

Queensland transparency: lapdogs and watchdogs

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BACKGROUND

Parliamentary Crime and Misconduct Committee chair Liz Cunningham has opened the inquiry into the release and destruction of Fitzgerald Inquiry documents by striking back at claims the committee was a 'lapdog' not a watchdog. While Ms Cunningham did not single out Premier Campbell Newman by name, the Member for Gladstone took aim at what she called 'unfair and uninformed' adverse comments made against the committee in the past week. Mr Newman had labelled the bipartisan committee a 'lapdog' over what he saw as its perceived failure to oversee the CMC.¹

The Crime and Misconduct Commission's predecessor, the Criminal Justice Commission, was established in 1989 following widespread corruption amongst high-level Queensland politicians and police officers being uncovered by the Fitzgerald Inquiry. The Inquiry had been established by the National Party government, which had been in power since 1957 and had governed in its own right since the dissolution in 1983 of its coalition with the Liberal Party. In 1989 it was defeated in a landslide win for the Labor Party. At the time, it was the worst defeat of a sitting government in Queensland history. The Goss Labor government came to office with a sweeping reform agenda. In September 1992 it was re-elected with a comfortable majority. However, in July 1995 the ALP scraped back into government with a majority of one. The result in the seat of Mundingburra was challenged, and a new election held. Labor and the Coalition held 44 seats each. In 1996 a Liberal/National government took office, with the support of Independent, Liz Cunningham. The government, under Premier Rob Borbidge, found itself immediately immersed in scandal when it emerged that before the election the (by now) Premier and the Minister for Police had signed a secret Memorandum of Understanding with the Police Union, agreeing to the repeal of various unpopular Goss reforms. This was referred to the CJC, but while that inquiry, under Mr Justice Carruthers, was taking place the Government set up the Connolly-Ryan inquiry into the future role, structure, powers and operations of the CJC itself. This inquiry seemed to have been established to undermine the Fitzgerald reforms.

1 <http://www.brisbanetimes.com.au/queensland/pcmc-chair-hits-back-at-lapdog-comments-20130313-2fzna.html#ixzz2WKwpNjmR>

In the meantime Carruthers had returned to New South Wales, with his inquiry incomplete, upset by political interference and the demands – from the other inquiry – that he hand over all his evidence before concluding his own inquiry. The CJC and Mr Carruthers sought injunctions from the Supreme Court to have the Connolly-Ryan inquiry closed down on the grounds of bias. While it cleared Mr Ryan of bias, this was not the case with Mr Connolly. One law firm commented on the case in its quarterly newsletter concluding:

It is vital that Commissions of Inquiry, Judges and even politicians act without bias, and be seen to act without bias, in their decision making process. It is only in this way that parties to the process and the public can have confidence in a fair hearing and a just result.²

This sorry tale reminds us that since its inception the CJC was frequently in the eye of a political storm. The accountability mechanisms established after Fitzgerald have often proved uncomfortable – to both sides of politics – and now is no exception.

The Queensland Crime Commission (QCC) was established in 1998 to investigate criminal activity, in particular criminal paedophilia and major and organised crime, an area in which the CJC had been found wanting. The Government therefore created a small, specialised body for this purpose, independent of the CJC. On 1 January 2002, after a change of government back to the ALP, the QCC and the former CJC were merged to establish the present Queensland Crime and Misconduct Commission (CMC). In addition, the CMC was given authority over all areas of the Queensland Public Service, whereas the CJC had been limited to oversight of the Queensland Police Service. The ALP held government, with a declining majority, through elections in 2004, 2006 and 2009. Then in 2012 it suffered a greater loss than that of the conservatives in 1989, taking over the record as the worst defeat of a sitting Queensland government. From 51 seats in 2009, it was reduced to only seven seats. In an ill-judged campaign, Labor employed a smear campaign against the leader of the Liberal National Party, Campbell Newman in the final weeks of the state election campaign, and referred a matter relating to Newman to the CMC. The CMC found no evidence to support their accusations against him. Newman became Premier, and shortly afterwards the CMC was under the spotlight again with two inquiries focused upon it. In the intervening years it had caused embarrassment to both sides of politics, but it seemed, to Newman and others, to have become complacent and inefficient. It did not fare well under the two new spotlights.

CMC FIASCO – TALE OF TWO REPORTS

In 1989, the Fitzgerald Report commented:

It is undesirable to leave reform to those people who are steeped in the previous philosophies and policies and who would no doubt find it difficult to willingly and cooperatively adopt an objective approach to the issue of reform.

2 M&M Report, September 1997.

The two recent inquiries both published their reports in May 2013, the first dealing with the CMC's recent general record of engagement in the political process and the second dealing with a spectacular failure of its internal management processes. The first (the Callinan-Aroney report) was the result of an inquiry established by the newly-elected Premier; the second was issued by the Parliamentary Crime and Misconduct Committee, a body of seven parliamentarians with few formal legal qualifications but a wide variety of experience in public life, and a range of political alignments. The two reports agreed on the need for change, but drew radically different conclusions on the form that such change should take. The Callinan-Aroney inquiry arose from the misguided use of the CMC to air allegations of misconduct against Mr Newman by then the Premier. This continued a trend towards using the CMC to advance partisan agendas, casting aspersions in the hope that these might linger until the CMC made its findings public. In this particular case, given the high stakes and the seniority of the main protagonists, the CMC made its report with unc customary speed and its failure to substantiate allegations against Mr Newman signally advanced his case to replace Ms Bligh and weakened her own credibility. The calls for some sort of inquiry into the role of the CMC flowed initially from this and similar incidents. They became irresistibly loud when administrative bungling and organisational cover-up were revealed about the CMC's handling of ancient but still highly-sensitive documents provided to the 1987 Fitzgerald enquiry. On the one hand, public access to knowledge about the contents of some of these files was inadvertently facilitated; on the other, equally sensitive files of lasting historical significance were destroyed. The political and the administrative dimensions were dealt with separately: a general inquiry carried out by Callinan and Aroney providing advice direct to the Premier, and the more focussed accusations of mismanagement were seen to be clearly within the remit of the Parliamentary Crime and Misconduct Committee.

THE PARLIAMENTARY CRIME AND MISCONDUCT COMMITTEE REPORT

The Parliamentary Committee's Report is both a remarkable document and the product of a remarkable process. Back in the Bjelke-Petersen days, a select parliamentary committee broke new ground in its widespread and influential analysis of education.³ But it was rare for Queensland's standing committees to deal in such a systematic way with issues of high political salience, pursuing non-partisan issues related to bureaucratic mismanagement and incompetence in immense detail. Several reasons account for the quality of this outcome. First, the parliamentary committee system itself had been subject to review during the dying days of the ALP administration and its established members had a strong commitment to making the change work.⁴ Secondly, the topic was of immense historical

3 See Ann Scott, 'The Ahern Committee and Education Policy in Queensland', PhD thesis, 1983, available online, Fryer Library, University of Queensland.

4 See Judy Spence, 'A new era of parliamentary reform,' *Australasian Parliamentary Review*, Vol 27, no 2, Autumn 2012 and Ken Coghill, 'Queensland Parliamentary Committees : dead, on life support, or lively', *Australasian Parliamentary Review*, Vol 27, no 2, Spring 2012.

interest, given that the archival material under discussion related to the Fitzgerald Inquiry. On the one hand, destruction meant irreparable loss; on the other hand, unintended access could be dangerous for people who had given evidence in confidence. Thirdly, the use of televised public sessions added a palpable accountability, especially in an environment in which accountability was under threat from a newly-empowered executive able to exploit an unprecedented majority.⁵ Finally, there were quality performances from the individuals involved, notably the chair (Liz Cunningham), the other long-serving independent MP, Peter Wellington, and the Acting Parliamentary Commissioner, Peter Davis, who played the role of an uncompromising prosecuting attorney.

The Parliamentary CMC's report provides great detail about the processes of administration, maladministration and omissions that contributed to the mistakes that were made. It clearly identifies those officers whom it regarded as derelict in their duties, up to and including the full-time Commissioner (since resigned on health grounds). It also pointed to the consequences of managers' inaction on an earlier diagnosis of structural problems within the CMC. This structure isolated CMC officers who had appropriate legal and historical knowledge from those who took and implemented some of the crucial decisions. This structural dysfunction was responsible for the discovery by a former detective, in the course of his PhD research, of the Fitzgerald documents that had been released by the State Archives, under direction from the CMC, lifting what should have been a 65-year embargo.

The report bluntly criticised the CMC itself for the unreliability of the information it provided to the Committee:

The evidence before the Committee of what happened and when in terms of access to the documents is largely uncontroverted. The focus of the Committee was on the how and why the documents became publically disseminated. Firstly, how responsible CMC office holders and systems of governance enabled the documents to become disseminated from February 2012, secondly why there was a failure to properly address the improper dissemination of the documents when Executive Management became aware of their dissemination in May 2012 and, thirdly, why documents were apparently destroyed in 2007. (p 2)

The PCMC inquiry focussed on the sequence of events in May 2012: the apparent inertia in the Legal Service's Unit in investigating what had happened and what holdings remained publically available; the absence of any report by the Chairperson to the PCMC of the matters reported by Mr Krosch or the errors in the RAPs [restricted access periods] allowing public access to confidential material which had been uncovered; and the absence of any satisfactory follow-up to the issues uncovered. (p 6) The Committee concluded that:

Unfortunately, the inadequate investigation of this matter in May 2012 meant that a great deal of very sensitive material was to remain in the public domain.(p 7)

5 See Roger Scott, 'Political Tsunami – the 2012 Queensland election and its aftermath', *Australasian Parliamentary Review*, Vol 27, No 2, Spring 2012.

The Committee also found that the CMC did have an opportunity to conduct an internal investigation into the issue, in May 2012, when Mr Krosch's email alerted the CMC to the Fitzgerald Inquiry documents being publicly available. They believed that the CMC 'dropped the ball' in May 2012 and failed to institute a proper internal inquiry which, had it taken place, would have prevented the damage that was ultimately caused to the CMC's reputation. The Committee pulled no punches about the extent of the management problem:

In relation to the Committee undertaking the inquiry, pursuant to the motion of the Legislative Assembly, with the assistance of the Acting Parliamentary Commissioner, it must be appreciated that at the time the inquiry was established the CMC was unable to inform the Committee as to the extent of information publically available, how many people were at risk, how many people's reputations were at risk or what operations, if any, had been compromised.⁶

There were similar critical comments about the production of 'large volumes of unhelpful material', about the omission of significant email records required under summons until very late in the Parliamentary Committee's proceedings, about the organisational culture of a key branch and about the failure of the Commissioner to meet his obligations to alert the Part-time Commissioners to the emergent problems. The tone of the Committee's Report is captured in its comment on the failure of named officers to understand the seriousness of the issue of public access to material from the Fitzgerald Inquiry which had only come to light inadvertently when the former police officer gained access to documents he had prepared himself during a covert operation:

The description by Mr X of the error as being 'administrative' or a 'misunderstanding' may have coloured the response of (three other named officers). Mr X's trivialising of the issue should not mitigate their lack of effective response: collectively, the lack of recognition by (the three named officers), all very senior officers, of the importance of sensitive Fitzgerald Inquiry material being in the public domain and their collective failure to properly investigate the issue is totally unacceptable. P 46

As the Committee chair remarked in her foreword:

There is no doubt that the past four weeks has been very difficult for the CMC and individual officers of the CMC. No organisation or individual is necessarily happy to have their (sic) actions scrutinised in detail in a public forum. There are many CMC officers who have expressed their dismay and regret at what has come to light. To their credit, some have taken responsibility for their actions. Some have not. This has been a painful process for the CMC and there is no doubt that there will be more pain in the coming days.

But the process was necessary. The CMC is an important institution. There is very great support for that institution to continue to play its vital role in the administration of

6 The Report footnote 64 documents this: Evidence received from the CMC suggests that as at March 2013, 741 documents were publicly accessible (PCMC Exhibit TD_26). Evidence from the Queensland State Archives suggests that the number of publicly accessible documents as at 4 March 2013 was 7341 (PCMC Exhibit TD_106. EX QSA50); PCMC, Record of Proceedings, 6 March 2013.

government in Queensland. The challenge for the CMC and its individual officers is to learn from the inquiry, reform and move forward as a better institution. P viii

THE CALLINAN-ARONEY REPORT

There is a striking contrast in tone between the findings of the Parliamentary Committee which had a long-term relationship with the CMC and the report of two external assessors with a necessarily shorter-term relationship focused on the involvement of the CMC in the political process. Callinan and Aroney seem to have agreed with the Parliamentary Committee's assessment of the manifest limitations and lack of cooperation displayed by CMC staff. They recount the level of personal antagonism between them, and make barbed references to the 'petulance' of CMC senior officers and their apparent pre-occupation with self-promotion rather than good performance. The Callinan-Aroney Report was published earlier than that of the Parliamentary CMC, and merely noted what was happening in the parliamentary arena dealing with its much narrower terms of reference. However, Callinan-Aroney did conclude, as those who established the inquiry had concluded, that the patent failure of administration on the Fitzgerald material releases and destruction provided an environment in which major reforms could be promoted without too much public dissent. The reforms suggested by Callinan-Aroney offered two major thrusts. First, there was a need to reduce the range of the CMC's activities which had been expanding for the past two decades and reduce the capacity for members of the community, including politicians, to misuse the complaints procedures for undesirable purposes. The Report argued that the slowness with which many complaints had been processed in the past, a major grievance for all concerned, was a result of too much easy access overloading the Commission with vexatious or frivolous complaints. They saw the law as an instrument to deal with this, by threatening legal penalties to be applied, beyond the existing requirements for statutory declarations. It would become an equally heinous crime to publicise the existence of complaints unless this became known through criminal court or disciplinary proceedings. Secondly, Callinan-Aroney argued that there is a need to bring the CMC under more direct political and administrative control. Wherever possible, central agencies of the public service were to be interpolated to regulate the conduct of the CMC, especially in areas of official misconduct by public servants. The implementation of the Callinan-Aroney recommendations was to be overseen by a committee embodying the most senior of these officials, representing Treasury and the Premier's Department as well as the Public Service Commissioner – all directly appointed by Ministers and accountable to them. On-going work on areas such as research and education about integrity would now be channelled through the Public Service Commission or the office of the Attorney-General. The complaints powers of the Ombudsman would move in the same direction and the Report pointed to the apparent irrationality of having a multiplicity of agencies engaged in what it called 'the integrity industry'. Recommendation 5 gives a taste of the Report's language and values:

In order to improve standards of conduct and diligence, and in replacement in part at least of Ethical Standards Units, there ought to be established within the Public Service Commission an Inspectorate empowered to inspect as it sees fit, whether without notice

or otherwise, any or all Departments and agencies of Government, and to have similar coercive powers to the Auditor-General's much along the lines of the federal Public Service Inspectorate which existed in the past.

The flavour was redolent of the old Queensland Public Service Board of pre-Fitzgerald days. The CMC Media Policy had stated that 'effective media and public relations are vital to the CMC and its role and place in the community are to be recognized, understood and supported. The maintenance of a good reputation is crucial to reinforcing public trust and confidence in the CMC'.

The Callinan-Aroney Report is scathing about the role of the media unit:

We can see no justification for other than one media liaison officer or trained media person at the CMC. Good public relations depend upon good performance, not upon self-promotion, or what some member or employee of CMC says or proclaims about it.

Whatever the role of the CMC may be, it is not to impart spin to what it bowls up to the public, but to provide, as far as is necessary, a straight up and down account of its activities. Just as good performance will gain public confidence, bad performance, as in the case of the shredded and disclosed documents, will diminish it. And all the self-promotion, coloured diagrams and glossy publications that the CMC might produce will not change a scintilla of that.

While the point the Callinan-Aroney Report makes is unarguable, some part of the organisation has to produce the accountability documents that provide transparency, and are required under legislation, such as the annual report. The staff of media units might be expected to be able to write such documents, aiming at the wider community, and they had a reasonable past record. The CMC's annual reports and strategic plan are generally refreshingly free of high-flown adjectives. Indeed, its 2010–11 annual report received an award in the Australasian Reporting Awards.

It is not difficult to infer that the overall aim of the Callinan-Aroney Report is to inhibit the capacity of the CMC for independent action in the future, reducing its range of functions by relocating key elements it is meant to supervise in protection of individual rights and the wider public interest to within that very bureaucracy. The CJC/CMC has a history of significant achievements, most often at the expense of creating political embarrassment in its findings for the current regime. The recent incumbents have much to answer for but the longer-term costs of maintaining a sensibly-resourced organisation are a price worth paying for honest and responsive government. This is the theme of one of the most interesting appendices to the Parliamentary Report, where three authors not aligned to the dominant LNP offered a minority report. This dealt mainly with the political agenda being promoted by having two enquiries proceeding simultaneously and under very tight time-lines – the Parliamentary Committee was required to report within four weeks. They repeated a view widely held at the time:

We believe the Government's actions on having two investigations on foot, at the same time, about the same matter, support our view that this Government has for some time had a 'get square' view of the Crime and Misconduct Commission and its independent

ability to investigate a wide range of matters able to be referred to it under current legislation. (p.228).

Miller and Trad, from the ALP, and the independent member Peter Wellington, asserted that:

The CMC plays a critical role in Queensland's democracy. For little over 20 years, the CMC has been at the forefront of crime prevention, crime and misconduct investigation and prosecution, witness protection and building the ethical and accountability standards within Queensland's democratic institutions.

The release and destruction of the COI [Fitzgerald Commission of Inquiry] documents was a significant error that was compounded by poor judgement on a number of occasions. However, to claim that this instance is emblematic of the workings and functioning within the CMC is not a conclusion that can be drawn from evidence provided to this Inquiry and, in fact, would only support a political agenda to weaken the very important role of the CMC to keep Government open and accountable. (p.228)

In contrast to Callinan-Aroney, the Parliamentary Committee adopted a forensic approach to the specific problems it needed to deal with. It sought to reassure the public that the significant benefits of the CMC in terms of democratic accountability and access to grievance procedure was not a systemic failure so much as an example of organisational decay. Three types of explanations were offered for this decay – first, the passage of time had allowed the organisation to use its insulation from direct public scrutiny to expand its range of activities in ways which were counter-productive to meeting its main mission as a check on corruption and misconduct; secondly, management structures had been put in place which isolated those who understood this mission from other elements in the organisation, identified as 'silos'; thirdly, there was inexcusable personal incompetence at several levels, resulting in the Parliamentary Committee itself not knowing what was going on. In reporting on the massive maladministration and the subsequent cover-ups and blame-shifting, the Parliamentary Committee has gone further than any committee before it to name names and condemn behaviours. It remains to be seen how far the insularity of the CMC culture protects its own from the consequences of their actions and inactions but the Parliamentary Committee diagnoses the need for internal structural change as well as new leadership. It also remains to be seen whether the newly-appointed leader of the CMC, a former senior public servant under an earlier LNP regime, exhibits the appropriate reformist zeal. Certainly the Parliamentary Committee and the free spirits among its members, like Independent Peter Wellington, caution against throwing out the baby of democratic accountability with the bathwater of incompetence among its current bureaucrats.

The Newman Government now faces two sets of recommendations for future action. The solution offered by the Callinan-Aroney Report flows from their legal orientation and the set of events which caused them to be appointed. This solution is to wind back the influence of the CMC because it is getting in the way of direct political accountability. This can be accomplished by reinvigorating the powers of central agencies of government in order to reduce the CMC's capacity for action on areas like research and public education about integrity in the governance process. Legal processes can then provide mechanisms to discourage the volume of complaints which overloaded the system. Their CMC

would be smaller, cheaper, have less to do and keep out of the way. The Parliamentary Committee's solution flows from their understanding of the administrative context and the concerns over integrity and corruption that placed the CMC at the centre of a wider definition of democratic accountability. Their CMC would continue to be a major inhibition on the corruption which otherwise can flourish – and has been seen to flourish – within Queensland governance structures. It would not be subordinated to informal direction from senior bureaucrats or Ministers; it would not be smaller or cheaper or less-utilised by the public – it would comprise new people and new management structures but it would not keep out of the way. Since the publication of the two reports, the recommendations have been discussed at a number of forums attended by the interested parties, some sponsored by independent bodies and others by official agencies. The most recent was a joint meeting between the CMC and its parliamentary oversight committee which held a brief public session on August 21 before spending the rest of the day in conclave. From this and from earlier gatherings, official spokesmen seemed to indicate the priority being given to the Callinan-Aroney proposals with the main modification likely to be an acceptance that the CMC might retain some control over its research agenda and community education activities. The main objective of reducing the volume of complaints as well as their perceived vexatiousness would be promoted in part by a redefinition of boundaries to ensure the great majority of complaints did not surface beyond the confines of individual departments as well as strengthening penalties for those lodging complaints judged to be 'vexatious'. At the August 21 forum, questions were raised about three celebrated cases – one concerning an MP and former minister, another concerning the former Vice-Chancellor of the University of Queensland and a third concerning a former party official turned Director-General – all of which still remained unresolved after very long delays. It was made clear that the CMC itself would eventually report on the first two but the third would be left to the Director of Public Prosecutions and no further action taken and no report issued. Academic commentators who attended the various gatherings came away with the impression that the government did not intend to subject itself to these sorts of embarrassments in the future. Lord Acton's famous comment is rarely quoted in full:

Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority, still more when you superadd the tendency or the certainty of corruption by authority.⁷

In Queensland, from time to time the anti-corruption watchdog has behaved as if it was endowed with absolute power. Since 2010 we now have a State government which knows it has absolute power and wants to use it to settle some old scores and diminish institutional challenges to that power.

7 Acton made this comment in 1887, echoing the sentiments of two of his Liberal antecedents, both Prime Ministers of Britain. Pitt the Elder warned the Commons in 1770 that 'unlimited power tends to corrupt the minds of those who possess it' and his son told the same body less than two decades later that 'necessity is the plea for every infringement of human freedom – it is the argument of tyrants; it is the creed of slaves.'