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**Tales of Watchdogs and Lapdogs:
A Parliamentary Committee Inquiry into the Crime and
Misconduct Commission's Treatment of Fitzgerald Inquiry
Records**

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The PCMC are the watchdog and they've become a lapdog. They are the ones who allowed the CMC to shred documents and to inadvertently release documents, to fail to actually correct the situation and then were not properly kept informed about the situation, and I think any reform of the CMC starts with having a review and reform and proper stringent rules for the operation of the parliamentary watchdog committee.

They cannot be a lapdog, they must be the watchdog.

Hon Campbell Newman MP
Premier of Queensland
8 March 2013

Recent media comments made by the Premier that the PCMC has become a lapdog to the CMC and "allowed the CMC to shred documents and inadvertently release documents..." are untrue and have no basis in fact.

The Committee relies on the accountability mechanisms established under the *Crime and Misconduct Act* which requires the CMC to keep the Committee informed of issues, such as a break down in, or a breach of, process.

In this instance, the Committee responded quickly and without fear or favour to the information it received about the release of confidential Fitzgerald Inquiry documents.

Mrs Liz Cunningham MP
Chair, Parliamentary Crime and Misconduct Committee
9 March 2013

Overview

This paper describes and examines a recent inquiry by Queensland's Parliamentary Crime and Misconduct Committee (PCMC) into actions of the Crime and Misconduct Commission (CMC) relating to firstly, the unauthorised access to confidential records of the former Fitzgerald inquiry and secondly, the destruction of some of the confidential records of that inquiry.¹ The PCMC inquiry is examined in the context both of the Queensland parliamentary committee system as a whole (with particular regard to changes to that system in recent years) and of other more or less contemporaneous developments regarding scrutiny of the CMC. The PCMC inquiry is of particular interest not only in light of these contexts, but also because, certainly in the Queensland experience at least, it had a number of unusual if not unique features.

Background – the history and the participants

Queensland has had a standing independent anti-corruption agency body since the establishment in 1990 of the then Criminal Justice Commission (CJC). The creation of the CJC gave effect to a recommendation by Justice Tony Fitzgerald in the July 1989 report on his landmark inquiry into public and judicial administration in Queensland.² Fitzgerald saw the CJC as being charged with 'monitoring, reviewing, co-ordinating and initiating reform of the administration of criminal justice.'³

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

² *Report of a Commission of Inquiry Pursuant to Orders in Council* ('Fitzgerald Inquiry'), July 1989.

³ *Ibid*, pages 308 and 372.

Fitzgerald also recommended the establishment of a standing parliamentary oversight committee 'not charged with any other responsibility' to oversee the operations of the CJC.⁴ The Parliamentary Criminal Justice Committee (PCJC) was established to give effect to this proposal.

From 1 January 2002, the CJC was merged with the then Queensland Crime Commission to become the Crime and Misconduct Commission. The CMC thus created has responsibilities for public sector and police misconduct and serious and organised crime. In turn, the PCJC became the Parliamentary Crime and Misconduct Committee.

The CMC is governed by five commissioners – a full-time chairperson, who is a lawyer, and four part-time commissioners who, broadly speaking, are community representatives.⁵

The broad oversight functions of the committee include:

- monitoring and reviewing the performance of the functions of the CMC
- reporting and commenting, as appropriate, on matters relevant to the commission, the performance of its functions or the exercise of its powers
- examining the commission's annual report
- participating in the selection of the chairperson and part-time commissioners of the commission and removal from office of commissioners
- reviewing the activities of the commission and reporting on any action that should be taken in relation to the Crime and Misconduct Act or the functions, powers and operations of the commission
- issuing guidelines and directions to the commission.⁶

The PCMC also conducts a wide-ranging independent review of the CMC every three years. As part of that review, the committee calls for submissions from the public, holds public hearings, and tables a report on its review.

Since 1998, the committee has been assisted by the Parliamentary Crime and Misconduct Commissioner (formerly known as the Parliamentary Criminal Justice Commissioner).

The PCMC has seven members, four nominated by the Leader of the House, and three nominated by the Leader of the opposition.

The Parliamentary Commissioner is appointed by the Speaker as an officer of the parliament, only with the bipartisan support of the committee. The Parliamentary Commissioner cannot be dismissed or suspended without the bipartisan support of the committee.⁷

Pursuant to various statutory provisions, the Parliamentary Commissioner is obliged to carry out a number of audit and inspections regarding the use by the CMC of a range of coercive powers, such as covert searches, listening and surveillance devices and controlled operations. The Parliamentary Commissioner also conducts an annual inspection of the intelligence holdings of the CMC and the Queensland Police Service, and this report is provided to and considered by the committee.

Apart from these functions, the Parliamentary Commissioner can act only on a referral from the PCMC, and has no power of self-referral. The Parliamentary Commissioner investigates these concerns and reports to the committee. The committee can table such reports if it considers it appropriate to do so.

The Parliamentary Commissioner is appointed upon a part-time basis and is assisted by a full-time legal officer, who is an officer of the parliamentary service.

⁴ Ibid.

⁵ The membership of the commission and the necessary qualifications for appointment are provided for in sections 223 to 225 of the *Crime and Misconduct Act 2001* (CMA).

⁶ CMA section 292.

⁷ CMA sections 306 and 307.

Over the years, the PCMC has been very active in its monitor and oversight role. It receives and deals with complaints about the CMC. In addition, it is to be specifically notified by the chairperson of the CMC of any conduct on the part of a CMC officer 'that the chairperson suspects involves, or may involve, improper conduct'.⁸ The committee has a number of options open to it when it receives such a notification or a complaint regarding the CMC. Some of these matters are referred back to the CMC itself or referred by the PCMC to the Parliamentary Commissioner.⁹

The PCMC also receives copies of confidential minutes of meetings of the CMC commissioners and meets on an approximately bi-monthly basis with the CMC chairperson, other commissioners, and senior officers. At these 'joint meetings' the committee questions the CMC chairperson and commissioners about the activities of the CMC and discusses various issues arising from the operations of the CMC. In advance of these joint meetings the committee receives an extensive briefing paper from the Commission setting out its activities in considerable detail and which informs the discussion and questioning at the meeting.

Much of the operations of the committee, including the vast majority of these joint meetings, have taken place *in camera*. There have often been good operational reasons for this to be the case.¹⁰

The tension between the need for confidentiality and the need for open and transparent accountability was recognised by Fitzgerald himself. As a former chair of the PCMC observed regarding the joint meetings:¹¹

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.

In recent times, there had been some disquiet expressed from time to time at what was perceived to be a lack of transparency in the oversight activities of the committee.

Background – the parliamentary committee context

In February 2010, the parliament established a select committee to review the parliament's committee system. At that time, the committee system (which itself had its genesis in the recommendations of the Fitzgerald Inquiry) had been essentially unchanged from its beginnings in the period from 1990 to 1995. The committees were largely function based, and growing comment had over time been made about their effectiveness and relevance. The Committee System Review Committee (CSRC) reported in December 2010, making far-reaching recommendations for the establishment of a new, portfolio-based committee system.¹²

Those recommendations were in the main accepted by the then government. In summary, many of the old function-based committees ceased, in favour of a new system based on portfolio committees. Seven portfolio committees were established and within their areas of portfolio jurisdiction are responsible for:

- examining bills to consider the policy to be enacted

⁸ CMA section 329.

⁹ CMA section 295. The PCMC can for example ask the Queensland Police Service or another law enforcement agency to investigate, or refer a matter to the director of public prosecutions.

¹⁰ Much of the material provided to the PCMC is confidential or highly confidential. Section 213 of the CMA ('secrecy') imposes an obligation of confidentiality on commission officers, and also upon committee members, the parliamentary commissioner, and support staff.

¹¹ The then chair, Geoff Wilson MP, transcript, joint public meeting of the Parliamentary Crime and Misconduct Committee and the Crime and Misconduct Commission, 30 April 2004, page 1, available here: <http://www.parliament.qld.gov.au/documents/committees/PCMC/2004/transcript-C040430.pdf>.

¹² Committee System Review Committee, Review of the Queensland Parliamentary Committee System, December 2010.

- examining bills for the application of the fundamental legislative principles set out in the Legislative Standards Act 1992
- considering the lawfulness of subordinate legislation
- examining the annual budget estimates
- assess the public accounts of each portfolio unit in regard to the integrity, economy, efficiency and effectiveness of financial management
- considering portfolio public works matters.

The new committees commenced in May 2011, and the referral of bills to committees commenced in August 2011.

[Whilst it is still relatively early days, there is evidence that these changes have resulted in a re-invigorated committee system, with a greater level of activity, increased participation by stakeholders and the public, an increased emphasis on operating in public, and more interaction between the work of committees and the work of the House.]

The PCMC continued largely unaffected by these changes. However, two specific recommendations of the CSRC regarding the PCMC are worth noting.

Firstly, one feature of the Queensland committee system has been that committee chairs were, without exception, drawn from members of the government. (In this regard, the CMA provides for the PCMC chairperson to be a member nominated as such by the Leader of the House.¹³) The CSRC recommended that the CMA be amended to provide that the chair of the PCMC be a member nominated by the Leader of the Opposition.¹⁴

The CMA provision remains unchanged. What has happened instead since the CSRC's recommendation is that the Leader of the House has nominated a non-government MP as PCMC chair.¹⁵

Secondly, the CSRC considered that there ought to be more openness surrounding the operations of the PCMC, observing:¹⁶

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 [the joint meetings with the CMC] 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.

The Committee recommended that the CMA be reviewed 'with a view to greater transparency of the operations of the Parliamentary Crime and Misconduct Committee'.¹⁷ Whilst no such review has taken place, the recommendation reflected some increasing concern regarding the openness of the PCMC's operations. Those concerns continued to be expressed in some quarters.

¹³ CMA section 300(2).

¹⁴ CSRC report, recommendation 18, at page 23. Note that Standing Orders provide for chairs to have a deliberative vote and a casting vote.

¹⁵ In its response to the CSRC's recommendation, the then government stated that it would refer the recommendation to a review of certain provisions of the *Crime and Misconduct Act 2001* to be undertaken by the Department of Justice and Attorney-General, and would report to the Assembly on its outcomes. See: Queensland Government, Government Response to the Committee System Review Committee Review of the Queensland Parliamentary Committee System, accessed in September 2013 at <http://www.parliament.qld.gov.au/documents/committees/CSRC/2010/QldParlCtteeSystemReview/gr-09Mar2011.pdf>.

¹⁶ CSRC report, page 50.

¹⁷ CSRC report, recommendation 46, at page 50.

Background – the broader context

The inquiry by the PCMC coincided in part with another inquiry examining the CMC. In October 2012, the new government appointed an Independent Advisory Panel, consisting of former High Court Judge Honourable Ian Callinan AC and Professor Nicholas Aroney, to review the *Crime and Misconduct Act* and related matters.

As its terms of reference the Advisory Panel was to make such recommendations as it thinks fit:¹⁸

- a. as to whether the *Crime and Misconduct Act 2001* and any other associated statutes and regulations should be amended
- b. to improve the operation of agencies charged with, or concerned in the operation of the Act with respect to:
 - (i) the use or any abuse of the powers and functions conferred by the Act
 - (ii) ensuring the maintenance of public confidence in the Act and the relevant agencies
- c. to ensure the prioritisation of focus by the relevant agencies on:
 - (i) criminal organisations
 - (ii) major crime
 - (iii) the elimination and prevention of corruption in public affairs
 - (iv) timeliness and appropriateness of action by the relevant agencies
- d. with respect to such other matters as the Panel think relevant to any of the above matters.

The panel released a summary of its conclusions and recommendations on 3 April 2013, just two days ahead of the tabling of the PCMC's report on its inquiry. The panel's report (in a redacted form) was tabled on 18 April 2013.¹⁹

The genesis of the PCMC inquiry

On the evening of 5 March 2013, the PCMC was contacted by the CMC's Assistant Commissioner, Misconduct and informed of the dissemination of former Fitzgerald Inquiry material from the CMC's holdings at the Queensland State Archives (QSA).²⁰

A media article which appeared the following day alleged that an error by the CMC had led to the wrongful reclassification of Fitzgerald Inquiry operational documents.²¹

The committee immediately commenced an inquiry, taking evidence from the then chairperson of the CMC on 6 March 2013. Later that day, the PCMC approved the issue by the Clerk of the Parliament of a summons to the State Archivist to give evidence before the committee and produce material relevant to the matter on 7 March 2013.

On 7 March 2013, the PCMC took *in camera* evidence from the State Archivist and other officers of the QSA and took possession of a large quantity of material relating to the QSA's holdings of the Fitzgerald Inquiry records. That afternoon, the chair of the committee reported to the Assembly as to its inquiry to date.²²

On the same afternoon, correspondence and discussion ensued between the Committee, the CMC, and the Attorney-General and Minister for Justice regarding urgent legislation to prohibit any republication of this material lawfully obtained from the QSA by third parties.²³

¹⁸ Review of the *Crime and Misconduct Act* and related matters: Report of the independent advisory panel, 28 March 2013, accessed in September 2013 at <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2447.pdf>

¹⁹ Review of the *Crime and Misconduct Act* and related matters: Report of the independent advisory panel, page 221.

²⁰ The CMC was statutorily charged with possession of the Fitzgerald inquiry records.

²¹ 'CMC blunder exposes dossiers', *The Australian*, 6 March 2013.

²² Queensland Parliament, *Record of Proceedings*, 7 March 2013, pages 502-503. This statement can also be found at Appendix I to the PCMC's report 90.

Early the following morning protective legislation was passed by the Legislative Assembly.²⁴ The Assembly also passed a resolution, upon the motion of the Attorney-General, for further inquiry by the Committee.²⁵

In summary, the Assembly required the Committee, in addition to action already undertaken, to inquire into and report on:

- a) the incorrect classification of Fitzgerald Inquiry documents transferred from the CMC to the QSA between 2007 and 2009
- b) the CMC's failure to remedy the incorrect classification of the documents in a timely and effective manner
- c) the destruction of Fitzgerald Inquiry records
- d) the failure by the CMC to account to the PCMC in a timely and effective manner in relation to (a) to (c)
- e) how the issues arising from the incorrect classification of documents can be remedied in the longer term, including whether some or all of those documents have to remain confidential
- f) any other matters and make any other recommendations the PCMC believes necessary to address issues raised in its inquiry.

Importantly, the motion also required the PCMC to conduct its proceedings, including the examination of all witnesses, in public unless there was any matter arising which involved current operational files. All transcripts and tabled evidence were to be authorised by the PCMC for publication as soon as practicable. Evidence already taken *in camera* was to be released, redacted only to the extent necessary to protect third parties, were to be published. The resolution also required all witnesses to give evidence under oath or affirmation.

The PCMC was to report to the House by 5 April 2013.

In speaking to his motion, the Attorney-General told the House 'We will make sure that there are sufficient resources from the Clerk of this parliament to the PCMC to conduct this inquiry.'²⁶

The inquiry and its conclusions

The committee took evidence from 31 witnesses over some 42 hours of public hearings over 14 days. The committee estimated that it had gathered some 10 linear metres of documentary evidence, as well as a large volume of electronic evidence.²⁷

The committee spent many more days in private deliberation and in considering evidence, compiling the report and formulating recommendations.

To assist its public hearing process, the PCMC appointed two Senior Counsel, one as Acting Parliamentary Commissioner and one as Counsel Assisting the inquiry.²⁸ This was without precedent in Queensland parliamentary committee inquiries with counsel examining witnesses first followed by questioning by members of the committee.

As well as examining witnesses, counsel assisted the committee with advice on a number of legal matters. (The committee was also supported by a number of other lawyers and support staff, including its own

²³ This correspondence can be found at Appendix 2 of the PCMC's report 90.

²⁴ *Crime and Misconduct Commission (Administrative Negligence Rectification) Amendment Act 2013*.

²⁵ The full text is at Queensland Parliament, *Record of Proceedings*, 7 March 2013, page 616.

²⁶ Queensland Parliament, *Record of Proceedings*, 7 March 2013, page 616.

²⁷ PCMC's report 90, page 10.

²⁸ The Parliamentary Commissioner (himself a Senior Counsel) was unavailable.

secretariat, augmented for the inquiry by the addition of other Parliamentary staff, and by the legal officer attached to the Office of the Parliamentary Commissioner.)

The committee made a total of 22 findings.²⁹ Key findings included:

- The CMC director who reclassified the Fitzgerald Inquiry QSA documents had no proper authority to do so.
- Therefore that Fitzgerald Inquiry material was unlawfully disseminated.
- Four very senior CMC officers all failed to adhere to internal policies and procedures by not promptly advising the CMC's corporate governance area that the Fitzgerald Inquiry material had been inappropriately disseminated from the QSA. The possibility of resolving the issue in May 2012 and thereby minimising risk was therefore lost.
- There was a similar failure to so notify in September 2012, with a similar lost opportunity to minimise damage.
- The project to transfer the Fitzgerald Inquiry documents to the QSA was fundamentally flawed, with the relatively junior CMC officers involved having no real appreciation of the sensitive nature of the material.
- There was an ineffective response within the CMC following the realisation that material from the Fitzgerald Inquiry at the QSA had been wrongly disseminated.
- There was no proper investigation in May 2012 to deal with the matter and determine exactly what material was available for public dissemination, how the dissemination came about and who was responsible, whether the dissemination was lawful, and whether the matter had been properly resolved.
- Original Fitzgerald Inquiry records which were to be retained permanently by the CMC were destroyed unlawfully in 2007 (in breach of the *Public Records Act 2002*), albeit probably under an honest and mistaken belief that the records destroyed did not contain Fitzgerald Inquiry documents that need to be retained permanently.
- Despite ample opportunity to do so in writing and in person at various joint meetings, the CMC did not advise the PCMC of this matter until March 2013 and this came only after the CMC became aware that media coverage was imminent. (The part-time commissioners all gave evidence that they were unaware of any issues regarding the Fitzgerald inquiry documents until March 2013)
- The current CMC model of a combined Chairperson and CEO is flawed because the Chairperson's roles as 'Chairperson of the Board' and 'CEO' are at odds. This dual role diminishes the role of the other part-time Commissioners and creates a culture that the approval of the Chairperson alone is important. An organisation such as the CMC cannot continue to be managed by a CEO who, whilst being a skilled lawyer, has little experience in managing a large organisation.

In her foreword to the PCMC's report, the chairperson of the PCMC, Mrs Liz Cunningham MP (Independent) stated:³⁰

The format for this inquiry was unprecedented in Queensland and if not unique, rare in Westminster democracies. We appreciated the opportunity given by the Legislative Assembly to utilise this new format of inquiry. We were determined to make it a successful model for the future.

The committee went on to make 24 recommendations.³¹ The bulk of these were directed to the CMC and addressed a range of matters including internal governance, procedures for handling sensitive historical

²⁹ PCMC report 90, page ix.

³⁰ PCMC report 90, page vii.

information, including the Fitzgerald Inquiry records, and cultural issues. The committee recommended legislative change so that the CEO roles of chairperson and CEO are separated out before the next chairperson is appointed (recommendation 19).

Since the inquiry

The government responded to the recommendations of both the PCMC and the independent panel in a combined document tabled on 3 July 2013.³² It has established an Implementation Panel (consisting of the Directors-General of the Department of Justice and Attorney-General and of the Department of the Premier and Cabinet, the Chief Executive of the Public Service Commission and the Acting Chairperson of the CMC) to implement the recommendations arising out of both inquiries that have been accepted by government. The government indicated its acceptance of the PCMC's recommendation that the CMC chairperson role be separated from the CEO role.

The government has stated its intention to introduce legislation to give effect to the accepted recommendations in 2013, with the implementation of all these recommendations to be completed by March 2014.

The CMC is progressing with implementation of such of the PCMC recommendations as are matters for the CMC.

The PCMC held its first joint meeting with the CMC in public session on 3 May 2013.³³ One of the recommendations of the independent panel was that the CMA be amended:³⁴

... to require that the Parliamentary Committee's hearings be public, subject only to the retention of the principle of confidentiality ..., the necessity not to compromise uncompleted investigations or convert functions, and non-disclosure of the making of complaints.

In its response, the government has indicated it accepts the panel's recommendation in this regard and stated that:³⁵

The government will work with the PCMC to ensure that the amendment requiring PCMC hearing to be in public achieves the correct balance and has due regard to the fact that some sensitive and confidential matters cannot be dealt with in a public hearing.

Conclusions

The PCMC's inquiry into the CMC's handling of Fitzgerald Inquiry documents was remarkable enough for what it investigated and uncovered. It has resulted in a number of recommendations that are having considerable impact on the CMC and will continue to do so.

It also had a number of remarkable features from a parliamentary committee aspect, particularly in the Queensland context. The combination of the referral from the Assembly and the PCMC's extensive powers underpinned an inquiry which exercised considerable powers in a very public manner. Whilst these powers are of course available to many committees in many jurisdictions, the exercise of them in such a comprehensive manner is a rare, perhaps unprecedented event in Queensland. The exercise of these powers took on notable practical operation through the use of senior legal counsel to conduct much of the

³¹ PCMC report 90, page xix.

³² Parliamentary Crime and Misconduct Committee – Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Commission of Inquiry documents and The Honourable Ian Callinan AC and Professor Nicholas Aroney - Review of the Crime and Misconduct Act 2001 and related matters: Queensland Government Response, accessed in September 2013 at: http://www.justice.qld.gov.au/data/assets/pdf_file/0020/204536/queensland-government-response-to-cmc-reviews.pdf.

³³ One previous public joint meeting had been held on 30 April 2004 – see footnote 11 above.

³⁴ Review of the *Crime and Misconduct Act* and related matters: Report of the independent advisory panel, recommendation 16, page 219.

³⁵ Footnote 35, page 33.

questioning of witnesses, and the quite extensive use of the power of the committee to authorise the issue and use of summonses for the attendance of witnesses and the production of documents.

The use of the existing office of Parliamentary Commissioner (with another counsel assisting) to assist the committee in extensive examination of witnesses was also a novel development.

The committee conducted many days of hearings and received a vast volume of written material. The committee achieved much in a short time frame. In its own way, this inquiry also demonstrates that the recent winds of change for the Queensland committee system, focused though they were on the establishment and functions of a range of portfolio committees, are also impacting on the work of the PCMC.

It is not yet clear what shape the legislative changes will take. As the acting CMC chairperson has noted in his foreword to the commission's recent annual report:³⁶

From the work currently being progressed by the Implementation Panel and the commission's own officers, it can be confidently anticipated that the commission will be in a very different state by the end of the next financial year in the way it focuses on more serious corruption in units of public administration, particularly in its response and throughput times.

In the foreword mentioned above, the PCMC chairperson also stated:

The committee affirmed at the commencement of its hearings that we were not afraid of positive reform of either the CMC or the Committee. We remain of that view and are open to new and more effective methods of parliamentary oversight. Such change must however be done with the public interest as foremost and accountability at its heart.

There appears to be no doubt that the foreshadowed legislation will bring considerable change for the CMC. It might yet well mean change for its Parliamentary oversight committee.

³⁶ CMC annual report 2012-13, page 5.