



Attention: Ms Simone Webbe
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The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd submission on the Independent Review of the Queensland Police Complaints, Discipline and Misconduct System

“Quis custodiet ipsos custodes?” [“Who will guard the guards?”] – Juvenal 160 A.D.

Dear Colleague,

We thank you for the opportunity to provide comment on the above Review. We acknowledge the particular importance of this Review, both to the Police Service and perhaps more importantly, to the Queensland public.

Preliminary Consideration: Our Background for meaningful comment

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd (“ATSILS”) provides legal services to Aboriginal and Torres Strait Islander peoples throughout mainland Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of: Law and Social Justice Reform; Community Legal Education and Monitoring Indigenous Australian Deaths in Custody. As an organisation which, for almost four decades has practiced at the coalface of the justice arena, we believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences. Consequently, we hope that our comments are of assistance in this very important area of much needed reform.

Please note: It is important to bear in mind that this submission is not cast with the vast majority of police in mind; namely, those who perform a highly demanding role in often trying circumstances, with honour and integrity. For such individuals, this Review is to some extent (barring false complaints etc) relatively academic. Rather, our submissions are based upon our first-hand experiences and are aimed at that small percentage of serving police officers who tarnish the otherwise good name of the Police Service. Those who perform their duties in the true spirit of the Police Service [“with honour we serve”], deserve no less – as do the citizenry of Queensland (whether Indigenous or non-Indigenous).

Summary of our Position

There is a **proven track record** that a police disciplinary process whereby the police investigate other police, **simply does not work**. The reasons for this are in one sense academic, but the **facts** speak for themselves. Whatever changes are put into place, this **fundamental flaw** (at least for matters involving more serious complaints) must be addressed. Without such, community confidence in the Police Service will continue to wain and more importantly, police officers who have conduct issues which need to be addressed, will remain unaddressed. A short to medium term increase in the proper resourcing of accountability measures will bear enormous long term benefits (with **costs decreasing over time** once it is made clear that standards will be enforced and officers held to account).

History of the Crime and Misconduct Commission (the starting point)

The CMC was established on 1 January 2002 when the Criminal Justice Commission (CJC) and the Queensland Crime Commission (QCC) merged to form the new organisation. The CJC had been established by the [Criminal Justice Act 1989 \(Qld\)](#) to help restore confidence in our public institutions following the damning revelations of the [1987 to 1989 Fitzgerald Inquiry](#) investigating police corruption.

For several years, in addition to investigating police and public sector misconduct, the CJC worked with the police to investigate organised and major crime. In 1997 this crime function was taken over by the newly formed QCC, pursuant to the [Crime Commission Act 1997 \(Qld\)](#). The QCC also took on the added responsibility of investigating paedophilia.

During 2001 the Queensland Government amalgamated these two commissions and formed a single body to investigate and guard against crime, misconduct and other wrong doing in the public sector – the CMC. The legislative framework was provided by the [Crime and Misconduct Act 2001 \(Qld\)](#). (hereafter the CMA Act).

Today the CMC is a unique organisation, operating on three major fronts - combating major crime, ensuring public sector integrity and protecting witnesses.

Our submissions will largely focus upon the CMC's role in raising public sector integrity, and in particular, its role in maintaining integrity in the Queensland Police Service (QPS) and the disciplining of Police Officers for Official and Police Misconduct.

Purpose and Functions of the CMC/Act

One of the purposes of the CMC is to “... *continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector ...*” (section 4).

The Act's purpose is achieved by, amongst other things, giving the CMC investigative powers to investigate major crime and serious misconduct themselves as well as requiring the CMC to assist public sector entities to deal effectively and appropriately with misconduct by increasing the capacity of the public sector units themselves to address misconduct and wrongdoing (section 5).

The CMC has a general roving mandate to monitor and reduce misconduct in the Police Service, oversee investigations of misconduct by the Service and, a discretion to investigate cases of misconduct themselves in appropriate circumstances – particularly the serious cases of misconduct.

Generally the CMC has a “monitoring” role of all police complaints. In this context, the CMC may issue advisory notes to the Police Service about the conduct of investigations by the Service and may ultimately decide to transfer a particular complaint to the CMC from the Police Service (section 47). In contrast, for other public service entities, the CMC only has a monitoring role for allegations of ‘official misconduct’.

The CMC also has a “preventative” function – relevantly, the responsibility to analyse systems within the Police Service designed to prevent misconduct, provide training, advice and make recommendations to the Service about preventing misconduct, as well as a general mandate to increase the capacity of the Service to prevent misconduct (section 24). In performing this preventative function, the CMC can inform the broader community of the results of such analysis or investigations (section 24(f)).

In the performance of all of its functions, the CMC must perform those functions independently, impartially and fairly and have regard to the importance of the public interest. In this regard the CMC must fulfil its role and be seen to be fulfilling its role by the wider community in general (section 57).

Some Perceived Criticisms of the Current System

The system of dealing with police complaints of course pre-dates the Fitzgerald Inquiry. Complaints against the police were then dealt with by the Police Complaints Tribunal.

The Fitzgerald Inquiry **exposed major problems with the danger of having police investigating police**, and as a result, the Fitzgerald Report recommended the establishment of the Criminal Justice Commission (CJC); one of the responsibilities of which was to independently investigate complaints against the police.

This remained the situation until the government took the view that the Commission was wasting precious time and resources getting bogged down with often relatively minor complaints (service-wide). Under the legislation at the time, it appears there was no discretion for the Commission to dispense with minor, frivolous or vexatious complaints.

Instead of making precautionary amendments dispensing with the voluminous complaints across the sector but reserving the investigation of Police complaints to the CMC, the amendments redirected all complaints, including those against police, back to the line agency – in this case, the Police Service.

ATSILS, like many others, has consistently expressed the view that police complaints should be investigated by the independent CMC (or another independent body), as was the case before the amendments effectively provided that the primary responsibility for such investigations should rest with the Police Commissioner.

We have been supported in this view by the Council for Civil Liberties, Mr R O'Regan (former Chair, CJC) and most recently, Mr W Carter (former Chair, CJC and Chair, two past Review Inquiries) among others.

There can be no doubt that the current system used to discipline Queensland police officers is flawed and must be reviewed. The recent decision by the police service to not discipline anyone connected with the "Palm Island" tragedy, is our submission both perplexing and reflective of a fundamentally flawed system. A system seemingly, in part at least, based upon a police mind-set which seeks to self-justify itself – in turn based upon a "circle your wagons" mentality.

The CMC has expressed the view that problems with the system must be addressed to maintain public confidence that officers who do the wrong thing will be held to account. The corollary of which, is that if a police officer (accused of some form of wrong doing), is cleared after a truly independent review, then not only can the public can have confidence in the outcome, but just as importantly, the police officer concerned will stand vindicated. No such vindication sheets home to officers cleared under the current flawed system – often, unfairly to the officers concerned.

The CMC reviewed the Queensland Police Service's disciplinary system at the request of our Attorney-General, the Honorable Mr. Cameron Dick in late 2009; and it recommended some major changes, including removing the power of high ranking police officials to suspend sanctions imposed for misconduct.

Under the current system, a disciplinary charge can be proved against an officer and a penalty of dismissal imposed. But the dismissal can be immediately suspended, meaning the officer remains in their position pending further determination. Any dismissal should stand – but if reinstatement occurs (via due process), any lost salary could be subsequently reimbursed.

Overview of Current process of Investigation

Under the Crime and Misconduct Act 2001, the CMC essentially investigates complaints of serious misconduct, official misconduct or cases involving the public interest.

The Act distinguishes between ‘misconduct’ (questionable honesty or impartiality) and ‘official misconduct’ (criminal offences or sackable conduct), with the clear inference that the latter is more serious.

However, in relation to police in particular, the Act contains many specific provisions – some of which clearly imply that the very existence of an allegation of ‘misconduct’ simpliciter against a police officer is always deserving of some degree of scrutiny by the CMC.

“Police misconduct’ in the Schedule is defined as misconduct (other than official misconduct) by a police officer that:

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

However, while the CMC is kept informed and monitors all police complaints, *it is the Police Commissioner who has primary responsibility for dealing with complaints about ‘police misconduct’ (section 41); unless the Police Commissioner considers that it is more appropriate for the CMC to do the investigation itself or for the Police Service in conjunction with the CMC conduct the investigation (section 42(4)).*

The CMC has primary responsibility for dealing with complaints of 'official misconduct' (section 45). However, the CMC does have power to refer 'official misconduct' allegations to the Police Commissioner, but as noted above, the CMC must be kept informed and is responsible for monitoring the way in which the Police Commissioner deals with the complaint (sections 42(5) and section 45(2)).

Whenever it receives complaints against the police, the CMC has ultimate discretion to refer complaints back to the Police Service for investigation – not just complaints of lesser seriousness (referred to under the Act as 'police complaints') but disturbingly even in cases of 'official misconduct'. Admittedly though, the CMC does have over-arching responsibility to monitor all complaints against the police.

In deciding whether to refer the complaint back to the Police Service or undertake the investigation itself, the CMC is obliged to consider four Principles – cooperation, capacity building, devolution and the public interest (section 34).

Further, while the CMC is to be kept informed and monitor all police complaints, ***it is the Police Commissioner who has primary responsibility for dealing with complaints about 'police misconduct'*** (section 41); *unless the Police Commissioner considers that it is more appropriate for the CMC to do the investigation itself or for the Police Service in conjunction with the CMC conduct the investigation (section 42(4)).*

In summary, from a practical point of view the CMC ordinarily only investigates complaints of serious misconduct and official misconduct with a significant public interest component, with the bulk of complaints being referred back to the Police Service. The proven track record of the police investigating police speaks volumes as to a system which simply does not work.

Changes to the Current System

ATSILS have always maintained a firm view in relation to the investigation of police complaints; that it is inappropriate for police officers to investigate other officers against whom a complaint has been made. This is a view based upon first hand experiences.

This practise also places the investigating officers in an invidious position – all the more so given the collegiate mind-set of the Queensland Police Service.

It is also accepted that it is not in the public interest for an independent body external to the Police Service to investigate every claim that a police officer's conduct is questionable.

It is significant that the first three principles that the CMC must consider when deciding whether to refer the matter back to the Police, most notably capacity building and devolution, seems to weigh in favour of referring the majority of complaints back to the police Service. This is highly regrettable.

The last principle – public interest considerations – in our view should weigh heavily in favour of the CMC investigating all complaints against the police (other than the most trivial matters).

Public interest in our view should always be the overarching principle governing the investigation of conduct of police officers.

The community is entitled to expect that our law enforcement officers – individuals invested with great (and seemingly ever-increasing) powers – must be held accountable. It sounds trite to suggest that with “powers” comes “responsibilities” – but such is the case. **Responsibilities without accountability is all but meaningless.** Not only must justice be done – but it must be seen to be done. This also raises the question as to what criteria are used by the Commission to determine the weight of ‘public interest’ in a particular case.

The stringency of requirements to satisfy natural justice principles exponentially increases as the seriousness of the matter under investigation increases. In our view, fundamental principles of natural justice should mandate, in the majority of cases, the investigation of complaints against police by an independent body like the CMC.

We additionally submit that inherently, questions of police integrity necessarily involve a matter of public interest. We submit that the situation of police officer complaints is a separate category from complaints against other public servants – and indeed the current Act certainly supports this contention, containing as it does separate and exclusive provisions in respect of complaints involving police.

A body totally independent of the police service - be it the CMC or otherwise, **needs to be properly resourced** so that this vital aspect of police accountability can be overseen. Such is also important in terms of police credibility – with long terms benefits for the enhanced reputation of the police service should such an overhaul be brought to fruition.

As outlined above, we acknowledge the often difficult tasks which police are called upon to fulfil. We are sure that the vast majority of police, being possessed of integrity and thus serving with honour and distinction, would support our view that the small percentage of the police force whose conduct seemingly brings shame to their colleagues - should be vetted out of the service.

That will not happen without independent, external assessments of police conduct. It will also assist the “credibility gulf” that clearly exists in many quarters with respect to police accountability – if a system were put in place which clearly demonstrated that in no sense could it ever be seriously suggested that police in Queensland were “above the law”.

We consider that the use of suspended sanctions in the QPS discipline system is problematic, as it removes the deterrent effect of the sanction and undermines public confidence in the system and the QPS.

We further support the proposal that the Police Commissioner should be given the power to sack officers in whom he or she had lost confidence, without engaging in a protracted disciplinary process.

We support the proposition that the CMC be given an increased monitoring role in relation to misconduct issues and a broader range of financial sanctions for misconduct charges.

The QPS should also elevate complaints management which remain within their purview, to "core business" and ensure its Ethical Standards Command, which deals with complaints against police, is properly resourced. We consider that it is of paramount importance that the QPS has the will and desire to hold its own members to account with a view to restoring public confidence in the system (i.e. for the less serious matters over which they should retain jurisdiction).

It is also important that police officers are treated fairly, and that disciplinary processes should proceed as **quickly** as circumstances dictate; ensuring there is a firm code of discipline that meets community expectations.

A case in point:

Assistant Police Commissioner Kathy Rynders' decision not to discipline the six Police Officers investigating Senior Sergeant Hurley

This is a matter ATSIILS is intimately aware of on a number of levels, not the least of which is that we wrote the formal complaint to the then Attorney –General in relation to this matter- which was in turn referred to the CMC and in turn onto the Police Commissioner.

Recently retired Deputy Police Commissioner Kathy Rynders found that six police officers should not be disciplined over botched probes into the Palm Island death in custody, and should only face "managerial guidance".

We were extremely perplexed and disappointed in this ruling, which flew in the face of a Crime and Misconduct Commission (CMC) recommendation that the officers should face disciplinary action and misconduct charges over two flawed investigations into Palm Island man Mulrunji's Watch House death in November 2004.

The CMC has expressed the view that it is powerless to challenge Ms Rynders' decision because of a legal loophole. Such remains an open question in our view.

The Queensland Civil and Administrative Tribunal

The *Queensland Civil and Administrative Tribunal* (QCAT) is an independent body which, among other functions, has the jurisdiction to hear disciplinary proceedings for official misconduct.

Section 219A of the Crime and Misconduct Act states that the provision for such disciplinary proceedings in QCAT is to:

- protect the public; and
- uphold ethical standards within public sector agencies and the police service; and
- promote and maintain public confidence in the public sector.

The QPS discipline process

The CMC may recommend to the QPS that it consider taking disciplinary proceedings either for police misconduct or official misconduct.

Police misconduct is defined above. ***Official misconduct*** is conduct involving the exercise of a police officer's powers that is dishonest or not impartial or a breach of trust that could, if proved, be:

- a criminal offence; or
- a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment.

Process for police misconduct

When the CMC refers alleged police misconduct to the QPS to consider disciplinary proceedings, the QPS appoints a prescribed officer to consider the matter and decide whether or not to initiate disciplinary proceedings.

If the decision is not to initiate such proceedings, under the current legislation the CMC has no power to request QCAT to review that decision.

If the prescribed officer decides to initiate such proceedings, a disciplinary hearing follows, after which the prescribed officer will come to a decision. If the CMC is not satisfied with that decision, it has the power to seek review of that decision by QCAT. This is called the 'review jurisdiction'.

Process for official misconduct

The CMC may refer alleged official misconduct to the QPS to consider disciplinary proceedings. If so, the QPS appoints a prescribed officer to consider the matter and decide whether or not to initiate disciplinary proceedings.

If the decision is not to initiate such proceedings, the CMC can take the matter directly to QCAT to commence disciplinary proceedings. This is called referring a matter in its 'original jurisdiction'.

If the prescribed officer initiates disciplinary proceedings but the CMC is not satisfied with the outcome, it can seek a review of that decision by QCAT. This is called referring a matter in the CMC's "review jurisdiction".

QCAT may, on finding an allegation of official misconduct proved against a person, order that the person—

(a) be dismissed; or

(b) be reduced in rank or salary level; or

(c) forfeit, or have deferred, a salary increment or increase to which the prescribed person would ordinarily be entitled; or

(d) be fined a stated amount that is to be deducted from—

(i) the person's periodic salary payment in an amount not more than an amount equal to the value of 2 penalty units per payment; or

(ii) the person's monetary entitlements, other than superannuation entitlements, on termination of the person's service.

Amendments to the Current Legislation

We consider that the current legislation must be amended to ensure that when the CMC refers alleged police misconduct to the QPS to consider disciplinary proceedings, and the QPS decides not to initiate disciplinary proceedings, the "decision" is none-the-less reviewable by QCAT.

This would create a similar situation as is currently the case for official misconduct, and the CMC could then take the matter directly to QCAT to commence disciplinary proceedings.

Palm Island's Mayor Mr. Alf Lacey recently stated that the decision not to discipline police who botched an Aboriginal death-in-custody investigation will take race relations in Queensland back to their darkest days. The extent of ill-feeling and distrust in Queensland Indigenous communities towards the police cannot be under-stated. Indeed, **this distrust does of itself often generate scenarios where public-nuisance type offences involving police inter-actions, arise.**

The highly respected lawyer, Mr. Andrew Boe, described the outcome as "perverse and obscene". We would with respect, agree. *"If the end result of that examination is that there is no further avenue then this is a complete systemic disgrace,"* he said.

Conclusion

We consider that it is vitally important that the public has full confidence in its police service; and one of the key ways in ensuring police integrity is through a complaint handling process which maintains public confidence in the police service, and ensures that the community's respect and trust is preserved through scrupulous examination, objectivity and consistency in dealing with complaints.

We cannot emphasise enough the importance of Aboriginal and Torres Strait Islander people receiving a competent and consistent policing service, and confidence that when police officers act inappropriately their conduct will be investigated in a thorough and transparent manner. Such is the case irrespective of whether the complainant is an Indigenous Australian or otherwise.

Such will go some way towards ensuring that Aboriginal and Torres Strait Islander people can build a stronger relationship with the Police Service.

As to Palm Island: **"a riot is the language of the unheard."** Martin Luther King Jnr.

We thank you for your careful consideration of these submissions and for affording us an opportunity to have input. I also take this opportunity to acknowledge the invaluable assistance provided to me by one of my Brisbane staff members in an earlier draft: Mr Rory Downey.

Yours faithfully,

Shane Duffy

Chief Executive Officer

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