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A/Chair, Parliamentary Crime and Corruption Committee
Parliament House
George Street
Brisbane Qld 4000

Review of the Crime and Corruption Commission (CCC)

The Whistleblowers Action Group Queensland (WAG) appreciates the invitation to make a submission to the Parliamentary Crime and Corruption Committee (PCCC) as part of its review of the Crime and Corruption Commission (CCC).

WAG submits that any Queensland government which aims to be open and accountable to the public interest and to engender confidence in the government, is compromised when agencies which are responsible for investigating wrong-doing within the Queensland public sector and protecting those who disclose that wrong-doing, including the CCC and the PCCC, fail to do so. The consequences can be, and WAG submits, have been, to create a climate in the public sector that tolerates persistent wrong-doing and fails to protect those who bring that wrong doing to the attention of those agencies.

WAG wishes to make the following five recommendations to improve the effectiveness of the CCC and the PCCC to investigate wrong-doing in the Queensland public sector and to protect those who disclose wrong-doing in the public sector.

1. WAG RECOMMENDS that no Queensland agency be allowed to investigate allegations of serious crime or corruption within itself.
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1.1 WAG submits that the CCC's ability to independently investigate allegations of serious crime or corruption within the public sector is severely compromised by the *Crime and Corruption Act 2001* which requires the CCC to devolve the responsibility for investigating complaints of serious wrong-doing in an agency back to the agency against which the complaint was made. Also, the *Crime and Misconduct Act 2001* requires the CCC to 'cooperate' with the agency investigating itself. WAG submits that the relevant Queensland Acts legislate for 'Caesar to judge Caesar' and create an environment for the CCC to become 'captured' by the agency investigating itself. Close cooperation between the CCC and the agency of concern can mean that serious matters, highly relevant to the public good may not be adequately investigated and the Queensland public can have no confidence that investigations undertaken by the CCC are independent.

1.2 WAG submits three instances of 'Agency Capture' that prevented the investigation of allegations of serious crime or corruption within the Queensland public sector.

2. WAG RECOMMENDS the creation of a stand-alone Whistleblowers' Protection Authority, similar to the Office of Special Counsel in the USA, with the sole responsibilities of encouraging those who witness wrong-doing in the public sector to speak up and for protecting whistleblowers who come forward from acts of reprisal.

2.1 The *Public Interest Disclosure Act 2010* says the public interest is served by facilitating public interest disclosures of wrong-doing in the public sector, ensuring that those disclosures are properly investigated, considering the interests of persons who may be subjects of the disclosure and protecting the person who made the disclosure from acts of reprisal. The Act makes it clear that a person making a public interest disclosure should not be subject to any liability, including disciplinary action, for making a disclosure and that it is illegal for another person to cause acts of reprisal against a whistleblower.

2.2 However the *Crime and Corruption Act 2001*, requires the CCC to devolve responsibility for investigating allegations of crime or corruption in a public sector agencies back to the agency against which a public interest disclosure has been made: increasing the likelihood that the agency will undertake acts of reprisal against the whistleblower who made the disclosure.

2.3 The CCC's website says that providing protection for those who speak out about wrongdoing in the public sector ensures that the government is open and accountable and that the CCC aims to protect whistleblowers. However, the CCC is not legally responsible for protecting whistleblowers. Instead, the Queensland Ombudsman has oversight of the *Public Sector Disclosure Act 2001*, but only to monitor compliance with the Act and is not responsible for taking any action against any non-compliance.

2.4 While Queensland public sector agencies are required to protect whistleblowers, WAG submits that the conflict of interest created within an agency to protect the person who is making a complaint against it significantly reduces the chances that the person will be protected. Instead, WAG submits, the degree of impunity that comes with the close cooperation of the CCC, significantly increases the likelihood that the agency in question will instigate illegal acts of reprisal against the whistleblower.

2.5 One consequence is that whistleblowers who risk their health and careers in the public interest are not protected and can suffer the adverse consequences of significant acts of reprisal. A second consequence is that ethical public officials currently working within

government who observe acts which are potentially criminal or corrupt can have no confidence that they will be protected if they report those acts, and so, may choose not to report and the wrong-going continues. A third consequence is that the Queensland public can have no confidence that the Queensland government is both open and accountable with the current legislative and administrative arrangements.

2.8 WAG submits that the Queensland government can make no claim of open and transparent government while illegal campaigns of reprisals are mounted against those who make public interest disclosures and while current public sector officials are reluctant to report acts of serious crime or corruption that they witness in their workplace because of fears of reprisals.

3. WAG RECOMMENDS that the Queensland Government adopts a policy of ‘Sword and Shield’ to create effective, but separate investigative and protective agencies.

3.1 To ensure the independence of anti-corruption agencies and the efficacy of whistle-blower protection agencies within Australian jurisdictions, Whistleblowers’ Australia and WAG recommend that all jurisdictions adopt an institutional framework of the ‘Sword and the Shield’ Policy; i.e. separating the functions and responsibilities for investigating wrong-doing reported by whistleblowers, (the Sword) from the functions and responsibilities for protecting whistleblowers from acts of reprisals (the Shield).

3.2 WAG submits that because agencies in Queensland are required to investigate themselves, the Queensland government has neither an effective Sword function to act against allegations of serious crime or corruption in the public sector, nor an effective Shield function to encourage and protect those who witness and wish to report acts crime or corruption within the public sectors.

3.3 WAG submits that the Queensland public can have no confidence that its government is both open and accountable with the current legislative and administrative arrangements.

4. WAG SUPPORTS the findings of the Callinan/Aroney Inquiry in 2013 which found that the CMC could not self-regulate and recommended that the Parliamentary Commissioner be given the statutory power and resources to investigate all complaints of official misconduct within the CCC and to have the power to make investigations on his or her own initiative, conducted independently of, but reporting to, the PCCC and that the powers of the Committee to make its own inquiries and investigations should remain.

4.1 WAG submits that any agency with the Queensland government, including the CCC must be subject to thorough scrutiny by the Queensland Parliament.

4.2 The CMC's ineptitude in releasing extremely confidential files from the Fitzgerald Inquiry in 2013 demonstrated to the Callinan/Aroney review of the *Crime and Misconduct Act 2001* that the CMC could not self-regulate.

4.3 The *Crime and Misconduct Act 2001* provided the PCMC with significant powers to investigate the CMC but it did not require the PCMC to actually use them. The Callinan/Aroney review team were critical of the PCMC's practice of conducting most meetings to review the CMC in private. They said "...A body such as the CMC which has the role of ensuring transparency by others should itself be purer than Caesar's wife " and recommended that the Committee's meetings be public, subject only to principles of confidentiality when appropriate.

4.5 While the Queensland Ombudsman is responsible to monitoring compliance with the *Public Interest Disclosure Act 2010*, it has no authority or responsibility to act on non-compliance. When Dr Swepson complained to the Ombudsman that the CMC had failed to investigate her claim of mis-reporting and her claim of acts of reprisal against her, the Assistant Ombudsman told her "...we are unable to consider the same issues that were considered by the CMC in their investigation. The intent of the legislation is to ensure that complaints that are investigated by one body should not be reinvestigated by another, given both complaint entities are publically funded."

4.6 WAG suggests that public confidence in the effectiveness and independence of the CCC is severely compromised if the PCCC chooses not to use its significant powers to scrutinise the CCC and the Ombudsman does not have the legislative authority or resources to do so.

5. WAG SUBMITS that, given the critical role of the PCCC in Queensland's unicameral system of government, ALL decisions made by the Committee must be bipartisan, as is required by the *Crime and Corruption Act 2001*.

5.1 WAG submits that the recent situation where the PCCC was unable to give bipartisan approval of the Queensland government's nominee for the new Chair of the CCC was an unedifying spectacle; sure to lower public confidence in the PCCC, the CCC and the Queensland government.

5.2 WAG submits that the creation of the Criminal Justice Commission (CJC) and its parliamentary oversight committee the PCJC in 1989/90 was supported by both sides of politics as part of the Fitzgerald Reform process and they form a vital part of Queensland's unicameral system of government. Both sides of politics agreed that bipartisan decision making by the PCJC was essential. While voting on party lines is normal and acceptable in most political settings, it cannot be acceptable with the PCCC which is unique in that it deals with potentially serious criminal acts or acts of corruption by politicians from either side of politics or by senior bureaucrats.

5.3 To ensure that all decisions of the PCCC are bipartisan and not determined by a majority of government members, in October 1997, the Borbidge Government introduced the binding principle of *obligatory bipartisanship*; meaning that committee members have a duty to put party political interests aside in order to consider the public interest in their decision-making. Both sides of politics have agreed and the principle of *obligatory bipartisanship* is now included in section 295 of the *Crime and Corruption Act 2001*.

5.4 WAG submits that *obligatory bipartisanship* must apply to **all** decisions made by the PCCC. If the Committee decides to act on a matter, the *Crime and Corruption Act 2001* lists a number of ways that the Committee may refer a matter for further investigation, including the catch-all method of 'other action the committee considers appropriate.' Further, the Act prescribes that whatever action the Committee decides on '*is effective only if it is made with the bipartisan support of the parliamentary committee.*'

5.7 WAG submits that that Act requires that *obligatory bipartisanship* must apply to **all** decisions made by the PCCC, not just some. WAG submit that *obligatory bipartisanship* means that PCCC members must put aside party-political interests to vote in the public interest: ie a Government must not use its majority to ‘not refer’ a serious or embarrassing matter it might be responsible for and an Opposition must not use its numbers to block a bipartisan decision to refer a serious or embarrassing matters it might be responsible for.

5.8 WAG submits that when the members of the PCCC are genuinely conflicted about referring or not referring a matter and cannot, in all good faith, come to a bipartisan decision, the Committee should report its gridlock on that matter to the Parliament.

This submission has been prepared by Dr Pam Swepson, Secretary WAG Qld Inc, on behalf of WAG Qld Inc.