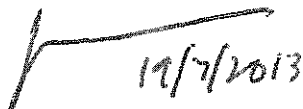
then he has only to ask not to be mentioned in the report. His name was mentioned only as a detail and his identity is irrelevant to any of the issues examined in the draft report.

Conclusion

The draft report did contain a number of errors. Often a draft report does need to be reconsidered and redrafted in the light of the submissions received at this stage of the process. This draft report is no exception.

The object of the complaint to the Parliamentary Committee was, I believe, to stop the publication of any report on what happened at the University⁵¹. I believe there is a strong public interest in the publication of a report. It is impossible not to notice that the submission by the University does not concede any fault in the way it dealt with the issues, and on my reading of the submissions the University, or at least those in governance positions at the University, do not acknowledge any broader obligation to act in the public interest⁵² in addition to the basic statutory obligation in the UQ Act to promote the University's interests.

Mr Favell upheld the principal argument advanced by the University. I have argued the unfairness argument is without merit, and that publication of an honest report on the events at the University, and how the University dealt with the issue of misconduct by its most senior officers, is in the public interest.

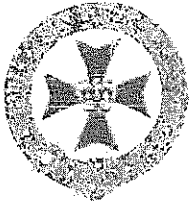
 19/7/2013

⁵¹ Submission by Story para 13.8 "For all these reasons, the Report is beyond repair. The CMC cannot address the concerns with it by "tweaking" or even significant redrafting. It is fatally flawed"

⁵² Consistently with the findings of the ICAC report into the NSW University sector: *Degrees of risk: A corruption risk profile of the New South Wales university sector*, Independent Commission against Corruption, Sydney, New South Wales. August 2002.

Appendix 5

**Letter from the Committee to Dr Ken Levy, Acting
Chairperson, Crime and Misconduct Commission,
9 August 2013**



Parliamentary Crime and Misconduct Committee

Parliament House
George Street
Brisbane Qld 4000
Ph 07 3406 7207 Fax 07 3210 8011
cmc@parliament.qld.gov.au
www.parliament.qld.gov.au/pcm

Your ref MI-11-3063/18 13/077003
Our Ref C 13/13; C13/14

9 August 2013

Dr Ken Levy
Acting Chairperson
Crime and Misconduct Commission
PO Box 3123
BRISBANE QLD 4001

Dear Dr Levy

CMC investigation into the University of Queensland

On behalf of the Parliamentary Crime and Misconduct Committee (the Committee), I refer to your letters, dated 25 June and 5 July 2013, regarding the Crime and Misconduct Commission's (the CMC) investigation into the University of Queensland (UQ).

Amended draft report

The Committee does not consider it appropriate to review the amended draft report. The Committee provided the Parliamentary Commissioner's report for your consideration. Further Committee consideration will be of the final report simultaneous to receiving a tabling request pursuant to section 69 of the *Crime and Misconduct Act 2001* (the CM Act).

REDACTED

REDACTED

Justice Daubney's complaint regarding section 58

Thank you for your response to Justice Daubney's complaint regarding section 58 of the CM Act. The Committee advised [redacted] Lawyers that it is not within the Committee's jurisdiction to negotiate or determine the scope or application of section 58. Accordingly, [redacted] Lawyers was referred to section 332 of the CM Act. The Committee, however, reserves any final opinion as to whether the CMC has acted inappropriately in relation to this matter, given the advice of the Parliamentary Commissioner to the Committee, and in regard to advice to the CMC on this issue, as referred to in the CMC's minutes of 10 and 24 May 2013.

Advice from

The Committee notes, from the minutes of the CMC's meetings on 10 and 24 May 2013 received by the Committee on 3 July 2013, that the CMC sought and received legal advice from [redacted] in relation to this matter and that he provided advice to the CMC in this matter.

The minutes of the meeting on 10 May 2013 reflect that Ms Florian, Assistant Commissioner, Misconduct, advised the CMC:

An opinion on several issues relating to this matter was sought from Three queries came back adverse to the CMC:

- *Senate member Daubney shouldn't have been investigated, due to status as a judicial officer;*

and

- *The concerns referred to the PCMC were valid and he considered that we should not proceed with publication of the draft report.*

The minutes of the CMC meeting dated 24 May 2013, state that also advised that senior CMC officers may have acted unlawfully in this investigation but a section 329 notification was not progressed as the CMC considers 's advice to contain errors of law.

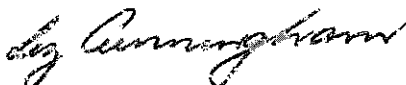
The Committee considered this issue and is concerned that it became aware of the matter only through examination of the CMC minutes. The Committee expect such a serious matter would give rise to formal advice to the Committee, along with your reasons for questioning the accuracy of the advice. The Committee resolved, in accordance with section 295(3) of the CM Act, to request, pursuant to section 295(2)(b) of the CM Act, that you report to the Committee on:

- the advice received by the CMC in relation to the conduct of the CMC in this matter to the extent it relates to the section 58 matter and the allegations that senior CMC officers may have acted inappropriately;
- why the CMC considers that advice to be wrong in fact and in law; and
- whether amended his advice following 's letter (referred to in the minutes of 7 June 2013) and if so, how and why.

The Committee intends to report to the Parliament on the CMC's handling of this matter on September 2013 and requests that you provide a copy of your finalised public report on your investigation regarding the University of Queensland by no later than Friday 6 September 2013.

Please contact the Committee's Research Director, Ms Amanda Honeyman, on if you wish to discuss this matter further.

Yours sincerely



Mrs Liz Cunningham MP
Chair

Appendix 6

**Letter from Dr Ken Levy, Acting Chairperson, Crime
and Misconduct Commission, 22 August 2013**

CRIME AND MISCONDUCT COMMISSION

GPO Box 3123
Brisbane Qld 4001

Level 2, North Tower
515 St Pauls Terrace
Fortitude Valley, Qld

Tel: (07) 3360 6060
Fax: (07) 3360 6333

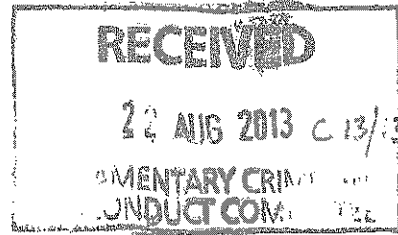
Toll Free:
1800 061 611

Email
mailbox@cmc.qld.gov.au

www.cmc.qld.gov.au

Our Reference: MI-11-3068
Contact Officer: Kaitleen Florian

22 August 2013



Mrs Liz Cunningham MP
Chair
Parliamentary Crime and Misconduct Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mrs Cunningham

RE: UNIVERSITY OF QUEENSLAND INVESTIGATION

Dear Mrs Cunningham

Thank-you for your letter of 9 August 2013 in relation to the CMC investigation into the University of Queensland.

Amended draft report

I note your comments in relation to the PCMC review of a draft report.

REDACTED

Justice Daubney's complaint regarding section 58

Your comments in relation to Justice Daubney's complaint are noted.

Advice from

I can advise that following correspondence between the CMC's general counsel and the provision of further instructions to [redacted], CMC officers met with [redacted] on 24 June 2013 and discussed many of the issues outlined further below. [redacted] was not able to write a further opinion at that time [redacted] but it was clear from that discussion that [redacted] was not familiar with all the relevant facts about the matters upon which he had provided his opinion. There were a number of matters in which [redacted] considered that he might have a different opinion if he was requested to provide a further advice.

General Counsel contacted [redacted] again on 16th August 2013 to ascertain his availability to provide an updated written opinion, but [redacted] was unable to do so in the timeframe required to respond to the PCMC.

Consequently also on 16th August 2013 the Commission resolved to brief the [redacted] QC to provide advice on a number of questions of law arising out of [redacted]'s opinion and to investigate and report pursuant to section 295(2)(b) on the conduct of the CMC in this matter to the extent that it relates to the section 58 matter and the allegations that senior CMC officers may have acted inappropriately.

A copy of the advice and report of [redacted] is attached to this correspondence.

Further, your correspondence raises a number of issues arising out of the earlier advice of [redacted] which I will address individually below:

REDACTED

- 2. The concerns referred to the PCMC were valid and the CMC should not proceed with the publication of the draft report.*

The Commission disagrees with some of the findings of law and assumptions of fact that underpins some aspects of [redacted] opinion, but as with the opinion of the Parliamentary Commissioner Mr Favell, accepts that the approach, tone and some of the content of the first draft of the public report could and should be addressed. The Commission considers that these issues have been addressed in the final draft of the public report.

- 3. Senate member Daubney shouldn't have been investigated, due to his status as a judicial officer.*

[redacted] view on the S58 issue was based on the first draft of the public report which did not set out the legal basis upon which the CMC was acting in progressing this matter at different points in time. This has been corrected in the final draft of the public report. In particular, in the absence of any information to the contrary [redacted] assumed that the CMC *investigated* Mr Daubney without complying with the procedure set out in S58. As previously advised to the PCMC in our correspondence of 25 June 2013, this was not the case, although the CMC's *review* of how the

To clarify this point
concluded that:

advice on this point was also sought and he relevantly

- There is nothing in s69 that prohibits the Parliamentary Crime and Misconduct Committee from directing the CMC to give the report to the Speaker.
- The report is an "other report" under s69(1)(b).
- The Parliamentary Crime and Misconduct Committee has an unfettered discretion to direct that it be give to the Speaker.

I note your request that the finalised University of Queensland public report be provided to the PCMC by no later than 6 September 2013. I can advise that this date will be met and the transmission of the final report to you is imminent.

Yours sincerely



KEN LEVY
Acting Chairperson

21 August 2013

Re: University of Queensland investigation and review

MEMORANDUM OF ADVICE

I am asked to advise, no later than 21 August 2013, on five questions concerning the above matter.

Item 1. Having received more detailed instructions regarding the position of Justice Daubney in relation to the CMC's review of the university's response to the forced offer, what is your opinion on the application, if any, of s58?

- 1.1. This question arises following advice from _____ concerning s 58 of the *Crime and Misconduct Commission Act 2001* ("the Act"), to the effect that it precludes investigation into the acts of a holder of an appointment in a unit of public administration, such as a member of the Senate of the University of Queensland, simply because that person also happens to be a judge. In the light of additional instructions which had not been provided to _____ I am asked to consider whether s 58 applied to the "review" process in which the CMC was engaged when it examined the university's response to the original complaint.
- 1.2. These instructions show that on 21 December 2011, the Commission resolved to undertake four separate tasks:
 1. A misconduct investigation into a complaint made by member of the public to the Queensland Police Service, which was referred to the CMC under section 38 of the Act.
 2. A review of the broader aspects surrounding the University's handling of the allegations relating to a forced offer to a potential student where there was an apparent conflict of interest. (The instructions state that in undertaking that review the CMC was looking at, amongst other things, how and when officers of the University were informed of the allegations against Professors Greenfield and Keniger, and the University's response to the allegations, including the public responses that were made).
 3. A referral of any relevant material and information to the Queensland Ombudsman that is considered relevant to any activities appropriate to his jurisdiction.
 4. A quality review of the University's management of official misconduct matters.
- 1.3. The misconduct investigation was in relation to a complaint from a member of the public that three named persons, Greenfield, Keniger _____, had committed criminal acts in relation to certain admissions of students to the medical faculty.

- 1.4. Considerable supporting evidence has been supplied to me, including correspondence and running sheets, showing that the distinction between these various functions was maintained within the CMC.
- 1.5. Clearly Justice Daubney was never the subject of any criminal investigation. The only aspect of the CMC's enquiries in which he had potential involvement was the university's handling of the allegations. A review of that aspect was justified, indeed required, by the CMC's functions and objectives stated in sections 4(1)(b), 5(3), 23, 24, 35 and 48 of the Act. It was a distinctly different exercise from that of a criminal investigation. Indeed, none of the 22 members of the Senate (other than the Chancellor and the suspect Vice-Chancellor) were even interviewed.
- 1.6. I am further instructed that at no time was the Senate, or any of its members (other than Greenfield) suspected of official misconduct with respect to the way in which they dealt with the allegations about the forced offer. The instructions assert that "There was no investigation, as that term is used in the CM act by the CMC of the Senate, or the Senate subcommittee". But that, with respect, begs the question, and to some extent pre-empts the answer that is sought. I accept however that clear administrative distinctions are maintained within the CMC between investigations and reviews. The answer however will depend not on practice but on a question of law.
- 1.7. There is no clear indication in the Act that a review may not be regarded as an investigation.
- 1.8. The real question is whether there was "*a commission investigation*" that was, or would be, "*in relation to the conduct of a judicial officer*" within the meaning of s 58(2) of the Act.
- 1.9. The term "*commission investigation*" is not defined. The verb "*investigate*" is defined to include "examine" and "consider", but that is a separate term, and is only of passing relevance.
- 1.10. It is perhaps arguable that the section is concerned with investigations focused on misconduct on the part of the judicial officer (such as a misconduct investigation under s35(1)(f) or (g)), but there is no good reason to so confine it. The words "*to the extent that ...*" in s 58(2) show that it is also concerned with any part of an investigation. The ordinary meaning of "*investigation*" is capable of covering most if not all of the CMC's functions that involve search, enquiry or examination. Also, the words "*in relation to*" import a very wide range of connection. Given Justice Daubney's membership of the University senate, it seems to me that the CMC's review of the university's handling of the complaint was always going to be one which would in due course require investigation (according to the natural meaning of that worked) "*in relation to the conduct of a judicial officer*". It is capable of being regarded as a "*commission investigation*" for the purposes of the section. In short, s 58 applies to it. To this extent (ie the extent to which it involved Justice Daubney's conduct), such investigation could not be made unless an until appropriate procedures were put in place by consultation with the Chief Justice, and consideration given to the question whether the conduct under investigation was sufficiently serious to justify dismissal.
- 1.11. One may share the concern noted in Mr Nase's memorandum that "*The mere fact he happens to be a judge does not make him immune from fair criticism if he chooses to participate in public life*", and that as a former judge he finds attempts to privilege a judge from criticism only because he is a judge to be offensive. However this is no answer to the words that have been chosen in the drafting of the act, which seem to

immunise judges who are involved in units of public administration from all CMC investigations unless and until a special procedure is put into place.

- 1.12. In short, "commission investigation" includes a review such as the review of the university's handling of the complaint. If such a review involves examining the propriety of the conduct of a judge who happened to be a member of the relevant subcommittee or Senate it would certainly be "*in relation to*" the conduct of a judicial officer.
- 1.13. The primary objective of section 58 seems to be to protect judges from having to deal with petty complaints from disaffected litigants, and generally from complaints about misconduct in the exercise of the judicial office, but plainly it also applies to non-official or personal misconduct that is not associated with judicial work.
- 1.14. It is noted in any event that section 58 does not entirely preclude an examination of the conduct of a judge in such a review. It only limits such exercises to cases where the impugned conduct is serious enough to warrant dismissal and requires a special procedure to be settled in consultation between the chairperson and the Chief Justice before the investigation may proceed into the judge's conduct. Furthermore it does not stand in the way of proper investigation of the other members of the body of which the judge is a member.

Answer to item 1:

- i. Section 58 did apply to the "review" that was conducted.
- ii. To the extent to which it investigated Justice Daubney's conduct it was unauthorised, because the prescribed procedure was not followed, and the conduct to be investigated was probably incapable of satisfying the requirements of section 58(2)(a).
- iii. The extent to which such investigation actually involved examination of Justice Daubney's conduct seems to have been minimal.
- iv. The more detailed instructions that have now been supplied do not falsify opinion on this point.

Item 2. In the event that you formed the view that s 58 applies to the conduct of the review, insofar as it relates to Justice Daubney – do you see any impediment to the tabling of the public report in its current form?

- 2.1. It is noted that the CMC has taken into account submissions made on behalf of Justice Daubney and others, and has re-drafted the report. The Judge's name has been redacted from the investigation report along with the names of the other subcommittee members, and various innuendos concerning the conduct of a number of persons have been omitted.
- 2.2. I am in no position to approve or otherwise "settle" the terms of the amended report, but am prepared to say that, leaving aside the Chancellor, the report must not cast aspersions on the conduct of the members of the subcommittee and Senate
- This is obvious from the fact that none of the 22 members of the Senate were interviewed (apart from the Chancellor and Vice-Chancellor), and there may be many points of justification of their action which have been neither ascertained nor considered. So far as I can see, the present report casts no such aspersions, and is primarily motivated by a desire to expose problems that arise in large institutions in dealing with misconduct by senior management.
- 2.3. However I have found some difficulty in discerning sufficient relevance in the annexure, Appendix 2, of a selection of university emails. The question, as noted later under item 5,

is whether such publication is really necessary for the enlightenment of other public bodies concerning the handling of public sector misconduct or other legitimate purposes. It could be seen as a backdoor method of casting aspersions, and I doubt that it assists in achieving the overall objectives of the report.

- 2.4. So far as I can see, the report contains no imputations concerning Justice Daubney, and no part of it is the product of any infringement of section 58.
- 2.5. The CMC's investigation or review of the conduct of the members of the Senate (other than Justice Daubney) in their dealing with the complaint was within the CMC's power. The only matter that was precluded from investigation was "the extent" to which the investigation would concern his conduct.
- 2.6. I agree with the following observation in opinion, with reference to section 58:

That does not mean, of course, that the fact that a judge is one of a number of members of a body like the University Senate would preclude the Commission from investigation the decisions and proceedings of such a body. Practical problems will undoubtedly intrude into any such investigation of a judge has been involved in relevant proceedings in order to exclude him or her from the scope of the investigation. However, the presence of a judge would not confer immunity upon anybody else who might be the subject of an investigation.

Answer to item 2:

No, subject to comments about annexure number 2.

REDACTED

REDACTED

Item 5. Is it your opinion that on its proper construction s69 of the CM Act prohibits the Parliamentary Committee directing the CMC to give the enclosed report to the Speaker?

- 5.1. The making of reports is an important means of performance of the CMC's functions, and a number of sections deal with their transmission. For present purposes the most relevant sections dealing with this function are Ss 24(i), 49, 64 and 69.
- 5.2. Section 24 states how the commission performs its "prevention function" and expressly includes "*by.. reporting on ways to prevent .. misconduct*".
- 5.3. Section 49 deals with misconduct complaints. In the present matter a specific report of the misconduct investigation was sent, as contemplated by the section, to the DPP, which in due course, declined to prosecute. That section confines transmission of the report to limited recipients such as the DPP, Chief judges and CEOs of units of public administration.
- 5.4. Obviously the present report is not of the kind contemplated by section 49, and it is not authorised under that section. It is true that some of the subject matter of the present report overlaps with that which was contained in the s 49 report, but there is no prohibition of this. The recounting of the evidence gathered by
and of the conflicting evidence concerning the forced offer, some of which would have been gathered during the misconduct investigation, is necessary background for the consideration of other issues. Nothing in s 49 prohibits the use of such information in this way. The consequence is that the right to publish the present report must be found somewhere else in the Act.
- 5.5. Section 64 confers a general power to "*report in performing its functions*". Some requirements are specified, including the making of recommendation and an objective summary. Comments are specifically permitted on matters relevant to its recommendations. It is a very broad, largely unfettered power. The functions and objectives that the CMC may properly attempt to achieve by means of reports would include those mentioned in sections 4(1)(b), 5(3), 23, 24, 33, 34, 45, 47 and many more.

- 5.6. To the extent that the present report is directed towards performing its functions it is clearly authorised under section 64.
- 5.7. Section 69 deals with reports that may be tabled in Parliament, with the privileges that attach to such tabling.
- 5.8. The question here is whether this report is a "*commission report*" under s 69.
- 5.9. That term is used twice in the section, once in subs (1), and again in subs (3). Such reports include "*a research report or other report that the parliamentary committee directs be given to the Speaker*" (S 69(1)(b)). It is obviously not a research report, but equally obviously is an "*other report*". As indicated above, it is authorised by s 64.
- 5.10. The Parliamentary Committee here has a discretion to direct that it be given to the Speaker or to decline to do so.
- 5.11. If the Parliamentary Committee directs that it be given to the Speaker, the report will fulfil the definition of "*commission report*", and under subs (3), assuming that it is signed by the Chairperson it must be given to the Speaker and other named officers. Such a procedure gives to the report the privileges that attach to Parliamentary reports.
- 5.12. Such privileges are not to be abused. The CMC as a responsible public body will be confronted from time to time with borderline cases where its duty to demonstrate problems in the management of public sector misconduct will conflict with its duty to minimise the publication of defamatory or otherwise embarrassing material. Ethical conflicts will need to be resolved. It seems to me that in the present matter conflicts of that kind did arise, and hopefully they have now been satisfactorily settled.

Answer to item 5:

- i. There is nothing in s 69 that prohibits the Parliamentary Committee from directing the CMC to give the report to the Speaker.
- ii. The report is an "*other report*" under s 69(1)(b).
- iii. The Parliamentary Committee has an unfettered discretion to direct that it be given to the Speaker.

The Parliamentary Crime and Misconduct Committee's request under s.295 of the act in relation to the question of whether CMC officers acted inappropriately in relation to questions 1, 3 and 4 above has been answered in this opinion.

You have my permission to quote from it in your response or to use this opinion in your response to that request.

I advise accordingly.