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Our Ref: A1252145

19 March 2024

The Hon Catherine Holmes AC SC
Reviewer
Independent CCC Publications Review

CCCReportingReview@justice.qld.gov.au

Dear Hon Holmes

Independent review into the Crime and Corruption Commission's reporting on the performance of its corruption functions

I refer to your correspondence dated 27 February 2024 and thank you for the invitation to make a submission to the Independent review into the Crime and Corruption Commission's reporting on the performance of its corruption functions.

The corruption function of the CCC

I note that the preamble to the terms of reference for your inquiry outlines the functions of the Crime and Corruption Commission (CCC), including continuously improving the integrity of, and reducing the incidence of corruption in the public sector.

In my submission, the rationale for and importance of this function cannot be separated from the reporting issue. That is because the function cannot be properly discharged without the ability to report publicly on its investigation when the CCC believes it desirable and in the public interest.

The rationale for a permanent commission of inquiry focussed on anti-corruption (and sometimes organised crime) in Queensland lays in the failure of our system of government to otherwise adequately deal with misconduct or corruption.

History demonstrates that permanent commissions of inquiry such as the CCC have usually arisen out of revelations of misconduct and corruption that existed and flourished because of the inadequacies of our system of government. In the case of the CCC, its genesis lay in the Fitzgerald Inquiry and Report.[1]

[1] Report of a Commission of Inquiry pursuant to Orders In Council 3 July, 1989
https://www.ccc.qld.gov.au/sites/default/files/Docs/Publications/CCC/The-Fitzgerald-Inquiry-Report-1989.pdf

As the Fitzgerald Report noted, Queensland has long had a corruption problem:

> *For many years, Queensland has had a corruption problem. The public perception of the problem, in earlier days, centred upon the Police Force. Police corruption was common knowledge, particularly among police, and there was a general acceptance that nothing could be done because police, police union officials and politicians were either involved or would resent the adverse publicity which would result if the problem were brought into the open. As the community grew more affluent, a suspicion grew among those in business that dealings with the government were not always as open and straight forward as they should have been.*
>
> *Successive governments and their departments, including the Police Force, have either failed to eradicate corruption or ignored or even condoned it. Meanwhile, the community's confidence in public institutions has been undermined.*
>
> *Corruption needs to be set into its local historical context. Its organic nature then becomes readily apparent. In Queensland, it was initially stunted by an absence of widespread affluence throughout the community, but it flourished as wealth became available in conjunction with a number of other significant factors, such as overt political support for police.*[2]

We cannot ever become complacent that corruption, in some form, will not reappear. Indeed, we should never assume that corruption is not occurring, simply undetected.

In Australia, permanent commissions of inquiry have been established to address the deficiencies of the Westminster system of government inherent in small, largely government dominated parliaments with strong party discipline (which I call the 'Westminster paradox') and which leads to inadequate oversight or lack of accountability of government[3].

The 'Westminster paradox' is more acute in Queensland than other states.

In bicameral parliaments, the scrutiny function of government can be undertaken by an upper house. In a unicameral parliamentary system like Queensland, scrutiny is problematic.[4] Unicameralism, coupled with single member seats, has led to the Parliament nearly always being dominated by the government of the day. This has consequential effects. For example, the parliamentary committee system which in theory assists the parliament in the function of accountability over government is dominated by government Chairs and government members. At the end of the day, what a parliamentary committee investigates and how it investigates will be subject to the will of the majority and sometimes those decisions are confidential to committee members[5].

A weaker unicameral Parliament and a much stronger, less accountable executive arm of government, has led to poor political culture. There are numerous examples of governments of both political complexions taking political advantage, not exercising restraint and using their numbers to take actions that are less than accountable or transparent[6].

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[2] Note 1, page 30.
[3] See N Laurie 'Mount Erebus to Ann Street: Forty years of judicial supervision of ad hoc and permanent commissions of inquiry and the intersection with parliamentary privilege and doctrines of mutual respect'
[4] Neil Laurie 'Life After (or Winner Takes All)', Queensland History Journal Volume 25, No. 3, November 2022 pp.260 – 276 at p.261-262 and 274.
[5] See Standing Orders 211, 211A and 211B of the *Standing Rules and Orders of the Legislative Assembly*.
[6] See Note 4.

This political culture seeps into the public sector generally. The parliament, the judiciary, the media and processes such as right to information are not sufficient to safeguard against misconduct or corruption.[7]

Transparency of Crime and Corruption Commission investigations and/or reporting

In my submission, it is not only necessary for the CCC to be able to investigate allegations of misconduct and corruption, it is also vital that it have the ability to report on such matters.
I have long argued that there is a need to increase the CCC's transparency, so that the general public and the public sector can understand what the CCC is doing. Whilst confidentially may be important to prevent any ongoing investigation being jeopardised, confidentiality of the CCC's involvement in a matter should be able to be detailed when that matter is concluded.[8]

The CCC receives many thousands of complaints a year. The CCC will only investigate a small number of those complaints, most being referred to public sector entities for investigation (with those entities sometimes being required to be reported back to the CCC), and others not being progressed for failing to reach a requisite standard or benchmark.

The CCC will never be able to report about every matter it investigates. That is neither required nor desirable. However, the CCC should have the independence and ability to report about a matter if the CCC believes that a report on that matter is in the public interest.

What should guide whether it reports on a matter?

To borrow phraseology from Freeburn J,[9] the CCC should be able to report:

> (a) to inform about matters relevant to the standards of integrity and conduct in units of public administration; or
> (b) on its assessment of the appropriateness of systems and procedures to prevent misconduct, or
> (c) on matters to ensure public confidence in the integrity of units of public administration, and
> (d) on significant matters investigated to ensure public confidence in the way in which corruption is dealt with.

The High Court's interpretation of the *Crime and Corruption Act 2001*[10] means at least 32 commission reports and 256 media releases over 26 years would never have occurred.[11] The significance of the decision and its poor policy implications for the future operation of the CCC lays in the examination of that list. Public information about the outcomes of numerous matters of high public importance and interest are at stake.

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[7] For further elucidation see Submission 036, 27 April 2021, Parliamentary Crime and Corruption Committee, Five-year review of the Crime and Corruption Commission's activities, Queensland, 27 April 2021.Accessed on 20 September 2023 Accessed at https://documents.parliament.qld.gov.au/com/PCCC-8AD2/RCCC-21CB/submissions/00000036.pdf.
[8] Review of the Crime and Corruption Commission's activities – The Clerk of Parliament, Submission 036 27 April 2021
[9] *Carne v Crime and Corruption Commission* [2022] QCA 141, [134]
[10] *Crime and Corruption Commission v Carne* [2023] HCA 28
[11] Letter from the Chair of the Crime and Corruption Commission to the Chair of the Parliamentary Crime and Corruption Committee, Parliament of Queensland, dated 20 October 2022, Accessed on 20 September 2023 Accessed at: https://documents.parliament.qld.gov.au/com/PCCC-8AD2/C-A72F/221020%20-%20IN%20-

The High Court's reading of the CCC statute means that the CCC's only power to report would be if there were a potential for criminal charges, or for disciplinary action. Reports relating to criminal charges or disciplinary action would then only be to relevant entities that could progress charges. Charges may never progress for reasons of evidence or prosecutorial discretion.

The public may know the CCC commenced an investigation, but may never know the outcome of the investigation. How can the public have confidence in the integrity of the system if there is no public reporting of outcomes? How can there be learnings from the investigation if there is no report on the investigation?

It must be stressed that there will be serious issues raised and investigated but found to be unproven. There will also be serious matters investigated that although no wrongdoing to a criminal or disciplinary standard is found; there are learnings from a systems point of view.

Without statutory amendment, the public will remain 'in the dark' about the outcomes of a large number of corruption investigations where a decision does not result in criminal proceedings but nonetheless contain lessons for, and usually recommendations to reduce the incidence of corruption or misconduct in, Queensland's public sector. Also, the very real benefit in some people under investigation, who may have been wrongly accused or slurred, to have a public report clearing their name cannot also be understated.

Should we be so protective of individual rights (reputation) that it keeps the public in the dark about matters of corruption and misconduct by public officials? Should the public not be able to judge for themselves the conduct of public officials by knowing the factual circumstances of an issue and the behaviours that occurred?

Safeguards

Although I advocate strongly for the ability to report, I do not endorse the CCC making findings of corrupt conduct or criminal behaviour against individuals in a public report (as per the NSW ICAC). Other more appropriate bodies should decide such matters.

However, the CCC should be able to report a narrative of facts, expose broad behaviour and corruption risks and advise that they have referred matters to the appropriate body. It is necessary for the public to be appraised of the wider facts of a matter, failures of systems, the behaviours of public officials and an appreciation of the mischief at hand.

Current provision

Despite the High Court's findings in *Carne v Crime and Corruption Commission* [2022] QCA 141, there are numerous reasons why the approach set out in s 69 CC Act was flawed policy.

Legislative issue – separation of powers

The approach of having draft reports sent to the oversight committee, essentially for approval to table, set up an inevitable conflict between the courts and parliament such as occurred in *Carne v Crime and Corruption Commission* [2022] QCA 141.

Furthermore, a parliamentary committee is not the appropriate body to determine pivotal issues such as whether procedural fairness was provided or if the CCC is acting *ultra vires*. These are issues for the courts, not parliament.

Legislative issue - independence

Furthermore, the insertion of s.69 resulted in the diminution of the CCC's reporting powers and thus its independence.

Section 2.18 and 2.19 of the original *Criminal Justice Act 1989* provided:

> ***2.18 Commission's reports.***
> *(1) Except as is prescribed or permitted by section 2.19, a report of the Commission, signed by its Chairman, shall be furnished-*
> *(a) to the chairman of the Parliamentary Committee;*
> *(b) to the Speaker of the Legislative Assembly; and*
> *(c) to the Minister.*
> *(2) The Commission may furnish a copy of its report to the principal officer in a unit of public administration who, in its opinion, is concerned with the subject-matter, of the report.*
> *(3) If a report is received by the Speaker when the Legislative Assembly is not sitting, he shall deliver the report and any accompanying document to The Clerk of the Parliament and order that it be printed.*
> *(4) A report printed in accordance with subsection (3) shall be deemed for all purposes to have been tabled in and printed by order of the Legislative Assembly and shall be granted all the immunities and privileges of a report so tabled and printed.*
> *(5) A report received by the Speaker, including one printed in accordance with subsection (2), shall be tabled in the Legislative Assembly on the next sitting day of the Assembly after it is received by him and be ordered by the Legislative Assembly to be printed.*
> *(6) No person shall publish, furnish or deliver a report of the Commission, otherwise than is prescribed by this section, unless the report has been printed by order of the Legislative Assembly or is deemed to have been so printed.*
> *(7) This section does not apply to an annual report of the Commission referred to in section 7.10.*
>
> ***2.19 Commission's report on court procedures and confidential matter.***
> *(1) A report of the Commission relating to procedures and operations of any court of the State; procedures and practices of the registry or administrative offices of any court of the State, shall not be furnished as prescribed by section 2.18 but shall be furnished-*
> *(a) to the Chief Justice of the State, if the report deals with matters pertinent to the Supreme Court;*
> *(b) to the Chairman of District Courts, if the report deals with matters pertinent to District Courts;*
> *(c) to the judicial officer, or the principal such officer if there be more than one, in the court, or the system of courts, to which the matters dealt with in the report are pertinent.*
> *(2) Notwithstanding any other provision of this Act, if the Commission is of the opinion that information in its possession is such that confidentiality should be strictly maintained in relation to it-*
> *(a) the Commission need not make a report on the matter to which the information is relevant; or*
> *(b) if the Commission makes a report on that matter it need not disclose that information or refer to it in the report.*

The above provisions were not without their difficulty, for example they did not foreshadow the CCC needing to publish reports that were not needed to be tabled in the Assembly. But s.2.18 did mean that the CCC itself determined the provision of a report to the Legislative Assembly.

The own initiative reporting process still preserved the duties of the CCC to act in the public interest and ensure procedural fairness to those the subject of inquiry.[12]

In a submission to the Parliamentary Crime and Corruption Committee in 2021 I pointed out that the current reporting provisions are complicated and convoluted (ss.49, 64, 65 and 69).[13]

I saw no difficulty in the reporting provisions contained in ss.49, 64 and 65, but I saw no valid reason for the restrictions placed on the CCC by s.69(1). In accordance with s.69(1) the CCC is impliedly restricted to only reporting directly where there has been a public hearing on a matter. All other reports (a research report or other report) must first receive the sanction of the committee. This requirement impinges on the independence of the CCC and places the committee in an invidious position. I stress that the CCC has a duty to afford procedural fairness, and it is for the CCC to ensure the discharge of that duty, it is not for the PCCC to warrant that the CCC has provided procedural fairness.

I have forever been puzzled as to why the reporting section was changed. The requirement to limit reporting to matters where there had been a public hearing or where a matter was approved by the committee pre-dates the current 2001 Act and has its genesis in amendments to the *Criminal Justice Act 1989* by the *Criminal Justice Legislation Amendment Bill 1997.* That bill amended both s.26 and 27 of the then act (which were the successors of sections 2.18 and 2.19 of the original *Criminal Justice Act 1989* detailed above).

The explanatory notes to the bill provide the following information about the two amending provisions:

> *Clause 16 provides for the amendment of section 26 (Commission's reports) in order to clarify the commission's obligation to furnish reports and to achieve the parliamentary committee's recommendations in reports 13 and 38 that there should be a definition of "a report of the Commission" for the purposes of section 26.*
>
> *Clause 17 provides for the amendment of section 27 (Commission's report on court procedures and confidential matter) in accordance with recommendations of the parliamentary committee. The second parliamentary committee concluded that s.27(2) has the potential to reduce the efficiency of the accountability process and the capacity of the parliamentary committee to review the commission. The current parliamentary committee was concerned that the commission is not required to advise the committee of the reasons why it deems a matter to be confidential and may not inform the parliamentary committee that it has withheld information. The amendments permit the disclosure of confidential information to the parliamentary committee, the Minister or the Speaker. The amendments provide a procedure in which the commission may refuse to disclose information to the parliamentary committee, but must disclose the reasons for the decision as to non-disclosure. The amendment establishes a register of information withheld under this provision and provide for inspection of that register.*[14]

It is correct that the parliamentary committee had made commentary about and recommendations concerning s.27 of the then *Criminal Justice Act 1989* in reports in 1997[15] and 1991.[16] However, I was never able to find any justification for the amendment to s.26 in reports of the parliamentary

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[12] *Ainsworth v. The Criminal Justice Commission*
[13] See Note 7.
[14] https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-1997-392
[15] https://www.parliament.qld.gov.au/documents/committees/PCCC/1994/three-year-review-94/rpt-26-210295.pdf see recommendation 27 and commentary at p.210
[16] https://www.parliament.qld.gov.au/documents/committees/PCCC/1991/Review-of-the-operations-1991/rpt-13-031291.pdf see recommendation 13

committee. Indeed, in the 1991 report the parliamentary committee simply recommended the following:

> *The Committee recommends that as a matter of practice the Criminal Justice Commission should in investigations which culminate in a public report and in which individuals are likely to be singled out, give notice to affected persons of allegations likely to be made against them and provide them with the opportunity to be heard (in the sense of an opportunity to respond) in relation to those allegations before the report is published.*[17]

The report of the parliamentary committee in 2001[18] noted that the CCC had raised the difficulties inherent in the then s.26 provision:

> *15.6.3 Analysis and comment - definition of 'report of the Commission'*
>
> *The CJC has previously expressed concern about the definition of 'report of the Commission' under section 26(9) of the Act. The CJC, in a letter dated 23 November 1999, has submitted that section 26(9), as it is presently drafted, 'arguably limits the Commission to tabling reports only where there has been an investigative hearing, or where the PCJC has directed that a report be tabled'. The CJC has further submitted that it is inappropriate that it cannot table a report in Parliament (other than a report relating to a matter where investigative hearings were held) without a direction from the Committee.*
>
> *The CJC has further submitted that:*
>
> *It is not difficult to envisage that the Commission might wish to table a report in circumstances where both sides of politics might have some interest in declining to give such a direction.*
>
> *The CJC has suggested the following amendments to subsections (9)(a) and (9)(b) of section 26 to define 'report of the Commission' as:*
>
> > *(a) a report authorised by the Commission to be furnished in accordance with subsection (1) other than a report under section 33;*
> > *(b) a report prepared by the Commission that the Parliamentary Committee directs the Commission to furnish in accordance with subsection (1).*
>
> *The CJC had submitted that its suggested amendment:*
>
> > *to section 26(9)(a) would allow the Commission to table any report which it considered should be made public, including reports on matters where investigative hearings had been held (except reports under section 33);*
> >
> > *to section 26(9)(b) would allow the Committee to direct that a report prepared by the Commission should be tabled, where it considered it appropriate and where the Commission had not already determined to table the report under subsection (a).*
>
> *Section 27 would still allow the Commission to report separately on confidential matters in the case of such a direction.*

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[17] https://www.parliament.qld.gov.au/documents/committees/PCCC/1991/Review-of-the-operations-1991/rpt-13-031291.pdf see recommendation 12

[18] https://www.parliament.qld.gov.au/documents/committees/PCCC/2001/three-year-review-01/Report55-3yrReview.pdf see pages 320-323

The Committee gave the CJC's submission careful consideration. The Committee was prepared, in principle, to support the CJC's suggestion, but on one proviso only. The Committee considered that prior to tabling of a report (falling under the redefined section 26(9)(a)), the Committee should be provided, on an embargoed basis, with an advance copy of a CJC report intended for tabling (other than a report on a hearing conducted by the CJC under section 25). This option is consistent with the current practice in respect of research and other reports publicly released by the CJC. The Committee was of the view that if the CJC maintained its position that the definition be clarified, that an embargoed CJC report intended for tabling, should be provided to the Committee, for example five days in advance of tabling (or such lesser period as agreed), and that the Committee simply have a right to make comments to the CJC in respect of any such report, prior to tabling.

The Committee is not seeking a right to veto or otherwise prevent the CJC from tabling a report in the Parliament. The Committee firmly believes that any such action by a Parliamentary Committee would be highly inappropriate.

The CJC, during the Committee's recent public hearings in respect of this review, has clarified its position in respect of the issue of an appropriate definition of a 'report of the Commission'.

The CJC Chairperson, Mr Butler SC stated:

> *The Commission has considered this from time to time. I think our view has changed, because it is a very difficult section. Because of the way in which it is structured, any change to it can give you quite unexpected results in terms of the ability to produce reports. After a great deal of deliberation on it, we determined that it is probably better to leave it the way it is rather than create some further anomaly in attempting to improve it. It seems to have worked in practice in recent times, certainly in the relationship between the CJC and this Committee. I do not see any reason why it could not work in practice in the future. It might be a little inconvenient for the Committee to find that it has to consider some reports before they can be provided to the Speaker, but that might be better than a situation which creates other problems.*

The Committee considers that, rather than seek an amendment to the Act, a more appropriate course may be to consult with the CJC with a view to issuing an appropriate guideline to the CJC pursuant to section 118A of the Act, to require the CJC, prior to tabling a report pursuant to section 26, to provide the Committee on an embargoed basis with an advance copy of its report intended for tabling (other than a report on a hearing conducted by the CJC under section 25).

I submit that if you agree to enable the CCC to report on matters that the successor provision to s.69(1) would enable the CCC to decide when reports should be tabled pursuant to the section. The ability to report <u>should not</u> be contingent on the approval of a parliamentary committee. As the CCC in a previous incarnation submitted, it is not difficult to envisage that the CCC might wish to table a report in circumstances where both sides of politics might have some interest in declining to give approval. Similarly, a government majority could withhold such approval.

How to address reporting

One way to address the problem is by amending the CC Act as follows:

- Amend s35(1) by adding to the list of how the commission performs its corruption functions, reporting to the parliament about its investigations into a complaint, information or matter under ss64 and 69.
- Amend s49 of the Act by including a new subsection that provides that if the CCC makes a report under s49 it does not preclude the CCC also making a report under s64 and s69.
- Amend s64 by inserting a new provision which provides that to remove any doubt, s64(1) applies to a commission report about its corruption functions, and includes the ability to report about its investigations whether or not a report has been made under s.49 and whether or not criminal or disciplinary proceedings have been commenced.
- Amend s69 to revert to a process for tabling CCC reports similar to the previous *Criminal Justice Act 1988* to allow the CCC to report directly to parliament, rather than through the PCCC.
- Provide a provision that explicitly provides for a process for judicial oversight of reports before tabling. Features of such a provision could include:
    - That the CCC has an obligation to provide any person to be adversely mentioned in a report under s.64, or any other report, procedural fairness in the preparation of the report.
    - A draft report must be provided to any person adversely mentioned in a report and that person provided a period to consider, make submissions or make application to the Supreme Court as regards the report.
    - If a person makes submissions and the CCC still proposes to table the report and the adverse comment, the CCC must ensure the person's submissions are fairly stated in the report.

Yours sincerely

Neil Laurie
The Clerk of the Parliament

Mount Erebus to Ann Street: Forty years of judicial supervision of ad hoc and permanent commissions of inquiry and the intersection with parliamentary privilege and doctrines of mutual respect

Neil J Laurie

The Clerk of the Queensland Parliament

Abstract: This paper examines the nature of and the public interest in establishing both ad hoc and permanent commissions of inquiry, the evolving application of the principles of procedural fairness in the last forty years, the public policy issues that are consequent upon judicial supervision of commissions, including the effects of such supervision on the functions and purpose of commissions and the effect on the information made available to the public and parliament. It details the background to and ruling in the recent High Court case of *CCC v. Carne*,[1] and considers the doctrines of mutual respect and parliamentary privilege.

INTRODUCTION

On my library shelf, I am lucky to have a copy of book titled *Royal Commissions and Boards of Inquiry* written by Leonard Hallett and published in 1982.[2] This was the first comprehensive Australian text outlining the legal and procedural issues associated with commissions of inquiry.

Of course, Hallett's work is now showing its age. The publication of Hallett's work was coinciding with the rapid growth of the field of administrative law in Australia and the

[1] *Crime and Corruption Commission v Carne* [2023] HCA 28.

[2] Leonard Arthur Hallett, *Royal Commissions and Boards of Inquiry*. Sydney: Law Book Company, 1982.

development of the principles and increasing application of procedural fairness (natural justice) to administrative decisions in Australia. The work pre-dates the rise of permanent, independent commissions of inquiry in Australia.

This paper examines the nature of and the public interest in establishing both ad hoc and permanent commissions of inquiry, the evolving application of the principles of procedural fairness in the last forty years, the public policy issues that are consequent upon judicial supervision of commissions, including the effects of such supervision on the functions and purpose of commissions and the effect on the information made available to the public and parliament. It details the background to and ruling in the recent High Court case of *CCC v Carne*,[3] and considers the doctrines of mutual respect and parliamentary privilege.

ROYAL COMMISSIONS

Hallett notes that Royal Commissions are one of the oldest institutions of government, generally reserved for particularly important inquiries.[4] They are tools of the executive branch of government, but have powers normally only associated with the judicial branch of government.[5] They do not decide issues, make decisions or affect the legal status of persons as do courts, but in conducting some inquiries they act in a manner similar to courts.[6] It is the exclusively 'informative function' that gives them their special character. The primary function of a Royal Commission is to inform government.[7] Commissions make reports and do not make determinations which alter legal relationships.[8] Investigatory Royal Commissions are concerned about finding and exposing the facts, rather than settling disputes between parties.[9]

[3] *Crime and Corruption Commission v Carne* [2023] HCA 28.

[4] Hallett, *Royal Commissions and Boards of Inquiry*, pp.16-18.

[5] Hallett, *Royal Commissions and Boards of Inquiry*, pp.22-23.

[6] Hallett, *Royal Commissions and Boards of Inquiry*, pp.22-25 and 179-182.

[7] Hallett, Royal Commissions and Boards of Inquiry, pp.8-16.

[8] Hallett, *Royal Commissions and Boards of Inquiry*, pp.22-25 and 179-182.

[9] Hallett, *Royal Commissions and Boards of Inquiry*, pp. 12-14.

THE RISE OF THE PERMANENT COMMISSION OF INQUIRY

Hong Kong's Independent Commission of Inquiry (ICAC), established in 1974 was the model for permanent, independent commissions. The trend to establish such bodies started in Australia in the late 1980s, and two examples will suffice for current purposes. Community concern about integrity in the New South Wales (NSW) public sector and the exposure of corruption among government ministers, within the judiciary and at senior levels of the police force led to the creation of the NSW ICAC in 1988,[10] which began operating in March 1989.[11] Revelations of police misconduct, ministerial misconduct and maladministration in government by the Fitzgerald Inquiry in Queensland led to its report recommending the creation of Queensland's Criminal Justice Commission (CJC) and that body came into existence on 31 October 1989.[12]

Prasser, writing in 2021, identifies that every State and Territory in Australia has a permanent anti-corruption body but notes that there is considerable variance between the form and functions of those bodies.[13]

The reasons for Permanent Commissions of Inquiry

The reasons for Permanent Commissions of Inquiry focussed on anti-corruption (and sometimes organised crime) largely lays in the failure of our system of government to adequately deal with misconduct or corruption.

History demonstrates that they have almost always arisen out of revelations of misconduct and corruption that existed and flourished because of the inadequacies of our system of government. They are established to address what former Australian

[10] Independent Commission Against Corruption, New South Wales, 'History' Accessed 20 September 2023, at: <https://www.icac.nsw.gov.au/about-thenswicac/overview/history>.

[11] *Independent Commission Against Corruption Act 1988* (NSW).

[12] *Criminal Justice Act 1989* (Qld).

[13] Scott Prasser, *Royal Commissions and Public Inquiries in Australia.* 2nd Edition. LexisNexis Australia 2021.

Chief Justice, Sir Harry Gibbs, has been attributed in describing as: 'the symptoms of a … general illness of the body politic'[14]

In my submission, they have been established to address the deficiencies of the Westminster system of government inherent in small, largely government dominated parliaments in Australia with strong party discipline (which I call the 'Westminster paradox') and which leads to inadequate oversight of government.

Of course, permanent commissions of inquiry bring about issues that are not inherent in ad hoc commissions. These issues include the problem of incumbency and the development of their own culture,[15] clashes with parliamentary oversight bodies and being increasingly held by courts to be acting outside of jurisdiction or their statute.

The architect of the CJC, Tony Fitzgerald QC, recently sat as a commissioner reviewing the Crime and Corruption Commission (CCC), the CJC's successor. The report of which he co-authored made it clear that a body such as the CCC still has relevance today:

> *While the form and function of the Crime and Corruption Commission (CCC) have changed over the past three decades, the organisation still has the central role in Queensland's integrity landscape envisaged in the 1989 Fitzgerald Report and remains fundamental to combating major crime and corruption in the state.*
>
> *For that reason, the CCC must remain an independent, fair and impartial body trusted by the public to achieve its important statutory functions.*[16]

The report further stated:

> *A principal recommendation of the 1989 Fitzgerald Report was the creation of a body, outside the QPS and independent of it, to oversee and undertake*

[14] Sir Harry Gibbs as cited in Colleen Lewis, Janet Ransley and Ross Homel, 'The Fitzgerald Legacy: Reforming Public Life in Australia and Beyond' Australian Academic Press, 2010, p. 1.

[15] Prasser, *Royal Commissions and Public Inquiries in Australia*, pp.85-97.

[16] Gerald Edward (Tony) Fitzgerald and Alan Wilson, *Report: Commission of Inquiry relating to the Crime and Corruption Commission*, Queensland, 9 August 2022, p.6.

an array of activities focused upon crime and official misconduct — a permanent embodiment of elements of the work of the Fitzgerald Inquiry.

That Inquiry involved a long and deep examination of what a former Australian Chief Justice, Sir Harry Gibbs, described as: 'the symptoms of a … general illness of the body politic'. Its final report sought, as Sir Harry also remarked: '… not merely to reform the system of criminal justice and to combat corruption, but also to improve the standards of public administration, and to render the workings of Parliament more democratic.[17]

THE RISE OF ADMINISTRATIVE LAW

Hallett's 1982 work of 363 pages, devoted just 15 pages to the topic of procedural fairness.[18] Hallett identified two rules of natural justice: the 'hearing rule' – a person must be given a right (opportunity) to be heard before an adverse finding; and the impartial rule – those who conduct the hearing must be above any reasonable suspicion of bias.[19] However, Hallett also noted previous cases where the strict view of commissions not making decisions or affecting rights led to the view that judicial remedies were not available in respect of Commissions of Inquiry.[20]

Mahon's case

A case from New Zealand was set to change things for Royal Commissions. On 28 November 1979, Air New Zealand Flight 901 crashed into Mount Erebus, a volcano of 12,500 feet on Ross Island, Antarctica. All 237 passengers and 20 crew on board were killed. An investigation by the Chief Inspector of Air Accidents found that the probable cause of the accident was pilot error. Even prior to the Chief Inspectors report being

[17] *Commission of Inquiry relating to the Crime and Corruption Commission*, 9 August 2022, p.6.

[18] Hallett, *Royal Commissions and Boards of Inquiry*, pp.182-183.

[19] Hallett, *Royal Commissions and Boards of Inquiry*, pp.179-193.

[20] *Testro v Tait* (1963) 109 CLC 353; Hallett, *Royal Commissions and Boards of Inquiry*, pp.182-190.

delivered, public dissatisfaction led to the establishment of a Royal Commission of Inquiry into the crash, presided over by Justice Peter Mahon QC. Justice Mahon's report exonerated the captain and crew, laid blame at the feet of Air New Zealand which he accused of presenting to his inquiry 'a litany of lies' and against whom he made an order of costs.[21]

Two years of litigation followed, with the New Zealand Court of Appeal,[22] finding that the judge, in making the order for costs, had acted in breach of the rules of natural justice. The Judicial Committee of the Privy Council in a landmark decision (*Mahon v Air New Zealand*),[23] upheld the Court of Appeal's finding and established that the rules of natural justice (procedural fairness) applied to Commissions of Inquiry. These rules were expressed to include: (a) that findings are based upon material that logically tended to show the existence of facts consistent with those findings; (b) reasons are not self-contradictory; (c) that natural justice required a commission to ensure that any person that might be affected adversely by a finding should know of the risk of such a finding being made, and be given an opportunity to adduce additional material that might deter the commission from making that finding.[24]

Kioa v West

Shortly after the *Mahon* case, In December 1985 the High Court handed down the landmark decision in *Kioa v West*,[25] regarding the extent and requirements of natural justice and procedural fairness in administrative decision making. That decision led to a rapid growth of administrative law in Australia because it established that all administrative decisions which affect rights, interests and legitimate expectations carry with them a duty to act in accordance with procedural fairness. According to Justice Mason in that case:

[21] New Zealand History, 'Erebus disaster', 1 August 2023, Accessed at: <https://nzhistory.govt.nz/culture/erebus-disaster>.

[22] *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* (No 2) [1981] 1 NZLR 618.

[23] [1984] 3 All ER 201.

[24] *Mahon v. Air New Zealand* [1984] AC 808, 821.

[25] (1985) 159 CLR 550.

> *The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?*[26]

APPLICATION OF PRINCIPLES TO ROYAL COMMISSIONS

We must now turn our attention to the application of the above principles of procedural fairness to Royal Commissions. In *Carruthers v Connolly*[27] there was overwhelming evidence[28] of ostensible bias against Commissioner Connolly with respect to matters that his Commission had to consider. Justice Thomas, in dealing with the effects of an inquiry upon people, stated:

> *It is true that the Commissioners' Report will of itself have no direct legal effect upon any person. However the performance of a recommendatory function has not been regarded by the courts as activity of so mean a character that it should not be the subject of judicial review. Indeed, the functions that have been entrusted to this particular Commission are of considerable importance and the investigation and report of the Commission is capable of having extensive consequences both of a public nature and upon reputations.*[29]

The court made a declaration that the Commissioners were disqualified from further proceeding with the subject Inquiry and an injunction was granted restraining them from proceeding.

In *Keating v Morris & Ors; Leck v Morris & Ors*[30] Moynihan J upheld the applicants' claim that the Bundaberg Hospital Inquiry was tainted by the apprehension of bias by the Commissioner. The claim was founded upon the conduct of the Commissioner in

[26] (1985) 159 CLR 550, 585.

[27] [1998] 1 Qld R 339; [1997] QSC 132.

[28] [1997] QSC 132, [57] per Thomas J.

[29] [1997] QSC 132, [66].

[30] [2005] QSC 243.

calling and interrogating the applicants. His Honour held that 'it is now well established that the application of the rules to investigative bodies such as the Inquiry differs from their application to litigation'.[31] His Honour went on to say that it was of fundamental importance 'that parties and the general public have full confidence in the fairness of decisions and the impartiality of decision makers to whom the rules of procedural fairness apply.'[32] According to His Honour,

> *Condemnation without a proper hearing or by an apparently biased tribunal is unacceptable; exoneration by such a tribunal may be worthless.*[33]

The issue according to Moynihan J is 'not whether the decision maker is in fact biased but whether a fair minded observer might reasonably apprehend that the decision maker might not bring an impartial or unprejudiced mind to bear on the task'.[34] His Honour was at pains to stress that an inquiry's inquisitorial and reporting function allowed commissioners to take a 'more active, interventionary and robust role in ascertaining the facts and a less constrained role in reaching conclusions than applies in litigation' but it did not dilute or diminish the 'expectation that an impartial and unprejudiced mind will be applied'.[35]

Justice Moynihan was 'satisfied that each of the applicants has made out a case of ostensible bias in respect of matters arising under the Inquiry's terms of reference. The circumstances established by the accumulated weight of evidence would give rise, in the mind of a fair minded and informed member of the community, to a reasonable apprehension of lack of impartiality on the Commissioner's part in dealing with issues relating to each of the applicants.'[36]

[31] [2005] QSC 243, [33] per Moynihan J.

[32] [2005] QSC 243, [36] per Moynihan J.

[33] [2005] QSC 243, [36] per Moynihan J.

[34][2005] QSC 243, [36] per Moynihan J.

[35] [2005] QSC 243, [46].

[36] [2005] QSC 243, [158]-[160].

APPLICATION OF PRINCIPLES TO PERMANENT COMMISSIONS

In *R v Criminal Justice Commission; ex parte Ainsworth & Anor*[37] the CJC had prepared a report on the introduction of poker machines for a cabinet sub-committee.[38] Later, this was presented as a report to Parliament.[39] The report was critical of the Ainsworth group of companies. The applicants were not provided a right to be heard. The report was written by a journalist engaged by the CJC and was based on secondary evidence. The applicants sought orders of Mandamus and Certiorari.

The Full Court of the Supreme Court of Queensland (McPherson, Lee and Mackenzie JJ) held (i) that the course adopted by the Commission was not one which attracted a duty of fairness under the Act (ii) there was no duty of fairness under the general law because the report did not affect any right, interest or legitimate expectation of the appellants (iii) even if there was a duty of fairness, the case was not appropriate for the grant of relief, whether by way of certiorari, mandamus or, as was sought in the course of argument, by way of declaration.

This case also raised the issue of parliamentary privilege. The fact that the report had already been tabled was particularly troubling for McPherson J:

> *The Report is presumably now in the possession of the Speaker, or perhaps it is of the Clerk of Parliament. For the Court to order a writ to issue against either the Speaker or the Clerk of Parliament would be accounted a gross breach of privilege. To attempt to enforce it by apprehending either of those individuals so as to bring them before the Court to face charges of contempt would be an act without a parallel since Charles I tried to arrest the Five Members in 1642. The constitutional distribution of power in a democracy proceeds on the footing of mutual respect by legislature and judiciary for the integrity of their respective functions. We should be overstepping the*

[37] *Queen v. The Criminal Justice Commission Ex Parte Leonard Hastings Ainsworth and Ainsworth Nominees Pty Ltd* [1990] OSC No 28 of 1990 (unreported).

[38] *Ex Parte Leonard Hastings Ainsworth and Ainsworth Nominees Pty Ltd* [1990] OSC No 28 of 1990 (unreported) p.27 per McPherson J.

[39] *Ex Parte Leonard Hastings Ainsworth and Ainsworth Nominees Pty Ltd* [1990] OSC No 28 of 1990 (unreported) p.6 per McPherson J.

> *proper limits of our responsibilities by a wide margin if we were to order a writ of certiorari to issue to bring up a record that now forms part of the proceedings of Parliament.*[40]

The High Court held, on appeal, that the CJC in 'compiling its report' on Poker Machines in Queensland had not afforded the appellant procedural fairness and made a declaration to this effect.[41] Chief Justice Mason, Dawson, Toohey and Gaudron JJ rejected the notion that a duty of natural justice did not arise:

> *The nature and purposes of the Commission and its organizational units are such that it is unthinkable that it might, in any circumstance whatsoever and whether discharging its functions or responsibilities or merely taking some step in the course of or in relation to them, proceed in a way that is partial or contrary to the public interest.*[42]

Later the joint judgement stated:

> *… a body established for purposes and with powers and functions of the kind conferred on the Commission and its organizational units is one whose powers would ordinarily be construed as subject to an implied general requirement of procedural fairness, save to the extent of clear contrary provision. That is because it is improbable that, though it did not say so, the legislature would intend that a body of that kind should act unfairly.*[43]

At this point it is worth noting that the report in *Ainsworth* was prepared for a cabinet sub-committee and preceded the *Parliament of Queensland Act 2001* (Qld) provisions that will be discussed in more detail below.

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[40] *Ex Parte Leonard Hastings Ainsworth and Ainsworth Nominees Pty Ltd* [1990] OSC No 28 of 1990 (unreported) p.27, per McPherson J).

[41] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

[42] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, [18].

[43] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, [21].

Narrow interpretation of statutes

Although not a doctrine stated by any court, an examination of cases involving challenges to the jurisdiction and reports of permanent commissions reveals a tendency for courts to narrowly construe their statutes. For example, in *Balog v ICAC*[44] the High Court found that the ICAC was:

> *…primarily an investigative body whose investigations are intended to facilitate the actions of others in combating corrupt conduct. It is not a law enforcement agency and it exercises no judicial or quasi-judicial function. Its investigative powers carry with them no implication, having regard to the manner in which it is required to carry out its functions, that it should be able to make findings against individuals of corrupt or criminal behaviour …*[45]

The court construed the statute such that that the only finding which the ICAC may properly make in a report concerning criminal liability is whether there is or was any evidence or sufficient evidence warranting consideration of the prosecution of a specified person for a specified offence.[46]

In another example, in *Greiner v ICAC (No 2)*[47] the majority of the NSW Court of Appeal (Gleeson CJ and Priestley JA), held that the determination by the ICAC in its report, that Greiner had engaged in corrupt conduct within the meaning of the ICAC Act, was made without or in excess of jurisdiction.

More recently in *Independent Commission Against Corruption v Cunneen*[48] the majority of the High Court restricted the jurisdiction of the ICAC to investigate the conduct of third parties in connection with the discharge of official functions by public officials. Justice Gageler (in dissent) noted that the interpretation adopted by the majority would mean that third party conduct such as endemic collusion among tenderers in

[44] (1990) 169 CLR 625.

[45](1990) 169 CLR 625, 636.

[46] (1990) 169 CLR 625, 635.

[47] (1992) 28 NSWLR 125.

[48] [2015] HCA 14.

tendering for government contracts, or serious and systemic fraud in the making of applications for licences, permits or clearances issued under NSW statutes, could not be investigated by the ICAC.[49]

THE INTERSECTION WITH PARLIAMENTARY PRIVILEGE *(CRIME AND CORRUPTION COMMISSION V CARNE)*

As can be seen from the above, it is not uncommon for the activities of ad hoc and permanent commissions of inquiry to be the subject of judicial review. However, the series of decisions that culminated in the very recent High Court decision of *Crime and Corruption Commission v Carne*[50] requires special attention as they deal with the intersection of judicial review of a permanent commission of inquiry's report provided to its parliamentary oversight committee, thereby potentially raising issues of parliamentary privilege.

Statutory Background

The Crime and Corruption Commission (CCC) and its oversight committee, the Parliamentary Crime and Corruption Committee (PCCC) are established by the *Crime and Corruption Act 2001* (Qld) (CCC Act). Section 64(1) of the CC Act provides under the heading 'Commission's reports—general' that the 'commission may report in performing its functions'. Section 69 of the CC Act provides that the section 'applies to the following commission reports — (a) a report on a public hearing; (b) a research report or other report that the parliamentary committee directs be given to the Speaker.' The section goes on to indicate that s69 reports are provided to the Chair of the PCCC, the Speaker and the Minister and then tabled in the Assembly.

Section 8 of the *Parliament of Queensland Act 2001* (POQ Act) provides that 'the freedom of speech and debates or proceedings in the Assembly cannot be impeached or questioned in any court or place out of the Assembly'. The section essentially repeats and reinforces the historical protection of Article 9 of the *Bill of Rights 1688* (UK).

[49] [2015] HCA 14, [92].

[50] [2023] HCA 28.

Section 9(1) and (2) of the POQ Act provides a statutory definition of the term 'proceedings in parliament'.

Section 55 of the POQ Act provides for the issuing of certificates by an authorised person (including a committee chairperson), to evidence various matters, including that documents were prepared, presented to or made or published under the authority of the Assembly, a committee.

Factual background

Peter Carne was the Public Trustee of Queensland (located in Ann Street Brisbane) from March 2009 until March 2014 and again from March 2016 until his resignation effective from 31 July 2021. By email on 17 June 2019, a police officer attached to the CCC notified Carne of its investigation of a complaint and requested an opportunity to conduct: (i) a formal disciplinary interview to allow the appellant to hear the allegations against him and to provide comment; and (ii) a separate criminal interview concerning matters related to the use of resources of the Public Trust Office.[51]

Between June 2019 and January 2020, the Commission and Carne's solicitors exchanged correspondence about the subject matter of the investigation, and the process for proposed interviews. Meanwhile, the CCC investigation continued. On 27 November 2019, Carne was served with a show cause letter under the hand of the Attorney-General. On 28 January 2020, the Carne was examined by a psychiatrist. On 13 February 2020, Carne's solicitors advised the CCC that the appellant was unable to participate in any interview at that time because of the state of his mental health. Carne did not participate in an interview with the CCC during the period from June 2019 to January 2020 in relation to the CCC's investigation.

On 19 June 2020, the PCCC held a private meeting at which the CCC was giving evidence. In response to an enquiry from the Chairperson of the PCCC, the Chairperson of the CCC advised that the CCC had not made a final decision on whether to prepare a report in relation to the Carne investigation matter, but he thought the CCC should

[51] This summary of facts is taken from the dissenting judgment in *Carne v Crime and Corruption Commission* [2022] QCA 141, [84], [89]-[90] per Freeburn J, except where otherwise noted.

do so 'because it is high profile and it has been in the media'. He said that after the show cause process had taken its course, the CCC 'probably should articulate some of the concerns that [it] had'.[52]

On 31 July 2020, Carne resigned from the position of Public Trustee, bringing the show cause proceedings to an end. On 11 September 2020, at a meeting of the PCCC, the Chairperson of the PCCC asked whether the CCC would be seeking a direction under s 69 of the CC Act for the tabling of the report, to which the Chairperson of the CCC responded in the affirmative. He added that he did not see 'why we should not publicly report in a matter that has so much public interest and is such an important matter in terms of workplace culture, corruption risks and so forth'.[53]

Sometime prior to 6 October 2020, the CCC prepared a report on certain allegations against Carne (the report). On 6 October 2020, the CCC forwarded the report to the PCCC and requested that, under s 69(1)(b) of the CC Act, the PCCC direct that the report be given to the Speaker of the Queensland Parliament for tabling in the Legislative Assembly.

Carne applied to the Supreme Court of Queensland for: (a) a declaration that the document styled 'An investigation into allegations relating to the former Public Trustee of Queensland: Investigation Report' is not a report for the purposes of s 69(1); (b) a mandatory injunction, pursuant to s 332 of the CC Act that the CCC retract its resolution of 6 October 2020 to approve the seeking of a direction from the PCCC to enable tabling of the report and advise the PCCC of the same.[54]

Trial

At trial Davis J dismissed the application by Carne.[55] Justice Davis found that the preparation of the report was authorised by s 64 of the CC Act and was protected by parliamentary privilege. Justice Davis considered the scheme set up by the CC Act. According to Davis J, the CCC has statutory obligations to achieve the purposes of the

[52] *Crime and Corruption Commission v Carne* [2023] HCA 28, [8].

[53] *Crime and Corruption Commission v Carne* [2023] HCA 28, [11].

[54] *Carne v Crime and Corruption Commission* [2021] QSC 228.

[55] *Carne v Crime and Corruption Commission* [2021] QSC 228.

Act, which includes to reduce the incidence of corruption and improve the integrity of the public sector. The CC Act also provides that powers of the CCC are to be exercised in a way which promotes public confidence in government. The CCC fulfils its functions by various means, including conducting investigations and reporting its findings.[56]

Davis J found that a report prepared by the CCC as a result of an investigation pursuant to the powers vested in it by the CC Act, where it is intended by the CCC to supply the report to the PCCC, is a document prepared for 'presenting or submitting a document to the Assembly' and 'for the purposes of or incidental to, transacting business of the [PCCC]'.[57] Davis J found that there was 'no doubt' that the CCC, in preparing the report and delivering it to the PCCC, was acting under the authorisation in s 64 of the CC Act.[58] Further, the PCCC had accepted the report for the purpose of transacting the business of the PCCC.[59]

In terms of evidence, Davis J relied on the certificate of the Chairperson of the PCCC under s 55 of the POQ Act that stated that the report was a document prepared for the purposes of, or incidental to, transacting business of the PCCC. Davis J noted that the certificate is not absolute proof of the matters certified. It is only evidence of those matters. But in Davis J's view the other evidence supported rather than contradicted the certificate, as did the provisions of the CC Act.[60]

Davis J also noted that a finding that the report is not a report for the purposes of s 69 did not necessarily mean that privilege did not attach to the report. According to Davis J it was, as a matter of fact, prepared with the intention of delivery to the PCCC and was in fact delivered to the PCCC. As it was prepared for the purposes of, or incidental to, transacting business of the PCCC it would likely still be protected by the POQ Act.[61]

[56] *Carne v Crime and Corruption Commission* [2021] QSC 228, [117].

[57] *Carne v Crime and Corruption Commission* [2021] QSC 228, [120].

[58] *Carne v Crime and Corruption Commission* [2021] QSC 228, [121].

[59] *Carne v Crime and Corruption Commission* [2021] QSC 228, [122].

[60] *Carne v Crime and Corruption Commission* [2021] QSC 228, [123]-[129].

[61] *Carne v Crime and Corruption Commission* [2021] QSC 228, [141].

Court of Appeal

On appeal to the Queensland Court of Appeal, the majority of the court (Mullens and McMurdo JJ)[62] found that, having investigated a complaint of corruption, the task of the CCC was to decide whether proceedings or disciplinary action should be considered. If the CCC decides that proceedings should be considered, it may report, not publicly, but to a prosecuting authority, a head of jurisdiction or the chief executive officer of the relevant unit of public administration.[63] Otherwise, there is no provision under the CC Act by which it is to report.[64]

Having found the CCC was not empowered or required to make the report, the majority found that the report was not a report to which s 69 applies.[65] The majority then held that parliamentary privilege could not be conferred upon a document made and delivered to the PCCC in purported, but not actual performance of the CCC's functions. In the majority's view, the preparation and delivery of the report, without the operation of s 69, were not 'acts done in transacting the business of the Assembly or its committee'.[66] At this stage it is noted that the majority only deals with the CCC Act, and does not deal with the POQ Act, which does not require that a document prepared or submitted be not tainted by illegality or unlawfulness or alternative is made pursuant to some lawful authority. (Such a limitation would affect the Parliament's ability to fulfil its functions, including that of oversight).

Justice Freeburn dissented and held that the CCC had the statutory power to prepare the report and that the report was subject to parliamentary privilege. His reasoning was similar to the trial Judge. His Honour's recitation of facts is the most comprehensive of the five separate judgements at the three levels. On the interpretation of s 64 of the CCC Act, His Honour stated:

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[62] *Carne v Crime and Corruption Commission* [2022] QCA 141.

[63] *Carne v Crime and Corruption Commission* [2022] QCA 141, [56].

[64] *Carne v Crime and Corruption Commission* [2022] QCA 141, [56].

[65] *Carne v Crime and Corruption Commission* [2022] QCA 141, [68-69].

[66] *Carne v Crime and Corruption Commission* [2022] QCA 141, [80-81].

> *... to interpret s 64(1) as only permitting reports whilst there remains a potential for criminal charges, or for disciplinary action, would be to read down the section too far.*[67]

Justice Freeburn agreed with the trial judge that the report here was brought into existence for the purpose of being submitted to the PCCC and was actually submitted to the PCCC with a request that the PCCC direct that the report be given to the Speaker.[68] Justice Freeburn also had difficulties with the relief sought. According to His Honour the 'core of the relief sought by the appellant is a desire to stop the PCCC from directing that the report be given to the Speaker'.[69] His Honour stated that in his view 'orders to that effect would be contrary to the principle that parliamentary proceedings are immune from outside examination by other organs of the state and would be to trespass inadvertently into the legislature's province'.[70]

Issues before the High Court

The first ground of appeal was essentially the privilege issue. The CCC argued that the Court of Appeal was precluded from making the declaration by the prohibition in s 8(1) of the POQ Act on 'proceedings' in the Legislative Assembly being 'impeached or questioned' in any court. The CCC argued that its preparation and presentation of the report were brought within the scope of 'proceedings' in the Legislative Assembly by operation of s 9 of the POQ Act. The second ground of appeal went to the construction of the CC Act. The CCC argued that the conclusion of the Court of Appeal, that the report is not a report for the purposes of s 69(1) of the CC Act, was erroneous.

Decision of the High Court

There were two joint judgements, both dismissing the appeal. The majority of the plurality (Kiefel CJ, Gageler and Jagot JJ.) found the CCC's argument that its preparation

[67] *Carne v Crime and Corruption Commission* [2022] QCA 141, [134].

[68] *Carne v Crime and Corruption Commission* [2022] QCA 141, [176-183].

[69] *Carne v Crime and Corruption Commission* [2022] QCA 141, [199].

[70] *Carne v Crime and Corruption Commission* [2022] QCA 141, [200].

and presentation of the report were brought within the scope of 'proceedings' in the Legislative Assembly by operation of s 9 of the POQ Act must be rejected on the facts. In the view of the joint judgement, s 9 of the POQ Act was not satisfied because the report was not prepared for, or presented to, the committee for purposes of transacting business of the committee. Rather, it was prepared by the CCC and presented to the PCCC for the CCC's own purposes.[71] In respect of the second ground of appeal the majority of the plurality held that the report is not a report to which s 69(1) of the CC Act applies. Further, there is no provision of the CC Act which authorises a report of this nature.[72]

The minority of the plurality (Gordon and Edelman JJ.) found that the Court of Appeal was correct to find that the October draft was not a report for the purposes of s 69(1) of the CCC Act. In the view of the minority of the plurality, parliamentary privilege does not present any obstacle to the declaration made by the Court of Appeal because, on the facts, no question of parliamentary privilege arose; no act was done in the course of, or for the purposes of or incidental to, transacting business of the PCCC to which parliamentary privilege could attach.[73] In particular, the October draft report was not prepared 'for the purposes of or incidental to, transacting business' of the PCCC, but rather for the purposes of the CCC.[74]

Observations on Carne

As to the second ground, which related to whether the report was one contemplated by s 69 of the CC Act, the High Court's interpretation of the CC Act was not surprising given the increasing tendency of the courts to read statutes narrowly regarding the jurisdiction and powers of permanent commissions of inquiry.[75] The CC Act is an overly complex piece of legislation, one result of the CCC's 'one stop shop' model. The interpretation by the CCC over many years (26 years) was not unreasonable and

[71] *Crime and Corruption Commission v Carne* [2023] HCA 28, [23].

[72] *Crime and Corruption Commission v Carne* [2023] HCA 28, [26-27].

[73] *Crime and Corruption Commission v Carne* [2023] HCA 28, [78].

[74] *Crime and Corruption Commission v Carne* [2023] HCA 28, [31] and [78].

[75] See for example: *Greiner v ICAC No 2* [1992] 28 NSWLR 125; *Balog v ICAC* (1990) 169 CLR 625; *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.

supported through the litigation by two justices of the Supreme Court. However, the High Court's interpretation was equally open and reasonable as a matter of statutory construction.

The High Court's decision on the first ground and the application of the provisions of the POQ Act is much more difficult to reconcile. Both judgements avoided the issue of parliamentary privilege by findings 'on the facts' that the issue of privilege did not arise, because the relevant acts done did not satisfy the requirements of s 9 POQ Act. That is, that the CCC's report was not prepared and submitted 'for the purposes of the committee'.[76] The fact a document was prepared for a committee's consideration and provided to the committee was itself insufficient to trigger the statute.

In argument before the High Court, Bret Walker SC, counsel for the Speaker of the Legislative Assembly of Queensland put that the motivations or purpose of both the person who produces the document and the person who receives it are irrelevant to the question of whether a document is prepared for the purposes of the Assembly or a committee.[77] On behalf of the Speaker, Walker submitted that it is the functional connection, objectively considered, of the document with the Assembly or committee which must be considered.[78] The majority of the plurality explicitly accepted this proposition and then stated that 'the mere preparation' of a document for the Assembly or a committee, or presentation of a document to the Assembly or committee, by a third party will not suffice if there is no other connection to the work of the Assembly or a committee at the time the document was prepared.[79]

Three points need to be made about this issue. First, it is hard to escape the conclusion that the court in identifying various statements made by the CCC in the material before it, was in fact identifying the motivations for the report and ascribing those motives to the CCC.

[76] *Crime and Corruption Commission v Carne* [2023] HCA 28, [31].

[77] *Crime and Corruption Commission v Carne* [2023] HCATrans 74 (6 June 2023); *Crime and Corruption. Commission v Carne* [2023] HCA 28, [35].

[78] *Crime and Corruption Commission v Carne* [2023] HCA 28, [35].

[79] *Crime and Corruption Commission v Carne* [2023] HCA 28, [36].

Secondly, the majority of the plurality appeared to adopt the notion of the 'appropriative act' for parliamentary privilege to apply. That is, privilege is not attracted to a document until the Assembly, committee, member or their agent does some act with respect to it for purposes of transacting business. The majority plurality seem to have embraced[80] this concept as enunciated by McPherson JA in *Rowely v O'Chee*[81] who in turn referred to cases like *Rivlin v Bilainkin*[82] and *Grassby*.[83] The embracement of this doctrine will have implications for people like whistleblowers who unilaterally disclose material to committees and members. Further, it is unclear what appropriative act is required to activate the privilege. In *Carne*, the preparation of the report was anticipated by the PCCC, it was prepared for the PCCC's consideration, was presented to the committee and was under consideration when the action was taken in the Supreme Court. In a demonstration of adherence to principles of mutual respect, the committee suspended its consideration of the matter, which it need not have done.

Thirdly, the majority of the plurality did not address the issue that there may be concurrent purposes for the creation and submission of documents to a committee. That is, both submitters and the committee may have differing or the same concurrent purposes.

Similarly, the minority of the plurality stated that the 'current case may be distinguished from one where a parliamentary committee, upon receiving a document unrelated to the business of the parliamentary committee, elects to retain it for the purpose of transacting its business'. According to the minority plurality, 'in such cases, the application of ss 8 and 9 of the POQ Act would have the result that the document would be privileged'.

It is difficult to comprehend how the report in *Carne* was not related to the business of the PCCC within the description stated by the minority of the plurality. Again, the preparation of the report and the intention to present to the committee was discussed in two separate properly constituted proceedings of the PCCC. It was prepared for the PCCC, provided to the PCCC and under consideration by the PCCC.

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[80] *Crime and Corruption Commission v Carne* [2023] HCA 28, [36].

[81] [2000] 1 Qd R 207, 221.

[82] [1953] 1 QB 485.

[83] (1991) 55 A Crim R 419.

Finally, both High Court judgements turned on a question of fact. Both judgements' findings of fact are clearly different to that of the trial judge. The trial judge's view of the facts were not in issue in the Court of Appeal, the majority's reasoning resting on the interpretation of the Act. Indeed, the dissent by Freeburn J takes a view of the facts in concurrence with the trial judge. In order to come to its view of the facts the High Court rejected the propositions in the s 55 certificate and substituted its view of the facts. The majority of the plurality stated:

> *This conclusion is not altered by the certificate issued under s 55 of the POQ Act, by which the Chairperson of the Committee certified that the Report was prepared for and presented to the Committee for its purposes. Section 55(2)(d) provides that a certificate stating that a document was prepared for the purposes in s 9(2)(a) or (c) is evidence of that fact. It does not, however, provide that it is conclusive. The s 55 certificate may be rebutted by other evidence. The Commission's statements as to its purpose for preparing the Report do just that.*[84]

The judgements appear to ignore the fact that on a routine basis a Committee may have a purpose (for example, to obtain information to make the most appropriate recommendation) and a submitter may likely have a different but concurrent purpose (for example, to influence the matter under consideration to be favourable to the submitter's position).

Let us 'Bell the Cat'. Courts do not like to be ousted from jurisdiction. Parliamentary privilege is an effective ouster from jurisdiction. The High Court have in *Carne* case chosen the facts that did not trigger the application of the statute that applied the privilege. The Court ignored other inconvenient facts.

The public policy issues

It is very important that there is judicial supervision of Commissions of Inquiry and Permanent Commissions of Inquiry. For example, in *Ainsworth*,[85] the CJC ignored any

[84] *Crime and Corruption Commission v Carne* [2023] HCA 28, [40].

[85] *Ainsworth v Criminal Justice Commission* [1992] HCA 10.

form of natural justice. The Commissioners in *Carruthers*[86] were found to have demonstrated ostensible bias and in *Keating v Morris & Ors; Leck v Morris & Ors*[87] the Commissioner's conduct of proceedings and interrogations were found to raise a reasonable apprehension of bias.

The courts have made it very clear that they will interpret statutes regarding permanent commissions of inquiry very narrowly. It is now incumbent on legislatures to ensure that the statutes creating those bodies are extremely clear as to jurisdiction, power and reporting authority. If the legislature wants commissions to be able to report and make findings, it is evident that the court will require clear statutory authority to allow reports that make findings against individuals.

In my submission, it is not necessary for independent commissions to make findings of corrupt conduct or criminal behaviour against individuals in a public report. Such matters can be decided by other more appropriate bodies. However, Commissions should be able to report a narrative of facts, expose broad behaviour and corruption risks and advise that they have referred matters to the appropriate body. It is necessary for the public to be appraised of the wider facts of a matter and the behaviours of public officials and an appreciation of the mischief at hand.

To avoid conflict between the courts and parliament, it would be best to avoid provisions such as the current s 69 if the CC Act, where a report is provided to a Committee to determine whether a report of a commission should be tabled. There are numerous reasons why the approach set out in s 69 is flawed policy.[88]

In the *Carne* case, the High Court's interpretation of the statute means at least 32 commission reports and 256 media releases over 26 years would never have occurred.[89] The significance of the decision and its poor policy implications for the

[86] [1997] QSC 132.

[87] [2005] QSC 243.

[88] For further information re history and policy issues relating to the section see Neil Laurie, Submission, Parliamentary Crime and Corruption Committee, Five-year review of the Crime and Corruption Commission's activities, Queensland, 27 April 2021.Accessed on 20 September 2023 Accessed at <https://documents.parliament.qld.gov.au/com/PCCC-8AD2/RCCC-21CB/submissions/00000036.pdf>.

[89] Letter from the Chair of the Crime and Corruption Commission to the Chair of the Parliamentary Crime and Corruption Committee, Parliament of Queensland, dated 20 October 2022. Accessed at: <https://documents.parliament.qld.gov.au/com/PCCC-8AD2/C-A72F/221020%20-%20IN%20-

future operation of the CCC lays in the examination of that list. Public information about the outcomes of numerous matters of high public importance and interest are at stake.

In the Court of Appeal, Freeburn J warned about a narrow interpretation of the CC Act, stating:

> *It would prevent the Commission from reporting on a matter relevant to the standards of integrity and conduct in units of public administration, or assessing the appropriateness of systems and procedures, or on a matter of public confidence in the integrity of units of public administration, and public confidence in the way in which corruption is dealt with. Reading s 64(1) in that narrow way would mean that the Commission's only power to so report would be if there were a potential for criminal charges, or for disciplinary action.*[90]

That warning has come to pass.

Without statutory amendment, the public will remain 'in the dark' about the outcomes of a large number of corruption investigations where a decision does not result in criminal proceedings but nonetheless contain lessons for, and usually recommendations to reduce the incidence of corruption or misconduct in, Queensland's public sector. Also, the very real benefit in some people under investigation, who may have been wrongly accused or slurred, to have a public report clearing their name cannot also be understated.

Should we be so protective of individual rights (reputation) that it keeps the public in the dark about matters of corruption and misconduct by public officials? Should the public not be able to judge for themselves the conduct of public officials by knowing the factual circumstances of an issue and the behaviours that occurred?

%20Crime%20and%20Corruption%20Commission%20-%20Data%20on%20investigations%20reports_media%20releases%20in%20relation%20to%20CCC%20investigations.pdf>.

[90] *Carne v Crime and Corruption Commission* [2022] QCA 141, [134].

One result of the litigation in *Mahon v Air New Zealand*[91] was that it took 20 years for the reports of the Chief Inspector of Air Accidents and the Mahon Commission to be tabled in the New Zealand Parliament. It took 40 years, for New Zealand's Prime Minister, on behalf of the New Zealand government, to apologise for the actions of the airline, then in full state ownership, and which according to the apology 'ultimately caused the loss of the aircraft' and the loss of life.[92] Judicial supervision is important, but it also risks public confidence in public institutions if it results in secrecy.

The CCC may be regarded as a permanent commission of inquiry, in that it can inquire into matters, but unlike a commission of inquiry that is expected and able to publicly report 'the truth of a matter', the CCC has largely been silenced. It is a watchdog that still has some bite, in that it has powers of investigation and can refer matters to others to prosecute. But it is a watchdog without a bark. It has been muzzled.

It has long been alleged that the CCC has been used by governments as a 'clearing house'. Issues of public concern are sent for investigation and when no criminal conduct is found, governments then imply there was no wrongdoing -even though wrongdoing that falls short of criminal conduct is often revealed.

Aristotle said:

> *To say of what is that it is not, or of what is not that it is, is false, while to say of what is that it is, and of what is not that it is not, is true.'*[93]

Until the statute is remedied, for anyone to say 'the CCC has investigated and no outcome has occurred, therefore there was no wrongdoing', is not necessarily speaking the truth. The public is capable of handling the truth.

[91] [1984] 3 All ER 201; [1983] NZLR 662.

[92] New Zealand Government Website, 'Prime Minster Delivers Erebus Apology', 20 November 2019. Accessed at <www.beehive.govt.nz>.

[93] David Marion 'Correspondence Theory of Truth' in *Stanford Encyclopedia of Philosophy*, Stanford University, 2005. Available at https://plato.stanford.edu/contents.html.

Life After (or Winner Takes All)

Neil Laurie*

The Queensland Parliament, established in 1859 and first sitting in 1860, was based on the Westminster system of Government of the United Kingdom that regularly meets at Westminster Palace in London.

Queensland had been separated from New South Wales for about six years when the term 'responsible government' was coined by Walter Bagehot in his work, *The English Constitution*,[1] to describe the government of the United Kingdom. Bagehot's description of responsible government, sometimes described by him as 'parliamentary government' or 'cabinet government', was based on his observations of the 'new constitution' of the United Kingdom. Bagehot thought that the starting point of this 'new constitution' was the *First Reform Act of 1832* when a more general voting franchise was enabled. The Parliament at Westminster may have practised responsible government since the middle of the eighteenth century, but it did not practise truly representative government until the early twentieth century.

The reality is that, despite the very important issue of franchise and representation, responsible government had developed in the middle of the eighteenth century, more than 100 years before Bagehot's writings, when it finally became apparent that the Crown must appoint ministers who had the support of the House of Commons. This was not a legal requirement. It was not one of the many immediate outcomes of the civil war, the Bill of Rights or the Act of Settlement. It was an eventual realisation of practical politics. The Crown was eventually forced to concede that, as a matter of political reality, the House of Commons controlled both the finances and law-making power of the nation and without its support a government could not survive.

The hallmarks of the Westminster government are discernible, and it can be stated with confidence that they include:

- The Crown or head of State (dignified or symbolic power) must appoint ministers who had the support of the popularly elected lower house ('Cabinet Government' or 'Efficient government').
- Ministers are Members of either House of Parliament.
- Ministers are 'responsible to Parliament' – that is accountable to the Parliament.

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- The Government must be able to maintain the support of the lower house of parliament. A government is dismissed or must resign by being unable to secure supply (blocking or rejecting a budget), the lower house passing a no-confidence motion, or defeating a confidence motion. The Westminster system enables a government to be defeated, or forced into a general election.
- The existence of an official Opposition – a government 'in waiting'.
- Financial initiative rests with the government (raising and spending tax).
- Other conventions, practices and precedents continue to play a significant role.

Some structural differences between the Westminster system in the UK as opposed to other Commonwealth countries include:

- Size – The UK Parliament is very large, currently 650 members. Even in the late eighteenth century there were more than 300 members. This is a very large number of members compared to later colonial parliaments. It is extremely difficult to maintain party discipline in large houses of parliament.
- Discipline – Discipline exists in the UK Parliament, but it not as strong or strict as in Canada, Australia and New Zealand.
- Heritage – Parliament developed during a period of more than 1,000 years. I believe the roots of the English Parliament lay in the Saxon Witan. A thousand years of Foreign Wars, Civil Wars, Civil Strife and slowly evolving wider representation gives those in the UK Parliament a much greater appreciation of the history of the institution.

Bagehot never asserted bicameralism as a necessary component of responsible government, and went so far as to express the view that 'with a perfect lower house it is certain that an upper house would be scarcely of any value'. [2]

Whilst unique amongst the States of Australia, Queensland is not the only unicameral Parliament to adopt responsible government or adapt it to unicameralism, unicameralism being the 'norm' at the provincial level in Canada, for example.

Whilst there can always be criticisms at the margins, the Queensland Parliament does provide a forum for debate and grievance and, with caveats, performs as well as any other Parliament the law-making and financial role. Even when numbers in the House have been finely balanced, it has provided stable government since 1922.

However, a Westminster style of government contains an inherent paradox. One function of Parliament is to scrutinise government. But governments are formed because they have the support of the lower house of parliament. In

small parliaments, with government majorities and strict party discipline, it is difficult to ensure scrutiny by the lower house. In bicameral parliaments this function can be undertaken by an upper house; in unicameral parliaments, scrutiny is problematic.

Furthermore, the size and voting systems can mean that such parliaments are not truly representative. The Queensland Parliament is less representative than many of its peers.[3] Also, there are serious structural and cultural impediments that prevent the Queensland Parliament from keeping government accountable. We need to keep government accountable because of the enormous power that government has over the day-to-day life of its citizens. The powers exercised by governments throughout Australia and the world in the past three years to deal with the COVID-19 pandemic is perhaps the best example of the power of government.

I do not fall into the category of people that believe that there are 'white hats' and 'black hats' in politics. In my opinion all members and parties are genuinely trying to help their citizenry, although having differing ideology and methods. Nonetheless, the natural self-protective mechanisms within government and failure to exercise restraint when they have a majority, can sometimes lead to those in government ending up with beige hats.

Structures affect culture

It is my thesis that there is a strong relationship between constitutional structure and political culture; furthermore, that a constitutional realisation and three constitutional structural changes influenced Queensland's political culture in the twentieth century and continue to do so.

The realisation

The realisation came with the decision in *McCawley v The King* [4]– that a state's Constitution limits its Parliament's legislative power only if derived from entrenched provisions. Thus, Parliament is 'master of its own household, except in so far as its powers have in special cases been restricted'.[5]

The implications of this decision were that the non-entrenched constitution was able to be changed, including the abolition of the Legislative Council. But the decision had implications beyond its own fact. For example, it was later held that in dealing with public moneys or any other subject not governed by a special method of law-making [entrenchment], Parliament is not bound to adhere to the letter or spirit of [the provision], but is, on the contrary, empowered to make any provision it thinks fit, whether consistent or not.[6]

The pivotal structural changes

Two of the three pivotal structural changes occurred before *McCawley v. The King*. The 1910 *Electoral Districts Act 1910* (Qld) abolished multi-

member seats and divided Queensland into 72 electorates with one vote, one value (with a 20 per cent tolerance). This pivotal change culturally entrenched one member per constituency. Governments are much more likely to achieve a majority in a house with such a voting system and discipline is more likely to be maintained because members are not competing for the vote with other members of their party. Cases in point are the ACT Legislative Assembly and Tasmanian Legislative assembly, based on the Hare-Clark system where government majorities are much harder to make and keep and competition between members of the same party can be intense.

Section 12 of the *Constitution of Queensland Act 2001* now states:

> Division of State into electoral districts
>
> The State is to be divided into the same number of electoral districts as there are members of the Legislative Assembly.

The second pivotal matter was the *Elections Act Amendment Act 1914* which introduced compulsory registration and voting for persons entitled to be enrolled. This pivotal change guaranteed that no longer did candidates for elections and their parties have to 'get out the vote'. Attendance by voters was virtually ensured.

The third pivotal change was the abolition of the Legislative Council, making Queensland the only state in Australia with a unicameral legislature.[7] This paved the way for Westminster government, Queensland style.

The abolition of the Legislative Council of Queensland on 23 March 1922 left Queensland with a single House of Parliament, the Legislative Assembly with single member constituencies and compulsory voting.

Queensland political culture (Westminster the Queensland way)

Legalism is an ancient Chinese philosophical belief that human beings are more inclined to do wrong than right because they are motivated entirely by self-interest and require strict laws to control their impulses. But what if there are no strict laws?

In Queensland, the political culture that developed post-1922 was often to take actions and pass laws that were considered legal, but otherwise ethically or morally questionable. Decisions often lack restraint. The culture is sometimes: 'Do the legal thing, not necessarily the right thing.' This can be demonstrated by 10 examples in the past century.

Example 1 – Manipulation of the electoral system

Governments in Queensland have manipulated the electoral system to benefit the government of the day.

The *Electoral Districts Act 1931* was a by-product of an attempt by the Conservative Moore government to reintroduce a Legislative Council.[8] Whilst

a bill to reintroduce the Legislative Council was not officially introduced although a draft bill was circulated, the *Electoral Districts Act* caused a redistribution and reduction in the number of electorates from 72 to 62. Due to re-weighting of quotas in metropolitan, country and remote seats, seven ALP seats and three conservative seats were removed.[9]

Given the risk of reintroduction of an Upper House, the ALP Forgan Smith government in the next Parliament would subsequently ensure that the Legislative Council was not reintroduced without a referendum. This was a supreme irony, given it was abolished in spite of a referendum in 1917 to keep it in existence.[10]

In 1949 the ALP Hanlon Government introduced the first explicit Gerrymander in Queensland.[11] This Gerrymander was achieved through a zonal electoral system whereby electorates were allocated into geographic zones, each with different quotas (there were 75 electorates in four zones). Those changes in 1949 benefited the ALP because their seats were predominantly in outer metropolitan areas. However, this Gerrymander would come back to bite the ALP, as changing demographics meant it began to benefit the Country Party (CP). The Country Party which became the National Party in 1974 embraced the system and in 1958 the Gerrymander was continued by the Country/Liberal Nicklin – Morris Government with 78 electorates established across three zones.[12] In 1971 the CP/LIB Bjelke-Petersen Government introduced legislation continuing the Gerrymander, with 82 electorates established in four zones. In 1985 the NP Bjelke-Petersen Government legislated the continuation of the Gerrymander with 89 electorates established in four zones.[13]

Following the Fitzgerald Inquiry, the election of the Goss ALP government and the establishment of the Electoral and Administrative Review Commission (EARC) in 1991, 89 electorates were established in accordance with EARC's recommendations. Electoral zones were abolished; optional-preferential voting was introduced; and a system of weighting large-sized electorates was introduced. To date EARC's electoral system has not been altered. It will be interesting to see how long the temptation can be resisted.

From 1985 through to 2016 the number of electorates in the State did not increase. Smaller parliaments benefit government. More about what happened in 2016 below.

Example 2 – The voting system

Governments in Queensland have manipulated the voting system to benefit themselves. From 1860 to 1892 Queensland's voting system was the 'first-past-the-post' (plurality) voting system. In 1892 preferential voting ('contingent vote'), was introduced by a largely conservative government to

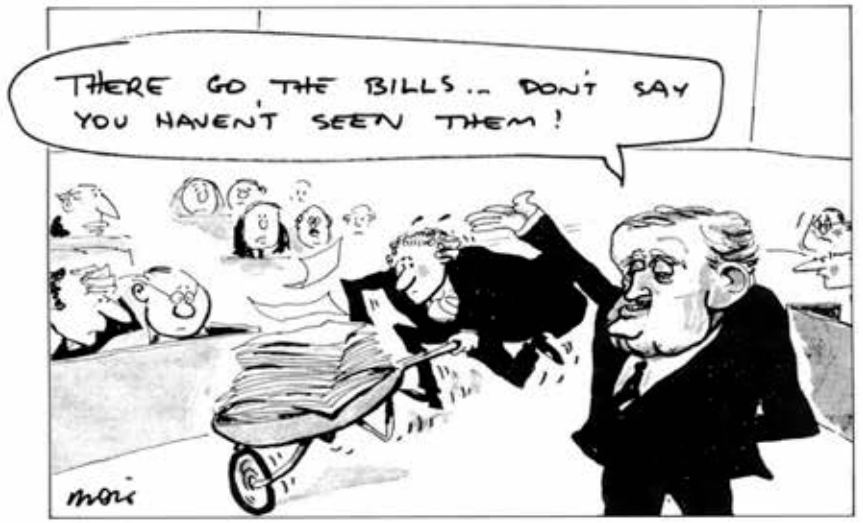
counter the Labor party's large vote and ensure smaller party votes went back to conservatives.[14] The *Elections Act Amendment Act 1942* reintroduced first-past-the-post voting.[15] The *Elections Act Amendment Act 1962* introduced compulsory preferential voting.

EARC's optional preferential voting system lasted until late one night in 2016. An electoral redistribution was due for the 46th Parliament. As a result, in the 45th Parliament there were attempts to address the size of the House as it was clear that without such action, fast-growing south-east Queensland would gain more seats at the expense of regional and rural areas.

In July 2015 the LNP introduced the Electoral (Redistribution Commission) and Another Act Amendment Bill to create a larger redistribution committee and give that committee the capacity to increase the number of electorates, potentially establishing up to five new seats. The bill was not supported by the government or the casting vote of the then Independent Speaker and the bill failed to pass its second reading on 28 October 2015.[16]

In November 2015 the Katter Australia Party (KAP) introduced the Electoral (Improving Representation) and Other Legislation Amendment Bill 2016. The Bill sought firstly to provide for broader representation on the Redistribution Commission by increasing the membership of the Commission from three to five. In the interests of transparency, the appointment of all Commissioners, with the exception of the Electoral Commissioner who has already undergone a separate appointment process, is subject to the approval of the leaders of all recognised parties in the Legislative Assembly. Secondly, the bill sought to change the number of electoral districts for the State by increasing the number of members of the Legislative Assembly from 89 to 93 in order to improve representation, particularly in regional Queensland. The Bill was not supported by the government or the casting vote of the then Independent Speaker and the Bill failed in to pass its second reading on 2 December 2015.[17]

In order to retain regional representation in 2016 the LNP introduced the Electoral (Improving Representation) and Another Act Amendment Bill 2015 to change the number of electoral districts for the State by increasing the number of members of the Legislative Assembly from 89 to 93. This time the attempt succeeded, largely due to a former ALP member becoming an independent and supporting the Bill. However, it came at a cost to an EARC recommendation. The ALP circulated an amendment to the Bill to reintroduce compulsory preferential voting. The proposed amendments, circulated shortly before consideration in detail, were purportedly aimed at reducing the number of informal votes at state and federal elections and to create more consistency between state and federal elections. The KAP and ALP joined to ensure the passage of the amendments.[18] The KAP no doubt saw great electoral advantage



Example 4: Parliamentary Reform invariably favours government control (Legislation).
(Courtesy of Alan Moir, cartoonist, *Courier Mail* 1979-1984)

in compulsory preferential voting and probably hoped it would bring about a split in the LNP, because the optional preferential voting system had largely led to the formation of the LNP. The fact that the ALP won the 2017 election with an additional four seats, despite a swing against it on the primary vote of about 2 per cent and to it by about 0.2 per cent in the two-party preferred vote is evidence that the voting change improved its overall position.

Of course, compulsory preferential voting is a double-edged sword. Sometimes it can help and sometimes it can be devastating.

Example 3 – Parliamentary Reform invariably favours government control (Committees generally)

From 1860 to 1922 there was extensive use of select committees in the Queensland Parliament. Committees considered legislative proposals and the vast array of issues, affecting all parts of the colony/state.

The committee system in Queensland went into decline from the abolition of the Upper House in 1922. From 1922 to 1989 there was only a handful of select committees.[19]

Apart from domestic committees, there was not a single select committee between 1915 and 1974. A Subordinate Legislation Committee was established in 1975 (and continued in successive parliaments) and there was an Education Committee 1978-79. Not until the late-1980s during the Fitzgerald Inquiry and the Ahern government did Queensland see the first slow steps towards

the current committee system. Legislation was enacted in 1988 to establish the Parliamentary Committee of Public Accounts with such a Committee established in 1989. Other committees were established subsequently by legislation or appointed by resolution of the House for oversight or to scrutinise various aspects of Government policy and administration.[20]

The Fitzgerald Report clearly stated, 'There is a need to consider introducing a comprehensive system of Parliamentary Committees to enhance the ability of Parliament to monitor the efficiency of Government.'[21]

The Goss government, elected in December 1989, should be congratulated for its efforts in implementing Fitzgerald and EARC recommendations. The resulting legislative books from 1990 to 1995 provide the genesis for much of the integrity and accountability frameworks that we have today. Freedom of Information (now Right to Information), judicial review of administrative decisions, electoral laws, freedom of protest are all rooted in this era. In addition, there were significant policy changes in public administration.

However, when it came to parliamentary reform, the response was much more lukewarm. The committee system established in the 1990s was not fit for the purpose and not in keeping with either the Fitzgerald Report or EARC recommendations. As will be discussed later, neither was the estimates process or the legislative process. Nor was an EARC recommendation that Opposition resources be 20 per cent of Ministerial resources. It has always hovered around 10 per cent.

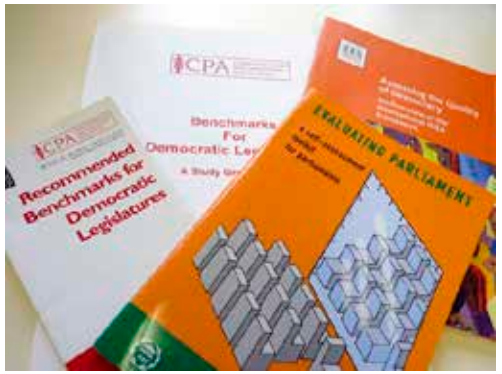
A unicameral parliament should have a committee system that encompasses and scrutinises the array of functions of government. Until 2012 there were no committees with responsibility for areas of government such as health, economics and education, despite various recommendations for such committees.

Until 2012 the work of the committees and the work of the Legislative Assembly were largely separate and distinct, as opposed to being complementary.

Reforms from 2009 to 2011 resulted in the portfolio committee system which has given the Queensland Parliament a more comprehensive committee system that covers the field of government, is relevant to the workings of the Assembly and in theory should create the oversight and scrutiny needed.

Example 4 – Parliamentary Reform invariably favours government control (Legislation)

The lukewarm approach to parliamentary reform in the 1990s is no better demonstrated than by the legislative process in place until 2012.



Queensland failed international benchmarks for democracy in relation to its committee system and legislative system.

The Queensland Parliament's legislative system was an antiquated relic little changed since 1860 where bills could be introduced and then debated, amended and passed without an urgency motion in seven days up until 2002 and in 14 days thereafter. Bills that were months or years in development in departments were often available for members, stakeholders and the public only days before they became law. There was no committee review of legislation, no formal process for stakeholder engagement and consultation with parliament and extremely little time to effectively scrutinise policy or content.

Our legislative process failed the benchmarks developed by inter-parliamentary institutions aimed at helping developing nations.[22] In particular the absence of committee scrutiny of legislation was a serious impediment to the Parliament.

Since 2012 our legislative system is much improved. It is not perfect, but members, stakeholders and the public generally are served well by our portfolio committees and their legislative scrutiny.

Example 5 – Parliamentary Reform invariably favours government control (the supine Estimates Committee process)

The estimates committee system recommended by EARC and introduced in 1996 also demonstrates that lukewarm approach to parliamentary reform in the 1990s. The Queensland estimates committee process first introduced in 1996 was tightly controlled with restrictive and structured timeframes for questions and answers. Borrowed from the Legislative Assembly of New South Wales, it bore no resemblance to the committee system operating in upper houses such as the Senate.

The Committee System Review Committee recommended a freer flowing system in its 2010 report.[23] Although changes occurred in the rules, the culture did not change and now chairs and committees implement the old inflexible system informally.

Example 6 – Estimates processes can be truncated

From its introduction in 1996 until 2011 the Budget had been considered by seven estimates committees established each year by motion. From 2011 the seven portfolio committees had considered the budget – a committee hearing each day for seven days over two weeks.

On 2 April 2014 the Newman Government truncated the hearing dates for the seven estimates committees, ensuring all seven committees conducted their hearings over a two-day period. The fairly obvious motive for this change of practice was both to ensure a very small Opposition was over-stretched and to limit media coverage to two days, rather than to spread it over two weeks.[24]

Ironically, the move actually resulted in each committee spending more time in hearings.

Estimates returned to their normal seven days of hearings in 2015. However, more recently, the motions sending the estimates to portfolio committees have set out in greater detail their times of sitting and the program of inquiry thus limiting the discretion of committees to determine their own schedule. The government, through these motions, controls the process, not the committees.[25]

Example 7 – Process can be set aside and wrongdoing forgiven

Parliament was recalled during the traditional Christmas period on 9 December 2005 to respond to a report of the then Crime and Misconduct Commission (CMC). The report revealed that an investigation had found sufficient evidence to charge a minister with deliberately misleading an estimates committee examination. However, the conduct was also a contempt. The House was recalled, the minister apologised and a motion was moved to find the minister guilty of contempt but to find his apology and resignation sufficient penalty. This effectively barred further criminal prosecution.[26]

The recall of Parliament to deal with a matter arising from a CMC investigation and report is an example of how dealing with an ethical issue can easily become hopelessly partisan if normal procedure is not followed. The matter was already before the Members' Ethics and Parliamentary Privileges Committee. That committee had established a long history of dealing with difficult matters in an appropriate and bipartisan fashion. In its history to that time, there had only ever been one dissenting report. Even if the committee had not been able to come to a bipartisan conclusion and agreed action, proper process would have been followed if the committee had been allowed to proceed in the normal way.

Ironically the same Minister would later be convicted of corruption and appear at the Bar of the House charged with contempt for failing to declare gifts from a mining magnate.

Example 8 – Committees can be sacked

In late 2013 a controversy arose around the acting chairperson of the Crime and Corruption Commission (CCC). The matter started with an article that was written by the acting chairperson about government crime legislation. A very boring little article. However, that article led to an allegation that the acting chairperson had met with a government media operative before submitting the article and a serious allegation that the acting chairperson had misled the Parliamentary Crime and Corruption Committee (PCCC) in later hearings. An interesting aside to this was the chair of the Committee was a well-respected independent member of the Assembly.

The government then moved a motion without notice to have the Attorney-General briefed on the matter and the chair tabled, on behalf of the committee transcripts of hearings about the matter.[27]

The following day was the final sitting day of the year and a day of high drama. In an unrelated matter, a member of the House who resigned the previous day was called to the bar of the House and dealt with for contempt for failing to declare matters on his register and fined $2,000 each for 42 instances of failing to declare.[28] Later, that evening at 9.04 pm, a motion was moved to establish a select committee of ethics and send matters relating to the acting chair of the CCC to that committee but also to sack all the members of the PCCC.[29]

It should also be noted that there have been other instances of individuals being removed from committees by the government. Sometimes this has been due to their own conduct, other times simply because of shifting political allegiances. But in this instance, there can be no sensible argument that the committee was doing other than that for which it was established.

Example 9 – The spirit of the Constitution can be breached, if not broken

Section 26B of the *Constitution of Queensland 2001*, was inserted in 2016.[30] The genesis of section 26B lay in recommendation 9 of Report No. 16 of the Finance and Administration Committee 'Inquiry into the introduction of four year terms for the Queensland Parliament', and the subsequent consideration of the Constitution (Fixed Term Parliament) Amendment Bill 2015 and the Constitution (Fixed Term Parliament) Referendum Bill 2015.[31] In short, the amendment was one trade-off recommended for the introduction of four-year terms.

The relatively new section 26B provides that the Legislative Assembly must ensure that each Bill is referred to a portfolio committee or another committee for examination by the committee and provides the timeframe for referral must be at least six weeks. However, the section clarifies that it does not prevent the Legislative Assembly by ordinary majority from declaring a bill urgent under the Standing Rules and Orders of the Legislative Assembly. Under these circumstances, a bill may be referred to a committee for a review period of less than six weeks, may be discharged from a committee or may not be referred to a committee before the bill is passed by the Assembly.

Now it would be assumed that urgent legislation would follow the process in the section. However, governments do not like to leave a record of 'urgent legislation', so they have devised other methods to circumnavigate the constitutional provision. Sometimes governments simply do not want legislation subject to scrutiny. One way to avoid scrutiny is to effectively introduce new bills as amendments to existing bills. For example, during the second reading debate of the Community Services Industry (Portable Long Service) Bill 2019 on 16 June 2020, after the bill had already been considered by the Education, Employment and Small Business Committee, the relevant Minister circulated 51 pages of amendments. The amendments were actually irrelevant to the Bill and dealt with matters such as changing a public holiday date, deferring public service wage increases and minor matters relating to COVID-19.

In another example, during consideration of the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 the relevant minister circulated 100 pages containing 229 amendments to this bill before the second reading debate, after it had already been considered and reported on by the Economics and Governance Committee.[32]

Both the Community Services Industry (Portable Long Service) Bill 2019 and the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 were subject to section 26B prior to the substantive amendments being moved, and were not considered urgent.

The Opposition wrote to the Speaker about this increasing trend to move substantial unrelated amendments to bills already considered by and reported on by committees. The Opposition noted the increasing trend by the government in moving substantial amendments outside of the long title of bills being debated without prior notice to the Business Committee. This resulted in the parliament not being able to properly discharge its responsibility to address issues contained in the bill without proper notice of the amendments or consideration by a committee.

They also complained that by continually bypassing parliamentary committees, the government was offending section 26B of the *Constitution of Queensland Act 2001*. They also argued that the limitation on parliamentary sitting hours as introduced in that term of parliament has resulted in a denial of opportunities of members to speak, to contribute to debates and to move amendments.[33]

The Speaker was unable to rule the practice unlawful.[34] Advice obtained for the Speaker, from Mr Del Villar QC confirmed that, although moving substantial amendments after a bill had already been scrutinised by a committee might be regarded as contrary to the spirit of the Constitution, the practice did not in itself breach section 26B.[35]

Example 10 – The purpose of the Constitution can be avoided, by characterisation

Also introduced in 2016, was section 26C of the *Constitution of Queensland Act 2001* which provides that the Legislative Assembly must ensure each bill for an annual appropriation Act is referred to the portfolio committees for examination in a public hearing. This is the process colloquially known as estimates.

The provision defines the annual appropriation Act as meaning an Act that appropriates an amount from the consolidated fund for departments of government, or the Legislative Assembly and parliamentary service, for a financial year.

On 22 April 2020 the Appropriation (COVID-19) Bill was introduced, debated and passed on the same day. The bill appropriated $1,614,800,000 from the consolidated fund for departments for the financial year starting 1 July 2020. This amount was in addition to the amount of $27,349,450,000 already authorised by the *Appropriation Act 2019*, section 3, to be issued from the consolidated fund for departments for the financial year starting 1 July 2020.

More significantly, on 8 September 2020, the Treasurer introduced the Appropriation Bill 2020 and the Appropriation (Parliament) Bill 2020. The bills were declared urgent and were set to pass the House by close of business on 10 September 2020. The long title of the Appropriation Bill 2020 was 'A Bill for An Act authorising the Treasurer to pay amounts from the consolidated fund for departments for the financial years starting 1 July 2019 and 1 July 2020'.

Clause 3 of the bill provided that the Treasurer was authorised to pay $28,635,094,000 from the consolidated fund for departments for the financial year starting 1 July 2020. This was in addition to previous allotted amounts. The end result was that this bill effectively gave a full annual appropriation for government for the financial year commencing 1 July of $28,635,094,000 plus $1,614,800,000, plus $27,349,450,000 equalling $57,599,344,000 ($57.6 billion). However, there was no referral to committee, no budget documentation and no estimates process as per s.26C of the Constitution.

The election, fixed by the Constitution, was to take place on 31 October that year.

The Member for Clayfield (a former treasurer) rose on a matter of privilege on 10 September 2020[36] and raised an issue about the constitutionality of the Appropriation Bills not being sent to estimates for examination. The Opposition argued that the bills introduced by the Treasurer were in reality the annual appropriation bills. However, the Opposition argued that there would be no referral of the bills to portfolio committees for examination and no necessary associated documentation that explained the appropriation or any estimates of expenditure. The Opposition argued that this was a breach of the *Constitution of Queensland*.[37]

The Treasurer responded by confirming that the advice the government received was that these were not annual appropriation bills and the government had legal advice to the effect that they can be passed by the Legislative Assembly.[38] Later the Treasurer made a Ministerial statement to the effect that he had been advised that:

> …the bills were constitutionally valid as the Constitution of Queensland Act permits the introduction of special appropriation bills to authorise the expenditure of money from the Consolidated Fund other than for a full financial year—for example, for part of a year or standing appropriation. Subsection 26C(3) of the Constitution of Queensland defines an 'annual appropriation act' as an act that appropriates an amount from the Consolidated Fund for departments of government or the Legislative Assembly and Parliamentary Service for a financial year. The Appropriation Bill currently before parliament is not an annual appropriation act as it does not seek an amount from the Consolidated Fund for the full 2020-21 financial year. Although the level of interim supply sought is based on 2019-20, the Treasurer stated he was advised that this does not represent the current estimates of total appropriation required for 2020-21. The Treasurer advised that the annual appropriation bill for 2020-21 will be introduced as part of the 2020-21 budget, which the government, if returned, has announced will be delivered in the week commencing 30 November.[39]

The Speaker ruled later that day, saying that it 'appeared that the pivotal issue is whether the bills introduced by the Treasurer are annual appropriation bills. The member for Clayfield argues that the bills are annual appropriation bills in both form and substance, meeting the definition set out in section 26C(3) of the Queensland Constitution.'[40]

The Speaker noted that the Treasurer had indicated that he had legal advice that the appropriation bills currently before the House were not an annual appropriation act as it did not seek an amount from the Consolidated Fund for the full 2020-21 financial year. The Treasurer had further indicated that although the level of interim supply sought was based on 2019-20, the legal advice was that this did not represent the current estimates of total appropriation required for 2020-21. The Speaker indicated that the Attorney-General had let him sight a portion of a written legal advice by the Solicitor-General that indicated that the bills were not annual appropriation

bills as they did not represent the complete or total appropriations for the financial year. The Speaker indicated it was the duty of a Speaker to intervene where there was a clear breach of a constitutional requirement. However, it was not unreasonable that he should rely on the advice and assurance of the first law officer—the Attorney-General—the Solicitor-General and the Treasurer on the constitutionality of a matter. If the bills were not annual appropriations as per the advice and assurances, then the requirements of part 6, chapter 31, of standing orders did not apply.[41]

The Speaker noted that the requirement in section 26C of the Constitution of Queensland 2001 was probably not a manner and form provision, but rather a provision dealing with internal parliamentary procedure and hence was non-justiciable. The Speaker noted that it did not mean it should be ignored by the House. The House had a duty to follow procedure in law, but it meant that legislation passed was unlikely to be able to be challenged.[42]

As explained above, the estimates process had been truncated in 2015. In 2020 it was simply postponed until after the fixed date election. Almost $55 billion of expenditure would have to await scrutiny until after the election.

It is interesting to note that the Appropriation (2020-2021) Bill 2020 [43] introduced after the election on 1 December 2020 characterised as the State's Budget for 2020 authorised the Treasurer to pay $60,857,652,000 from the consolidated fund for departments for the financial year starting 1 July 2020. However, the explanatory notes made it clear that this amount included amounts already authorised under the *Appropriation Act 2019*, *Appropriation (Covid-19) Act 2020* and *Appropriation Act 2020* ($57.6 Billion).[44] In other words the official budget in 2020 was for about $3.3 Billion.

Conclusion

In 1922 the Legislative Council was abolished, not by vote or mandate of the people who had rejected the Council's abolition by referendum in 1915, but by numerical manipulation by the executive.

There is no doubt that the obstructionism of a non-elected body, essentially representing only the wealth of the State could not continue. But the failure to reform the Council and the alternative option of abolishing it, undoubtedly led to a weaker unicameral Parliament and a much stronger, less accountable executive arm of government.

Unicameralism, a single House of Parliament, coupled with single member seats, has led to the Parliament nearly always being dominated by the government of the day. When those governments see political advantage, do not exercise restraint and use their numbers to take actions that are less than accountable or transparent, Queensland democracy is the poorer.

Endnotes

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6 *New South Wales v Bardolph* (1934) 52 CLR 455.
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8 Clem Lack, *Three Decades of Queensland Political History*, Brisbane, Government Printer, p. 115.
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22 The Commonwealth Parliamentary Association's work titled Recommended Benchmarks for Democratic Legislatures; The Inter-Parliamentary Union's work titled Evaluating Parliament; and The Institute for Democracy and Electoral Assistance's work titled Assessing the Quality of Democracy.
23 Note 20 pp. 33-37. Give reference.
24 Legislative Assembly, Record of Proceedings, 2 April 2014 at p. 1011. https://documents.parliament.qld.gov.au/events/han/2014/2014_04_02_WEEKLY.PDF
25 Legislative Assembly, Record of Proceedings, 18 June 2021 at pp. 2193 -2198. https://documents.parliament.qld.gov.au/events/han/2021/2021_06_18_WEEKLY.PDF
26 Legislative Assembly, Record of Proceedings, 9 December 2005. https://documents.parliament.qld.gov.au/events/han/2005/2005_12_09_WEEKLY.PDF
27 Legislative Assembly, Record of Proceedings 20 November 2013, p. 4099. https://documents.parliament.qld.gov.au/events/han/2013/2013_11_20_WEEKLY.PDF
28 Record of Proceedings 21 November 2013, p. 4190. https://documents.parliament.qld.gov.au/events/han/2013/2013_11_21_WEEKLY.PDF
29 Legislative Assembly, Record of Proceedings 21 November 2013, p. 4263. https://documents.parliament.qld.gov.au/events/han/2013/2013_11_21_WEEKLY.PDF

30 *Constitution of Queensland and Other Legislation Amendment Act 2016.*
31 Explanatory notes to the Constitution of Queensland and Other Legislation Amendment Bill 2016.
32 Legislative Assembly, Record of Proceedings, Record of Proceedings, 17 June 2020, p. 1315. https://documents.parliament.qld.gov.au/events/han/2020/2020_06_17_WEEKLY.PDF (The amendments were circulated by the Clerk of the Parliament at 9.08pm on the Minister's instructions the evening prior to the commencement of the second reading debate at 2.42pm on 17 June 2020).
33 Letter, dated 15 July 2020, from the member for Kawana, Mr Jarrod Bleijie MP, to the Speaker, Hon. Curtis Pitt, regarding a matter of privilege https://documents.parliament.qld.gov.au/tp/2020/5620T1571.pdf
34 Speaker's Ruling, Operation of Parliament, Legislative Assembly Record of Proceedings, 9 September 2020, p. 2245. 2020_09_09_WEEKLY (parliament.qld.gov.au).
35 Letter, dated 3 September 2020, from Mr Gim Del Villar QC to the Clerk of the Parliament, Mr Neil Laurie, regarding an opinion on alleged breaches of the Queensland Constitution. https://documents.parliament.qld.gov.au/tp/2020/5620T1572.pdf
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41 Legislative Assembly, Record of Proceedings, 10 September 2010, at pp. 2436-47.
42 Tabled paper: Bundle of correspondence from the member for Clayfield, Mr Tim Nicholls MP, and the Treasurer and Minister for Infrastructure and Planning, Hon. Cameron Dick, to the Speaker, Hon. Curtis Pitt MP, regarding a matter of privilege concerning the constitutionality of the appropriation bills [1628].
43 https://documents.parliament.qld.gov.au/tp/2020/5720T321.pdf
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Conversions

1 foot	=	*30.48 centimetres*
1 mile	=	*1.61 kilometres*
1 chain	=	*20.12 metres*
1 acre	=	*0.4 hectares*
1 acre	=	*0.004 square kilometres*
1 pound	=	*0.45 kilograms*
1 ton	=	*1.02 tonnes*
1 fathom	=	*1.82 metres*
20 shillings	=	*1 pound (£)*
12 pence (d)	=	*1 shilling (s)*

At metric conversion 14 February 1966
(refer to exchange rates after this date)

1 pound (£)	=	*$2 Australian dollars*
10 shillings (s)	=	*$1 Australian dollar*
1 shilling (d)	=	*10 cents*

Cover: The design by Society member Dr Michael Tracey incorporates the Queensland Flag with the Union Jack in the upper left corner and the Maltese Cross with a superimposed Royal Crown.

Images left to right: Hugh Nelson; Hamilton Goold-Adams and family; *Parliamentary Reform invariably favours government control (Legislation)*, Alan Moir; *Newstead House*; Commissariat Store

QUEENSLAND HISTORY
JOURNAL
THE ROYAL HISTORICAL SOCIETY OF QUEENSLAND
Volume 25, No. 3, NOVEMBER 2022

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Seminar: Centenary of the Abolition of the Legislative Council, March 2022
RHSQ and Queensland Parliament

Queensland Parliamentary Service

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27 April 2021

Mr Jon Krause MP
Chair
Parliamentary Crime and Corruption Committee
Parliament House
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BRISBANE QLD 4000

pccc@parliament.qld.gov.au

Dear Mr Krause

Five-year review of the Crime and Corruption Commission's activities

I refer to your correspondence of 1 June 2020 and thank the Parliamentary Crime and Corruption Committee's (the committee) invitation to make a submission to the five-year review of the activities of the Crime and Corruption Commission (CCC). I seek the committee's leave to table this late submission to the inquiry.

This submission is set-out under seven headings:

- Ongoing need for the CCC
- Focus of the CCC
- Independence of the CCC and the mix on the Commission
- Transparency of the CCC and its activities
- The CCC as an investigator and reporter
- Accountability of the CCC
- The PCCC.

Ongoing need for the CCC

It must never be forgotten that standing investigatory bodies like the CCC are a relatively recent phenomena in our Westminster system of government. The Independent Commission Against Corruption (ICAC) was established in New South Wales in 1988 to address growing community concern about the integrity of public administration in NSW. The NSW ICAC was the first of a growing number of standing commissions in Australia. Queensland's Criminal Justice Commission (CJC), later to be rebadged as the Crime and Misconduct Commission (CMC) and then the Crime and Corruption Commission (CCC), commenced in 1989 following the Fitzgerald inquiry and report.

Prior to the CCC, ad hoc Royal Commissions were the most vigorous type of inquiry in Australia. Royal Commissions are initiated by the executive (ie the government rather than parliament) to inquire into a particular matter or area of public importance. A Royal Commission's aim is not to settle disputes between parties (unlike a court), nor necessarily generate prosecutions. The aim of Royal Commissions has generally been to get to the "truth" of a matter, and in the process of doing so, create clear air about a matter.

Royal Commissions investigate serious allegations of impropriety or corruption or systems of administration and provide recommendations for redress and/or policy and law reform. Royal Commissions, although technically an instrument of executive government, are viewed as independent, and although exercising broad and far-reaching powers of investigation, including powers to compel the production of documents or attendance by witnesses to give evidence, are generally very transparent about their operation and ultimately accountable for their actions via the risk of judicial intervention and through their reports. Royal Commissions almost inevitably conduct most proceedings in public and publish findings in a report and make recommendations. This generally public operation of Royal Commissions is important to note.

In my submission the first issue that should always arise in the review of the activities of the CCC is whether there is a continuing need or justification for the CCC. That is, is there a continuing need for a standing body with broad and far-reaching powers of investigation in Queensland?

In my submission the answer to this question is a resounding yes, there is a continuing need for a standing body with broad and far-reaching powers of investigation in Queensland. The reason for this is that there is an ongoing need for (a) the independent and (b) the transparent investigation of public sector misconduct and oversight of public sector systems to reduce misconduct.

The misconduct uncovered by the Fitzgerald inquiry and report, could still easily emerge in Queensland. Indeed, some of the wider safeguards that existed prior to and immediately after the Fitzgerald inquiry and report have now been fatally weakened. The weakening of these other safeguards bolsters the need for the CCC.

Decline of the media

Take, for example, the decline of the media, the often titled "fourth estate". It has long been maintained that investigative journalism may uncover examples of institutional corruption, abuse, or mismanagement.[1] But commercial media revenues have been gutted by the rise of the internet and social media. Media cut-backs have seen the decline of resources for investigatory journalism.

The Australian Competition and Consumer Commissions report on its *Digital Platforms Inquiry*[2] noted that digital disruption has created disincentives for investment in investigative journalism:

> *media organisations that republish articles are able to compete effectively for online audiences with the content originators who may have invested significantly in uncovering and/or producing the story. This may potentially reduce the incentives for news media businesses to invest in investigative journalism and other news content that is costly to produce.*
>
> ...

[1] D Wilding, P Fray, S Molitorisc, E McKewon, The Impact of Digital Platforms on News and Journalistic Content', Centre for Media Transition, University of Technology Sydney, NSW, 2018, p. 19; The Civic Impact of Journalism Project, Submission to the Senate Select Committee on the Future of Public Interest Journalism, June 2017, p. 2.

[2] https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf

> ... *investment in the production of news content such as investigative journalism – the level of investment and resources media businesses allocate to understanding and meeting changes to algorithms is likely taking away resources that may be better utilised in the production of high quality news content* ...

Although there are some that argue that investigative reporting is adapting to the new digital media landscape,[3] the best that can be said is that we are in a time of flux.

From my own experience and observation I can attest to the fact that state based serious political and investigative journalism has been in decline since the public broadcaster's decision to axe the state-based 7.30 Reports in the mid-1990s. The Queensland based *7.30 Report* was absolutely required viewing for everyone in the public sector in the 1990s, especially those that worked in parliament or politics. The *7.30 Report* largely set the agenda for scrutiny in the Legislative Assembly and follow-up reporting by the print, TV and radio media. Since the demise of the *7.30 Report*, state-based TV political coverage has largely vanished. This has been exasperated by the conversion of serious radio programs on the public broadcaster to light "magazine" formats or otherwise rescheduling such programs to dead hours.

Commercial news media spends only a fraction of their time reporting state-based political and accountability matters, with far more time spent on the goings on in football or other sport (particularly the private lives of their participants). The time spent on state-based political and accountability matters by the commercial broadcasters is usually incomplete, sensational and inept. I do not necessarily blame the journalists for this, but rather the content and editorial decision makers.

In the United States of America, media organisations have become intensely partisan, being essentially a contest between the Fox right and the CNN left. The balanced, sensible middle ground is abandoned in that fight. The media in Australia is trending like that of the USA, where media is retreating from the balanced, sensible middle ground to locked-in partisan positions.

The migration of senior or experienced political journalists from both commercial and public media to government at all levels is a very concerning trend that remains under-reported, I suspect because of media solidarity. But their migration bells the cat about the health of political journalism, the under-investment in serious journalism and the decline of the fourth estate as an accountability mechanism. It is apparent that there are more resources for spin than there is in serious journalism.

Decline of academic commentary

Another example is the decline of academic commentary on accountability, ethics and politics. There are few academics that regularly contribute to political commentary or debate public accountability, particularly state-based political/accountability matters. I am not certain of the reasons for this decline, but I suspect it is a combination of decreasing investment in teaching government and related issues, an increasing focus by academics on commercial matters, engagements by academics in governmental roles or consultancies (thereby creating conflicts) and, perhaps workload management and reporting issues. In any event, there has been a significant decline in this alternative and under recognised source of critic that was very active in the 1980s and 1990s.

Professional organisations and stakeholder groups

Professional organisations and stakeholder groups (including employer groups, unions etc.) can play an important role in highlighting government ineptitude, wasted resources, misguided regulation, unfairness and

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[3] A Carson (2019), *Investigative Journalism, Democracy and the Digital Age*, Routledge.

misconduct. However, the primary purpose of all these groups is by necessity biased towards protecting the profession or stakeholders they represent.

As society and government becomes larger and more complicated, such organisations and groups struggle to deal with the increasing multitude of issues with which they have to cope. The views of the executive of such organisations and groups largely dictates the direction and focus of these groups. And the executive of such organisations and groups can often also be infected by the political bias of the executive.

The Parliament

The Parliament has undergone significant reform in the last 30 years. The journey of reform began with the introduction of Members' and Related Persons' Registers of Interest in 1988. It continued with significant modernisation of procedural reform. The importance of the introduction of a Code of Ethical Standards and a Standing Ethics Committee, together with the consolidation of constitutional provisions regarding the legal obligations on members cannot be understated. Nor can innovative initiatives like e-petitions and regional sittings.

Whilst parliamentary committees in the 1990s and 2000s played an important role, the Fitzgerald vision of a "comprehensive system of parliamentary committees" was unfortunately not realised until 2011 when the portfolio committees were introduced.

Parliament has a number of distinct functions: to form a government, to legislate, to approve the raising and spending of money, to air grievances and provide a forum for general debate, to make the government of the day accountable and act as a grand inquisition. As we stand here in 2021 the Queensland Parliament is achieving most of those functions better than it has ever done in its history. The legislative process in 2021, whilst not perfect, is more open, transparent and achieves better outcomes than at any time in our history. Our financial process (annual budget) is the subject of periodic criticism and could be improved, but it is far superior to that of 25 years ago. If the system was used better by the actors in the system, there would be better outcomes. The public have never been able to access and participate in parliamentary processes like they can today.

However, we must also acknowledge weaknesses. The ability of the Legislative Assembly or its committees to hold any government to account or act as an inquisitor is weakened by the arithmetic of the vote in the House and committee. Committees are performing exceptionally well in the legislative space and being given an increasing role in policy development through law reform referrals, but how are they performing the role of keeping government to account for its actions? At the end of the day what a committee investigates and how it investigates will be subject to the will of the majority and sometimes the decisions themselves will not be revealed.

Focus of the CCC

Having established that there is a continuing need for the CCC, attention must now shift to the focus of the CCC itself.

I have had some recourse to the CCC's (and its predecessors) reporting to try and identify the focus of the CCC over the years and whether that focus has altered.

The CCC's *Strategic Plan 2020-2024*[4] outlines its Strategies as follows:

[4] https://www.ccc.qld.gov.au/sites/default/files/Docs/Publications/CCC/CCC-Strategic-Plan-2020-2024.pdf

- Advance major crime investigations and help the QPS solve major crime
- Remove the financial benefit and support for serious criminal offending
- Investigate and oversee investigations into serious and systemic public sector corruption and police misconduct
- Work with stakeholders to build corruption resistant public institutions
- Inform public policy about major crime and corruption by providing independent advice to government.

It is noted that major crime and confiscation of assets takes precedence of order to public sector corruption and police misconduct in the strategic plan. Importantly, the strategy indicates that the CCC will only involve itself in serious or systemic corruption and misconduct: "Investigate and oversee investigations into serious and systemic public sector corruption and police misconduct".

The CMC's Annual Report 2009-2010[5] detailed the following statistics:

- The CMC conducted investigative hearings over 162 days in Brisbane, Cairns, Townsville, Mackay, Yeppoon, Maroochydore and Proserpine to obtain critical evidence in 39 serious crime investigations.
- The CMC conducted 33 investigations into 111 allegations involving official misconduct by members of the QPS. This resulted in 8 people charged with 138 criminal offences and 6 people recommended to be charged with 35 criminal offences and 28 people subject to 122 disciplinary recommendations
- The CMC conducted 63 investigations in to the public sector. Of the 63 investigations, 30 involved 100 allegations of misconduct by public officials in public sector agencies other than the QPS. The two most common were corruption and favouritism and official conduct.
- The most complex crime investigation ever undertaken by the CMC led to the dismantling of several drug networks, the arrest of 63 people on 291 charges and the restraint of assets worth over $7 million.
- CMC operations seized drugs with an estimated street value of $4.5 million.
- Efforts to identify and recover proceeds of criminal activity resulted in the restraint of assets worth $19.543 million and the forfeiture of assets worth $5.568 million.
- The CMC received 4665 complaints containing over 11 000 allegations — the largest number since the establishment of the CMC — and assessed 97 per cent of them within a month.
- Of approved establishment 331 FTE – The allocation was Crime 49 FTE, Misconduct 90 FTE, and Intelligence 32 FTE with other areas making up the remaining 160 FTE.

The CMC's Annual Report 2013-2014[6] detailed the following statistics:

- 348 days of hearings relating to major crime investigations with 79 persons charged with 402 offences
- 61 official misconduct investigations completed with 8 people charged with 138 criminal offences and 6 people recommended to be charged with 35 criminal offences and 28 people subject to 122 disciplinary recommendations
- 89% of 3943 complaints of official misconduct assessed within 4 weeks
- Of 329 FTE – The allocation was Misconduct (including Applied research and Evaluation) 104.10 FTE, Crime (including intelligence) 99.50 FTE, other areas 125.50 FTE
- There is no breakdown of public v. private hearings.

[5] https://www.ccc.qld.gov.au/sites/default/files/Docs/Publications/CMC/CMC-Annual-Report-2009-2010.pdf

[6] https://www.ccc.qld.gov.au/sites/default/files/Docs/Publications/CMC/CMC-Annual-Report-2013-2014.pdf

The CCC's *Annual Report 2018-2019*[7] details the following statistics:

- 208 days of hearings relating to crime investigations and 126 people charged with 126 criminal offences relating to crime investigations
- 36 days of hearings relating to corruption investigations and 23 people charged with 192 criminal offences relating to corruption investigations and 17 recommendations for disciplinary action made from corruption investigations relating to 10 people
- The CCC assessed a total of 3381 complaints and 76 per cent of corruption complaints were assessed within four weeks
- Of 341.46 FTE – The allocation was 75.65 FTE in the Corruption Division and 58.08 FTE in the Crime Division and 41.59 in the Intelligence Division (total 99.67 FTE) and 166.14 FTE in other Divisions[8]
- The report indicates that there were 16 days of public hearings re Taskforce Flaxton (relating to the operation of prisons), but does not indicate the total mix of private/public hearing days.

Identifying 'like for like' statistics from the annual reports is not easy. In any event, reporting is at such a high level that it is virtually impossible to determine the significance or nature of the crime investigations or the corruption investigations undertaken.

The strategic plan and the annual report only gives an overall 'flavour' of the CCC's focus and resource allocation. From a long time observer's point of view, it is my perception that the CCC's focus since its establishment has drifted from an independent agency to fight organised crime and corruption to restore and maintain confidence in public institutions, to an agency increasingly focussed on major and serious crime. Whether this trend has been driven by demand, internal focus or legislative change requires further inquiry and the PCCC is probably better placed to make that assessment.

The questions that remain are:

- What is major and serious crime sufficient to warrant the CCC's powers and resources?
- Why are the resources and powers of the Queensland Police Service insufficient to deal with these matters?
- What is the cost in time, effort and resources to corruption investigations by the CCC increasingly involving itself in major and serious crime?

Transparency of Crime and Misconduct investigations

I submit that there needs to be an effort to increase the CCC's transparency, so that the general public can get more than a "flavour" of the CCC's activities. Whilst confidentially may be important to prevent any ongoing investigation being jeopardised, confidentiality of the CCC's involvement in a matter should be able to be detailed when that matter is concluded.

I say more about transparency generally below.

Independence of the CCC and the "mix" on the Commission

Diversity

The original *Criminal Justice Act 1989* provided that the commission consisted of the chairperson and four other members. Appointment of the chairperson was full-time and the others part-time. The chairperson was

[7] https://www.ccc.qld.gov.au/sites/default/files/Docs/Publications/CCC/CCC-Annual-Report-2018-19.pdf

[8] Exact comparisons are difficult to make due to organisations and reporting restructures.

to be a lawyer qualified to be a judicial appointment. Of the remaining commissioners, one was to be a person in legal practice who had demonstrated an interest in civil liberties, the three remaining were to be persons with an interest and ability in community affairs. Persons were disqualified for appointment if they held any judicial, political or other units of public administration.[9]

Under the current *Crime and Corruption Act 2001* the commission also consists of a full-time commissioner who is the chairperson; a part-time commissioner who is the deputy chairperson; and 3 part-time commissioners who are ordinary commissioners. Both the chairperson and the deputy chairperson must be a lawyer qualified to be a judicial appointment. The qualification for the other commissioners is simply that person is qualified for appointment as an ordinary commissioner if the person has qualifications, experience or standing appropriate to assist the commission to perform its functions.[10]

The CCC's *Annual Report 2018-2019* indicates that four of the five commissioners were at the time in fact lawyers of considerable reputation and experience. However, only one of the commissioners was not a lawyer, that commissioner being an academic also having public sector experience. It is noted that the former and current CEO is also a lawyer, although I understand that the latter has considerable public sector administrative experience.

The bottom line is that the CCC is now dominated by lawyers, a situation that was not contemplated by the Fitzgerald vision. Without casting aspersions on any member of the commission, past or present, I query whether the ongoing 'mix' of persons appointed to the commission is appropriate. I suggest the re-legislative entrenchment of diversity of background for the commission.

Ineligibility

No commissioner can be an ineligible person – and a long list of prohibitions are listed in the Dictionary as follows:

> ***ineligible*** *person means any of the following—*
>
> *(a) a person who has been convicted, including by summary conviction, of an indictable offence;*
> *(b) a person who is an insolvent under administration;*
> *(c) a person holding judicial appointment;*
> *(d) a member of the Legislative Assembly or the Executive Council;*
> *(e) the parliamentary commissioner;*
> *(f) a person appointed as the public interest monitor or a deputy public interest monitor under this Act or the Police Powers and Responsibilities Act 2000;*
> *(fa) a person appointed to act as the public interest monitor or a deputy public interest monitor under this Act or the Police Powers and Responsibilities Act 2000;*
> *(g) the director of public prosecutions;*
> *(h) a member of the police service, or, other than in relation to appointment as a senior officer, a person who has been a member of the police service within the 5 years before the time at which the person's qualification for appointment arises;*
> *(i) a public service employee;*
> *(j) a person who holds an appointment on the staff of a Minister;*
> *(k) a local government councillor;*
> *(l) a local government employee.*

[9] See s.8 to 10 of the Criminal Justice Act 1989 https://www.legislation.qld.gov.au/view/html/repealed/current/act-1989-111#Act-1989-111

[10] See sections 223 to 225.

But I query why the ineligibility requirements do not apply to the wider notion of a person holding an office in or engagement with (ie consultancy) with units of public administration. The obvious intention is to preclude conflicts of interest and independence from the public sector, but the current formulae has deficiencies. For example, under the current formulae an officer of the Parliamentary Service is not an ineligible person (which is clearly not appropriate). A contractor or consultant to an agency may not be ineligible (which is clearly not appropriate).

Pension

One of the election commitments of the Australian Labor Party for the 2015 election was to "Revise the terms of appointment of the chair of the Crime and Corruption Commission to make the employment conditions similar to that of a Supreme Court Judge, with access to a judicial pension."[11] In 2015[12] the Act was amended so that Division 2, Subdivision 3 now enables the Chairperson of the Commission to have access to a judicial pension. This subdivision gave effect to the government's election commitment.

The change essentially means that if the CCC chairperson serves in the office for at least five years they become entitled to receive a pension calculated at 6% of the chairperson's prescribed salary (indexed annually) for each completed year of service up to a maximum of 60% of the prescribed salary. The pension will be calculated on the amount of the prescribed salary, which the bill provides is the total of the annual salary, jurisprudential allowance and expense of office allowance of a Supreme Court judge. This in itself appears modest and reasonable.

The residual benefit is that if a person who serves as the CCC chairperson is subsequently appointed as a Supreme or District Court judge they can aggregate the years of judicial service and service as CCC chairperson for the purposes of pension entitlements under the Judges Pensions Act.[13] I must admit to having concerns about this amendment at the time, as I thought it created the impression that a chairperson was on an implicit 'promise' to be appointed to the judiciary. On reflection I have come to the conclusion that the provision cannot create any such expectation and is fair and reasonable.

Term

However, the fact that officers of the commission cannot be appointed for a term longer than 5 years, but can be reappointed for terms not exceeding 10 years in total is worthy of careful consideration. Is it really in the interests of the independence of the CCC for senior appointments (such as the chairperson or commissioners) to be made for periods and subject to renewals? Isn't a single, longer fixed term appointment (not exceeding 10 years) more likely to safeguard independence?

Transparency of the CCC and its activities

I reserve my strongest criticism of the CCC for four interrelated matters:

- Effectively outsourcing some investigations to other agencies that it should, in the public interest, conduct itself;
- Increasing use of closed hearings and secrecy restraints on persons receiving orders to produce etc.;
- Increasing calls by the CCC to restrict public commentary about CCC complaints; and
- Failing to issue public reports on significant investigations.

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[11] https://www.ourfuture.qld.gov.au/assets/custom/docs/progress-report-2015-election-commitments-june-2017.pdf
[12] Electoral and Other Legislation Amendment Act 2015 – see s.45
[13] https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2015-1852

There is no doubt a necessity for the CCC to refer to agencies for investigation many of the complaints it receives. However, over the past decade there have been investigations involving serious allegations of police misconduct referred back to the Queensland Police Service (QPS) that would make people that recall the pre-Fitzgerald era scratch their heads.

Increasing use of closed hearings and secrecy restraints on persons receiving orders to produce means that there is very little information available for public scrutiny of the CCC's investigations and actions within those investigations, even when those investigations are closed. Any inconsistency of approach or excessive use of powers are difficult to scrutinise. There needs to be consideration of a statutory time limit to the CCC's secrecy restraints on closed investigations and on persons receiving orders to produce.

Increasing calls by the CCC to restrict public commentary about CCC complaints should be ignored. One result of any such legislative action would be to make the CCC less accountable for its actions, or lack of action. It would be a very dangerous road to traverse. I treat with 'a grain of salt', the refrain from the CCC that public airing of complaints hurts their investigations. It may place pressure on the CCC to act more hastily than it otherwise would, but I am yet to be convinced by any hard evidence that public airing of complaints has thwarted an investigation. If that is the CCC's contention, then it needs to back that claim with multiple examples of cases jeopardised. I suspect that delay has caused more issues than public airing.

More significantly, there has been an increasing trend for the CCC to not publically and comprehensively report on its investigations, especially regarding high profile or 'political' inquiries. Instead there has been a trend to issue a press statement, followed by a press conference. Often the information revealed at the press conference is far more detailed (and damaging) than the matters detailed in the press release.

I stress that the outsourcing of complaints and the failure to report often does not benefit the person the subject of complaint. Without a detailed, publically available report, matters may never be properly closed and the failure to comprehensively report can lead to their continual reopening. Without a final comprehensive report, information about an investigation is at risk of being drip fed to the public via press release, press statement, follow-up questioning at PCCC or estimates hearings. A comprehensive report is in my opinion the most effective and fairest way to bring matters to an end when there is no criminal sanction to be undertaken.

Reporting – legislative issues

In respect of reporting, I wish to bring the attention of the committee to the diminution of the CCC's reporting powers and thus its independence.

Section 2.18 and 2.19 of the original *Criminal Justice Act 1989* provided:

> ***2.18 Commission's reports.***
> *(1) Except as is prescribed or permitted by section 2.19, a report of the Commission, signed by its Chairman, shall be furnished-*
> *(a) to the chairman of the Parliamentary Committee;*
> *(b) to the Speaker of the Legislative Assembly; and*
> *(c) to the Minister.*
> *(2) The Commission may furnish a copy of its report to the principal officer in a unit of public administration who, in its opinion, is concerned with the subject-matter, of the report.*
> *(3) If a report is received by the Speaker when the Legislative Assembly is not sitting, he shall deliver the report and any accompanying document to The Clerk of the Parliament and order that it be printed.*

(4) A report printed in accordance with subsection (3) shall be deemed for all purposes to have been tabled in and printed by order of the Legislative Assembly and shall be granted all the immunities and privileges of a report so tabled and printed.
(5) A report received by the Speaker, including one printed in accordance with subsection (2), shall be tabled in the Legislative Assembly on the next sitting day of the Assembly after it is received by him and
be ordered by the Legislative Assembly to be printed.
(6) No person shall publish, furnish or deliver a report of the Commission, otherwise than is prescribed by this section, unless the report has been printed by order of the Legislative Assembly or is deemed to have been so printed.
(7) This section does not apply to an annual report of the Commission referred to in section 7.10.

2.19 Commission's report on court procedures and confidential matter.
(1) A report of the Commission relating to procedures and operations of any court of the State; procedures and practices of the registry or administrative offices of any court of the State, shall not be furnished as prescribed by section 2.18 but shall be furnished-
(a) to the Chief Justice of the State, if the report deals with matters pertinent to the Supreme Court;
(b) to the Chairman of District Courts, if the report deals with matters pertinent to District Courts;
(c) to the judicial officer, or the principal such officer if there be more than one, in the court, or the system of courts, to which the matters dealt with in the report are pertinent.
(2) Notwithstanding any other provision of this Act, if the Commission is of the opinion that information in its possession is such that confidentiality should be strictly maintained in relation to it-
(a) the Commission need not make a report on the matter to which the information is relevant; or
(b) if the Commission makes a report on that matter it need not disclose that information or refer to it in the report.

The above provisions were not without their difficulty, for example they did not foreshadow the CCC needing to publish reports that were not needed to be tabled in the Assembly. But s.2.18 did mean that the CCC itself determined the provision of a report to the Legislative Assembly.

Furthermore, the own initiative reporting process still preserved the duties of the CCC to act in the public interest and ensure procedural fairness to those the subject of inquiry.

In *Ainsworth v. The Criminal Justice Commission* the High Court held that the CJC in compiling its report on Poker Machines in Queensland had not afforded the appellant procedural fairness. The subject report had been tabled in Parliament pursuant to s.2.18 of the *Criminal Justice Act 1989* and was, therefore, a proceeding in Parliament. The High Court, by granting declaratory relief that the report had been compiled in breach of procedural fairness avoided issues raised in the full court of the Supreme Court of Queensland which had refused the applicant relief by way of certiorai or mandamus.[14] It is clear from this decision and the current

[14] During the course of the judgement McPherson J stated:

The Report having, pursuant to s.2.18 of the Act been printed and tabled in the legislative Assembly, it now forms part of the proceedings in Parliament. Mr Morrison QC submits that to award certiorai in this case will involve a breach of art 9 of the Bill of Rights 1688, which precludes proceedings in Parliament from being questioned in any court. That may well be the so; but it is not necessary to determine the point in that way. The procedure for certiorai, if followed to its conclusion, involves the issue of a writ, of which the general form is seen in Form No. 469 in the Schedule to the Supreme Court Rules. It embodies a command by the sovereign directed to the person to whom the writ is addressed. That you send us in our Supreme Court of Queensland under your hand and seal forthwith ... the proceedings aforesaid with all things touching the same, as fully and entirely as they remain in your custody ... that we may further case to be done thereon what right we shall see fit to be done.

provisions of the Act, that the CCC has a duty to afford procedural fairness, and it is for the CCC to ensure the discharge of that duty.

The current reporting provisions are more complicated and contained in ss.49, 64, 65 and 69:

> ***49 Reports about complaints dealt with by the commission***
>
> *(1) This section applies if the commission investigates (either by itself or in cooperation with a public official), or assumes responsibility for the investigation of, a complaint about, or information or matter involving, corruption and decides that prosecution proceedings or disciplinary action should be considered.*
> *(2) The commission may report on the investigation to any of the following as appropriate—*
> *(a) a prosecuting authority, for the purposes of any prosecution proceedings the authority considers warranted;*
> *(b) the Chief Justice, if the report relates to conduct of a judge of, or other person holding judicial office in, the Supreme Court;*
> *(c) the Chief Judge of the District Court, if the report relates to conduct of a District Court judge;*
> *(d) the President of the Childrens Court, if the report relates to conduct of a person holding judicial office in the Childrens Court;*
> *(e) the Chief Magistrate, if the report relates to conduct of a magistrate;*
> *(f) the chief executive officer of a relevant unit of public administration, for the purpose of taking disciplinary action, if the report does not relate to the conduct of a judge, magistrate or other holder of judicial office.*
> *(3) If the commission decides that prosecution proceedings for an offence under the Criminal Code, section 57 should be considered, the commission must report on the investigation to the Attorney-General.*
> *(4) A report made under subsection (2) or (3) must contain, or be accompanied by, all relevant information known to the commission that—*
> *(a) supports a charge that may be brought against any person as a result of the report; or*
> *(b) supports a defence that may be available to any person liable to be charged as a result of the report; or*
> *(c) supports the start of a proceeding under section 219F, 219FA or 219G against any person as a result of the report; or*
> *(d) supports a defence that may be available to any person subject to a proceeding under section 219F, 219FA or 219G as a result of the report.*
> *(5) In this section—*
> *prosecuting authority does not include the director of public prosecutions.*
>
> ***64 Commission's reports—general***
>
> *(1) The commission may report in performing its functions.*
> *(2) The commission must include in each of the reports—*

Failure to obey the writ amounts to a contempt of court. This has only to be stated for its implications to be grasped. The Report is presumably now in the possession of the Speaker, or perhaps it is of the Clerk of Parliament. For the court to order a writ to issue against either the Speaker or the Clerk of Parliament would be accounted to a gross breach of privilege. To attempt to force it by apprehending either of those individuals so as to bring them before the court to face charges of contempt would be an act without parallel since Charles I tried to arrest five members in 1642. The constitutional distribution of power in a democracy proceeds on the footing of mutual respect by legislature and judiciary for the integrity of their respectful functions. We should be overstepping the proper limits of our responsibilities by a wide margin if we were to order a writ of certiorai to issue to being up a record that now forms part of the proceedings of Parliament.

(a) any recommendations, including, if appropriate and after consulting with the commissioner of police, a recommendation that the Police Minister give a direction to the commissioner of police under the Police Service Administration Act, section 4.6; and

(b) an objective summary of all matters of which it is aware that support, oppose or are otherwise relevant to its recommendations.

(3) If the Police Minister decides not to give a direction under the Police Service Administration Act, section 4.6 following a recommendation made under subsection (2)(a), the Police Minister must table in the Legislative Assembly, after giving the reasons—

(a) a copy of the recommendation; and

(b) the Minister's reasons for not giving the direction.

(4) The commission may also include in a report any comments it may have on the matters mentioned in subsection (2)(b).

(5) In this section—

Police Minister means the Minister administering the Police Service Administration Act.

Police Service Administration Act means the Police Service Administration Act 1990.

65 Commission reports—court procedures

(1) This section applies to a commission report about—

(a) the procedures and operations of a State court; or

(b) the procedures and practices of the registry or administrative offices of a State court.

(2) The report may be given only to—

(a) the Chief Justice, if the report deals with matters relevant to the Supreme Court; or

(b) the Chief Judge of the District Court, if the report deals with matters relevant to the District Court; or

(c) the President of the Childrens Court, if the report deals with matters relevant to the Childrens Court; or

(d) the Chief Magistrate, if the report deals with matters relevant to the Magistrates Courts; or

(e) the judicial officer, or the principal judicial officer if there is more than 1 judicial officer, in the court, or the system of courts, to which the matters dealt with in the report are relevant.

69 Commission reports to be tabled

(1) This section applies to the following commission reports—

(a) a report on a public hearing;

(b) a research report or other report that the parliamentary committee directs be given to the Speaker.

(2) However, this section does not apply to the commission's annual report, or a report under section 49 or 65, or a report to which section 66 applies.

(3) A commission report, signed by the chairperson, must be given to—

(a) the chairperson of the parliamentary committee; and

(b) the Speaker; and

(c) the Minister.

(4) The Speaker must table the report in the Legislative Assembly on the next sitting day after the Speaker receives the report.

(5) If the Speaker receives the report when the Legislative Assembly is not sitting, the Speaker must deliver the report and any accompanying document to the clerk of the Parliament.

(6) The clerk must authorise the report and any accompanying document to be published.

(7) A report published under subsection (6) is taken, for all purposes, to have been tabled in and published by order of the Legislative Assembly and is to be granted all the immunities and privileges of a report so tabled and published.

(8) The commission, before giving a report under subsection (1), may—

(a) publish or give a copy of the report to the publisher authorised to publish the report; and

(b) arrange for the prepublishing by the publisher of copies of the report for this section.

I see no difficulty in the reporting provisions contained in ss.49, 64 and 65, but I see no valid reason for the restrictions placed on the CCC by s.69(1). In accordance with s.69(1) the CCC is impliedly restricted to only reporting directly where there have been a public hearing on a matter. All other reports (a research report or other report) must first receive the sanction of the committee. This requirement impinges on the independence of the CCC and places the committee in an invidious position. I stress that the CCC has a duty to afford procedural fairness, and it is for the CCC to ensure the discharge of that duty, it is not for the PCCC to warrant that the CCC has provided procedural fairness.

What is puzzling is why this reporting section was changed. The requirement to limit reporting to matters where there had been a public hearing or where a matter was approved by the committee pre-dates the current 2001 Act and has its genesis in amendments to the *Criminal Justice Act 1989* by the *Criminal Justice Legislation Amendment Bill 1997.* That bill amended both s.26 and 27 of the then act (which were the successors of sections 2.18 and 2.19 of the original *Criminal Justice Act 1989* detailed above.

The explanatory notes to the bill provide the following information about the two amending provisions:

Clause 16 provides for the amendment of section 26 (Commission's reports) in order to clarify the commission's obligation to furnish reports and to achieve the parliamentary committee's recommendations in reports 13 and 38 that there should be a definition of "a report of the Commission" for the purposes of section 26.

Clause 17 provides for the amendment of section 27 (Commission's report on court procedures and confidential matter) in accordance with recommendations of the parliamentary committee. The second parliamentary committee concluded that s.27(2) has the potential to reduce the efficiency of the accountability process and the capacity of the parliamentary committee to review the commission. The current parliamentary committee was concerned that the commission is not required to advise the committee of the reasons why it deems a matter to be confidential and may not inform the parliamentary committee that it has withheld information. The amendments permit the disclosure of confidential information to the parliamentary committee, the Minister or the Speaker. The amendments provide a procedure in which the commission may refuse to disclose information to the parliamentary committee, but must disclose the reasons for the decision as to non-disclosure. The amendment establishes a register of information withheld under this provision and provide for inspection of that register.[15]

It is correct that the parliamentary committee had made commentary about and recommendations concerning s.27 of the then *Criminal Justice Act 1989* in reports in 1997[16] and 1991.[17] However, I have been unable to find any justification for the amendment to s.26 in reports of the parliamentary committee. Indeed, in the 1991 report the parliamentary committee simply recommended the following:

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[15] https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-1997-392

[16] https://www.parliament.qld.gov.au/documents/committees/PCCC/1994/three-year-review-94/rpt-26-210295.pdf see recommendation 27 and commentary at p.210

[17] https://www.parliament.qld.gov.au/documents/committees/PCCC/1991/Review-of-the-operations-1991/rpt-13-031291.pdf see recommendation 13

The Committee recommends that as a matter of practice the Criminal Justice Commission should in investigations which culminate in a public report and in which individuals are likely to be singled out, give notice to affected persons of allegations likely to be made against them and provide them with the opportunity to be heard (in the sense of an opportunity to respond) in relation to those allegations before the report is published.[18]

The report of the parliamentary committee in 2001[19] noted that the CCC had raised the difficulties inherent in the then s.26 provision:

15.6.3 Analysis and comment - definition of 'report of the Commission'

The CJC has previously expressed concern about the definition of 'report of the Commission' under section 26(9) of the Act. The CJC, in a letter dated 23 November 1999, has submitted that section 26(9), as it is presently drafted, 'arguably limits the Commission to tabling reports only where there has been an investigative hearing, or where the PCJC has directed that a report be tabled'. The CJC has further submitted that it is inappropriate that it cannot table a report in Parliament (other than a report relating to a matter where investigative hearings were held) without a direction from the Committee.

The CJC has further submitted that:

It is not difficult to envisage that the Commission might wish to table a report in circumstances where both sides of politics might have some interest in declining to give such a direction.

The CJC has suggested the following amendments to subsections (9)(a) and (9)(b) of section 26 to define 'report of the Commission' as:

> *(a) a report authorised by the Commission to be furnished in accordance with subsection (1) other than a report under section 33;*
> *(b) a report prepared by the Commission that the Parliamentary Committee directs the Commission to furnish in accordance with subsection (1).*

The CJC had submitted that its suggested amendment:

to section 26(9)(a) would allow the Commission to table any report which it considered should be made public, including reports on matters where investigative hearings had been held (except reports under section 33);
to section 26(9)(b) would allow the Committee to direct that a report prepared by the Commission should be tabled, where it considered it appropriate and where the Commission had not already determined to table the report under subsection (a).

Section 27 would still allow the Commission to report separately on confidential matters in the case of such a direction.

The Committee gave the CJC's submission careful consideration. The Committee was prepared, in principle, to support the CJC's suggestion, but on one proviso only. The Committee considered that prior to tabling of a report (falling under the redefined section 26(9)(a)), the Committee should be provided, on an embargoed basis, with an advance copy of a CJC report intended for tabling (other than a report

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[18] https://www.parliament.qld.gov.au/documents/committees/PCCC/1991/Review-of-the-operations-1991/rpt-13-031291.pdf see recommendation 12

[19] https://www.parliament.qld.gov.au/documents/committees/PCCC/2001/three-year-review-01/Report55-3yrReview.pdf see pages 320-323

on a hearing conducted by the CJC under section 25). This option is consistent with the current practice in respect of research and other reports publicly released by the CJC. The Committee was of the view that if the CJC maintained its position that the definition be clarified, that an embargoed CJC report intended for tabling, should be provided to the Committee, for example five days in advance of tabling (or such lesser period as agreed), and that the Committee simply have a right to make comments to the CJC in respect of any such report, prior to tabling.

The Committee is not seeking a right to veto or otherwise prevent the CJC from tabling a report in the Parliament. The Committee firmly believes that any such action by a Parliamentary Committee would be highly inappropriate.

The CJC, during the Committee's recent public hearings in respect of this review, has clarified its position in respect of the issue of an appropriate definition of a 'report of the Commission'.

The CJC Chairperson, Mr Butler SC stated:

> *The Commission has considered this from time to time. I think our view has changed, because it is a very difficult section. Because of the way in which it is structured, any change to it can give you quite unexpected results in terms of the ability to produce reports. After a great deal of deliberation on it, we determined that it is probably better to leave it the way it is rather than create some further anomaly in attempting to improve it. It seems to have worked in practice in recent times, certainly in the relationship between the CJC and this Committee. I do not see any reason why it could not work in practice in the future. It might be a little inconvenient for the Committee to find that it has to consider some reports before they can be provided to the Speaker, but that might be better than a situation which creates other problems.*

The Committee considers that, rather than seek an amendment to the Act, a more appropriate course may be to consult with the CJC with a view to issuing an appropriate guideline to the CJC pursuant to section 118A of the Act, to require the CJC, prior to tabling a report pursuant to section 26, to provide the Committee on an embargoed basis with an advance copy of its report intended for tabling (other than a report on a hearing conducted by the CJC under section 25).

I submit that s.69(1) must be amended to enable the CCC to decide when reports should be tabled pursuant to the section.

The CCC as an investigator and reporter

I think there needs to be some clarity provided about the role of the CCC as an investigator and reporter and whether it is also a prosecution agency. Generally there is separation between investigators and prosecutors. There are sound reasons for this separation. This separation is particularly important for the exercise of prosecutorial discretion, which refers to when a prosecutor has the power to decide whether or not to charge a person for a crime (despite there being a prima facie case), and which criminal charges to file or discontinue. It is also important when there are serious and complex charges which may be issued in a matter.

Under the *Director of Public Prosecutions Act 1984* and guidelines made pursuant to the Act[20], the Director of Prosecutions and their staff are responsible for initiating and discontinuing cases in accordance with guidelines, although it is conceded that in most instances charges are initiated by police charge.

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[20] https://www.justice.qld.gov.au/__data/assets/pdf_file/0015/16701/directors-guidelines.pdf

Recent statements at public hearings suggest CCC frustration with Director of Prosecution resources and timeliness.

Accountability of the CCC

The CCC is accountable to the Parliamentary Crime and Corruption Committee (PCCC) and the PCCC in turn may use the Parliamentary Crime and Corruption Commissioner (the Commissioner). The Commissioner also has specified independent responsibilities and powers. The CCC is also accountable to the courts, and there are a multitude of mechanisms for judicial approval for the use of powers and the review of the exercise of powers. However, these accountability mechanisms are often focussed on individual or specific matters and are always restricted by resources. I would submit that transparency of the CCC's operations is, at the end of the day, the best form of accountability.

The PCCC

The Committee System Review Committee report noted at 48-49:[21]

> *Operations of the Parliamentary Crime and Misconduct Committee*
>
> *A considerable portion of the oversight role regarding the Crime and Misconduct Commission is reported upon in the form of reports by the Parliamentary Commissioner to the committee, many of which are tabled by the Parliamentary Crime and Misconduct Committee in the Legislative Assembly. A number of these reports relate to the activities of the Crime and Misconduct Commission in the exercise of a range of its coercive powers, such as covert searches, surveillance devices and controlled operations, and the reporting is in accordance with statutory requirements.*
>
> *Other reports by the Parliamentary Commissioner are tabled by the Parliamentary Crime and Misconduct Committee where appropriate. The Parliamentary Crime and Misconduct Committee also conducts a wide-ranging review of the Crime and Misconduct Commission every three years. As part of that review, the Parliamentary Crime and Misconduct Committee calls for submissions from the public, holds public hearings, and tables a report on the review. The Parliamentary Crime and Misconduct Committee has also reported on complaints and other matters considered by it. Where appropriate, this has been done in a non-identifying manner.*
>
> *The Parliamentary Crime and Misconduct Committee also meets with senior officers of the Crime and Misconduct Commission, usually on five or six occasions a year, to question Commissioners about the activities of the Crime and Misconduct Commission and discuss various issues arising from the operations of the Crime and Misconduct Commission. These meetings are held in camera and are informed by confidential reports provided in advance by the Crime and Misconduct Commission, which contain detailed information about the activities of the Crime and Misconduct 164 Parliamentary Crime and Misconduct Committee, Report on Activities, report 63, November 2003. As a previous chair of the Parliamentary Crime and Misconduct Committee observed:*
>
> > *It is an unavoidable reality that those meetings are constrained by appropriate requirements of confidentiality, which allow for a full and frank exchange of views on matters often of a highly sensitive and delicate nature and often involving serious criminal matters. However, balanced against this are the many broad systemic issues which are appropriate for public airing and discussion, such as was the case for the public inquiry process of the PCMC's recent three-year review of the commission.*

[21] https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2010/5310T3777.pdf

Whilst acknowledging that many of the operations of the Parliamentary Crime and Misconduct Committee need to be carried out in private, this Committee believes there would be merit in a greater degree of openness in some respects. One possibility might be for the Parliamentary Crime and Misconduct Committee to hold at least part of these meetings in public. (Indeed, the last above quotation comes from the transcript of such a meeting held in public.) This would allow greater public scrutiny of the Crime and Misconduct Commission. Requirements for confidentiality could be satisfied either by holding other confidential meetings or by having both public and in camera sessions of meetings.

As a parliamentary committee, the Parliamentary Crime and Misconduct Committee consists solely of members of Parliament. It is assisted in its consideration of complaints and concerns regarding the Crime and Misconduct Commission by the Parliamentary Crime and Misconduct Commissioner. The Commissioner must be a person of considerable legal experience. There might also be merit in the Parliamentary Crime and Misconduct Committee having input from external expertise, and the possibility of the membership of that committee including lay members should be considered.

Recommendation

The Committee recommends that the Crime and Misconduct Act 2001 be reviewed with a view to:
- *having lay members included on the Parliamentary Crime and Misconduct Committee and*
- *greater transparency of the operations of the Parliamentary Crime and Misconduct Committee.*

In 2014 the Act was amended to insert s.302A:

302A Meetings of parliamentary committee generally to be held in public

(1) A meeting of the parliamentary committee must be held in public.
(2) However, the parliamentary committee may decide that a meeting or a part of a meeting be held in private if the committee considers it is necessary to avoid the disclosure of—
(a)confidential information or information the disclosure of which would be contrary to the public interest; or
(b)information about a complaint about corrupt conduct dealt with, or being dealt with, by the commission; or
(c)information about an investigation or operation conducted, or being conducted, by the commission in the performance of its crime function, corruption functions or intelligence function.
Note—

The standing rules and orders of the Legislative Assembly provide for who may attend a public or private meeting of the committee—see standing order 207.

I must admit to being sceptical about the practicality of this section. However, I must now concede that I believe the provision has improved the transparency and accountability of both the PCCC and the CCC. It arrested the trend in the previous decade or more of the PCCC and CCC operating largely in secret.

Later, the committee at p.22-23 also discussed the Chair of the PCCC and recommended:

The Committee recommends that the Crime and Misconduct Act 2001 be amended to provide that the chair of the Parliamentary Crime and Misconduct Committee be a Member nominated by the Leader of the Opposition.

This has never been actioned by legislation, but instead there has been a "convention" established that a non-government member be appointed Chair.

However, there have been difficulties with this provision and other provisions of the Act that require bipartisan votes:

- In 2012 an Independent member was appointed chair of the Parliamentary Crime and Misconduct Commission that was not the choice of the Opposition.
- In November 2013 the entire Parliamentary Crime and Misconduct Commission was discharged by the House and a new membership appointed. The effect of this was to remove the Independent member as chair. The chair then appointed was a government member.
- In 2015 the government refused to appoint the nominated opposition member as chair, because the candidate was thought to be unsuitable.
- In 2015 an independent member was substituted for a government member on the PCCC to enable the appointment of the chair of the CCC. This was after delay in appointment by the opposition.

All of the above was legal, but that does not mean it should be allowed into the future.

The Act requires amendment to entrench the Chair of the PCCC as the nominee of the Leader of the Opposition. This provision could also provide an ability for required endorsement by the government and stated reasons for lack of endorsement. However, the time has come for it to be dealt with legislatively.

Tactical substitutions to avoid bipartisan provisions also need to be addressed in the legislation.

Yours sincerely

Neil Laurie
The Clerk of the Parliament