



CRIMINAL JUSTICE COMMISSION

**SUBMISSION IN RESPONSE TO THE
CRIME COMMISSION BILL 1997**

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CONTENTS

EXECUTIVE SUMMARY	iii
SECTION 1	
INTRODUCTION	1
SECTION 2	
IMPACT OF THE BILL ON CJC INVESTIGATION OF POLICE MISCONDUCT	4
SECTION 3	
PASSING OF COMPLAINTS TO THE CJC	7
SECTION 4	
PROPOSED INTELLIGENCE ARRANGEMENTS	9
SECTION 5	
PUBLIC INTEREST MONITOR	12
SECTION 6	
CONSTITUTION OF THE MANAGEMENT COMMITTEE OF THE QCC	14
SECTION 7	
DEFINITIONS OF CRIMINAL PAEDOPHILIA	16
SECTION 8	
DEFINITION OF ORGANISED CRIME	17
SECTION 9	
POWERS OF THE QCC	18
SECTION 10	
OTHER MATTERS	20
The appointment of QCC and management committee members	20
Guidelines to police task forces	20
Jurisdiction of Misconduct Tribunals	20
Hearings	20
Non-publication orders	21
Inclusion of the CJC as a law enforcement agency	21
Transitional provisions	22



EXECUTIVE SUMMARY

This submission from the Criminal Justice Commission (CJC) on the Government's proposed Crime Commission Bill 1997 raises the following main concerns about the Bill as currently drafted:

- The CJC's functions to supervise the Queensland Police Service (QPS) will be reduced by the removal of part of the CJC's responsibility for investigating and collecting intelligence concerning police misconduct which is not official misconduct. Similarly, the Queensland Crime Commission (QCC) will not be required to refer suspected police misconduct to the CJC, despite the fact that such misconduct may involve criminal behaviour, or otherwise merit dismissal, demotion or other serious punishment.
- The QCC or its management committee will be able to decide which matters raising suspicions of corruption or other official misconduct should be referred to the CJC for investigation, instead of being required to refer all such matters to the CJC.
- The CJC's capacity to supervise the QPS effectively will also be reduced by removal of its to monitor police intelligence gathering. This means that police intelligence activities will be largely unsupervised, increasing the prospects of inappropriate files being maintained. The Bill will also inevitably lead to duplication of some intelligence functions, and a reduction in the collection of strategic intelligence on organised crime.
- The proposal to have the CJC's applications to use surveillance powers overseen by a Public Interest Monitor will duplicate the existing role of the PCJC and Parliamentary Commissioner. A particular concern is that the Government-appointed Monitor will have unsupervised access to highly sensitive information which could concern Government corruption.
- The QCC will be able to use its intrusive surveillance powers to investigate any allegations of child sexual abuse, including that occurring within families. The use of listening devices and compulsory hearings in such cases raises civil liberties concerns, and ignores previous recommendations, including that of the Queensland Children's Commission, for a multi-agency approach that gives priority to the needs of child victims.
- The inclusion of politicians on the QCC's management committee risks political interests influencing operational decisions about investigations. The proposal raises the prospect of PCJC members being included in any CJC investigation of official misconduct related to the leaking of confidential QCC information. It will also decrease the capacity of the PCJC to monitor the CJC, because of the onerous new obligations given to the PCJC's Chairperson and deputy Chairperson.

The CJC's continuing concerns about the concept of a separate crime commission, the resultant fragmentation and duplication of the CJC's functions, and the potential impact on the CJC's corruption-fighting role of budget cuts to meet the cost of the new organisation, are discussed in the CJC's previous submission on the Government's discussion paper, and summarised in the introduction to this submission.



SECTION 1 INTRODUCTION

This submission by the CJC is in response to the Crime Commission Bill 1997 introduced in State Parliament on 30 October 1997. It supplements, and should be read in conjunction with, the CJC's previous submission on the Government's *Discussion Paper on the Proposal to Establish the Queensland Crime Commission*.

This second submission briefly summarises the CJC's main continuing concerns about the establishment of the QCC, as set out in more detail in the earlier submission. As well, the submission comments on the detailed provisions of the Bill, which were not available at the time of the earlier submission.

The CJC has serious concerns about the potential effect of a number of the provisions in the Bill, as discussed in detail later in this submission. In summary, the main concerns are:

- The drafters of the Bill appear to have fundamentally misunderstood the role and function of the CJC to investigate police misconduct, in addition to its more general role in relation to official misconduct. Numerous clauses in the Bill refer only to the official misconduct jurisdiction and ignore, amend or limit parts of the CJC's jurisdiction over police misconduct. Such misconduct can be sufficiently serious to constitute a criminal offence and/or merit dismissal or other substantial punishments such as demotion. The limits which the Bill places on the CJC's role in this regard are therefore of serious concern.
- The Bill would reduce existing requirements for evidence of official misconduct to be passed to the CJC for investigation. This arises first because in certain circumstances the QCC would be entitled to withhold such evidence from the CJC, subject only to a limited review by the Parliamentary Criminal Justice Commissioner. Second, the Bill only requires the QCC to pass on information or complaints that provide evidence of official misconduct, rather than all suspicions of official misconduct. This provision appears to conflict with the *Criminal Justice Act 1989*, and would require the QCC to decide which matters should be investigated by the CJC. This restriction on the CJC's ability to investigate all corruption and official misconduct appears contrary to the Government's stated intention to preserve and enhance the CJC's anti-corruption role.
- The provisions in the Bill relating to intelligence functions would unavoidably lead to fragmentation, duplication, and a reduction in accountability for police intelligence activities. In particular, the current situation whereby the CJC is involved in ongoing, day-to-day monitoring of police intelligence gathering will be replaced by a once-a-year audit of such activities by the Parliamentary Commissioner. Any reduction in accountability for the intelligence function is of particular relevance given recent public concern over police intelligence activities in Victoria. Furthermore, the removal of part of the CJC's role to oversee police seems contrary to the rest of the Bill and to the Government's stated commitment to preserving the CJC's police monitoring role.
- The Bill would result in an inappropriate extension of the role of the Public Interest Monitor to include functions in relation to the CJC. The Monitor was proposed as a means of providing some accountability for increased police surveillance powers. It may be appropriate for the Monitor to have a similar role in the QCC, given that the QCC will also have substantial surveillance powers, and will not be subject to an independent accountability mechanism. However, the CJC is already accountable for its use of powers through the Parliamentary Criminal Justice Committee (PCJC) and the Parliamentary Commissioner. The imposition of the

Monitor on these existing arrangements is unnecessary. Additionally, the Monitor — who is to be appointed by the Government rather than through a bipartisan process — would have access to very sensitive information, including information about possible Government corruption. This potential conflict of interest is a serious concern.

- The Bill's definition of criminal paedophilia is so broad that the QCC's standing reference on the matter will allow its coercive powers to be used in investigations far removed from the scenarios of paedophilia networks used to support the need for the QCC. For example, the Bill would enable the QCC to place listening devices in bedrooms in private homes throughout Queensland to investigate complaints of child sexual abuse by a parent or family member, thousands of which are made every year. In some circumstances, such measures could be taken without prior judicial approval. In addition to the civil liberties concerns raised by this prospect, there is much existing evidence to suggest that investigations of intra-familial abuse in particular are better undertaken through multi-agency mechanisms such as the existing SCAN teams, rather than through a police-dominated approach.
- The CJC remains concerned at the proposed constitution of the QCC's management committee, and particularly at the presence on it of the Chairperson and deputy Chairperson of the PCJC. The involvement of politicians in operational matters including decisions about starting and ending investigations raises serious concerns. Such involvement could lead to pressure on the QCC to end investigations which may be politically embarrassing, or to pursue those which might not otherwise merit resources, but which appear politically popular. As the Bill stands, politicians on the management committee will also be involved in determining which corruption allegations should be referred to the CJC for investigation. To preserve long-term public confidence in the administration of justice, such decisions need to be made independently of political interests. In addition, the politicians concerned could be placed in an invidious position should there be allegations of leaked information from the committee. For example, parliamentary privilege is not likely to extend to prevent parliamentarians who are performing Executive functions from being investigated for official misconduct by the CJC in such circumstances. It is also at least arguable that members of Parliament on the management committee could be regarded as occupying offices of profit under the Crown, thus making their continued presence in Parliament subject to constitutional challenge. Furthermore, the members of the PCJC already have demanding responsibilities arising from their supervision of the CJC. The extent of that workload was used as one of the justifications for the creation of the position of Parliamentary Commissioner. It seems unrealistic to expect that the PCJC will be able to continue its current level of monitoring of the CJC, far less to improve its performance in that regard, if its two most senior members are given extensive new responsibilities on the management committee of the QCC.

In relation to the more general issue of the need for a separate crime commission and the model which has been proposed, the CJC briefly reiterates the following concerns, which are set out in more detail in its previous submission:

- The QCC will be costly to set up and maintain; it will dismantle the CJC's careful blend of functions and powers; and it will cause duplication and fragmentation. The Government still has not provided an estimate of the cost of the QCC, as confirmed in the explanatory memoranda accompanying the Bill (p. 1). There remain real concerns that the costs of the QCC will be met by extensive budget cuts to the CJC, which will reduce its effectiveness in performing its corruption-fighting functions. Suggestions that the QCC could be 'cost neutral' based on the NSW model are misleading. NSW has a different legislative scheme, and a much larger drug and organised crime market. Even then, the NSW Commission only began recovering substantial amounts some six years after its scheme started operation.

- Despite repeated assertions to the contrary, no evidence has been advanced to show that the CJC and the QPS have failed to respond appropriately to either organised crime or paedophilia. Similarly, there is no evidence to show why the QCC would be any more effective in investigating such matters. The QCC proposal gives investigators no greater powers than those already available or to be made available under new police powers laws and through the CJC. However, the use of powers by the QCC and police will be subject to less scrutiny and control.
- The CJC has performed, and is continuing to perform, its role in relation to paedophilia, in terms of investigating possible corruption and in overseeing QPS investigations. However, many reports have found that a much broader societal response to child sexual abuse is required, rather than simply a heightened focus on investigations. The QCC's likely dominance by police will not provide such a response, and may well lead to paedophilia investigations taking second place to organised crime investigations. The extra funding to be devoted to the QCC would be better spent on improving existing agencies and, in particular, the multi-agency SCAN teams.
- The suggestion that separate agencies are needed to fight corruption and organised crime ignores the proven links between organised crime and corruption. The establishment of a separate QCC will seriously disrupt the CJC's current multi-disciplinary approach which blends research, intelligence, corruption prevention and investigatory functions.
- If the QCC adopts the NSW Crime Commission (NSWCC) as a model, it will rely heavily on police task forces which remain under the control of the Police Commissioner rather than the QCC. If this is the case, the QCC may lack real control over its investigations and will risk becoming a tool to give police access to greater powers with less scrutiny than is currently the case.
- Similarly, the adoption of a NSWCC-style management committee for the QCC, even with the proposed adaptations, is no substitute for independent accountability mechanisms such as those applying to the CJC, including the PCJC and Parliamentary Commissioner. The management committee is not required to report on either its own functions or the performance of the QCC. By contrast, the CJC is subject to ongoing review by the PCJC and, in the future, the Parliamentary Commissioner, and must provide regular reports on its activities.

SECTION 2

IMPACT OF THE BILL ON CJC INVESTIGATION OF POLICE MISCONDUCT

There are repeated references in the Bill to the CJC's jurisdiction to investigate official misconduct. For example:

- Clause 4(3) contains a general statement recognising 'that the investigation of official misconduct should be undertaken independently of general law enforcement, and that the need for cooperation between law enforcement agencies may be subordinate to the need for independent investigation of official misconduct'.
- Clauses 28(1)(c), 33(1), and 51 deal with the referral of evidence of official misconduct to the CJC; and clauses 61 and 62 deal with the role of the Parliamentary Commissioner to determine whether the CJC should have access to certain QCC information relating to official misconduct.
- Clause 132 makes reference to transitional provisions for CJC investigations other than those relating to official misconduct.

In addition, the Bill would amend the *Criminal Justice Act 1989* as follows:

- Clauses 134, 136, 137 and 139 would limit the objects of the Act, and the functions of the CJC and its Official Misconduct and Intelligence Divisions, to matters related to official misconduct.

The intention of these provisions clearly is to assist in the transfer from the CJC to the QCC those functions related to organised and major crime, and to transfer certain intelligence functions from the CJC to the Parliamentary Commissioner. However, the provisions have the additional effect of restricting the CJC's existing jurisdiction to investigate police misconduct that is not official misconduct. In particular:

- The amendments to section 29(3)(b) of the *Criminal Justice Act* would limit the function of the Official Misconduct Division to investigate matters continuing from the Fitzgerald Inquiry, so that it could investigate only official misconduct, and not other police misconduct. There remain some matters where such investigations could still be relevant. For example, recent claims of past police involvement in paedophilia, some investigation of which was begun during the Fitzgerald Inquiry, could theoretically involve misconduct rather than official misconduct because the alleged behaviour may not have involved official duties. If new evidence arises to support such allegations, perhaps as a result of the CJC's current Operation Triton, under the Bill the CJC would lose its jurisdiction to reopen or continue investigations to determine whether criminal or disciplinary charges should be instituted.
- The amendments to section 58(2)(a) and (b) of the *Criminal Justice Act* would limit the function of the Intelligence Division so that it could not collect intelligence on police misconduct that is not official misconduct, or retain intelligence records relating to such conduct from the Fitzgerald Inquiry. Again, the maintenance of records from the Fitzgerald Inquiry relating to potential police misconduct may have continuing relevance, and there is also a need to continue the collection of data on non-work-related, but nevertheless serious, police misconduct.
- Clauses 28(1)(c), 33(1), 51, 61 and 62 would have the combined effect of enabling the QCC not to pass on to the CJC any evidence of police misconduct that is not official misconduct. Instead,

clause 51(2) enables the management committee to deal with some such complaints by internal inquiry, or by reference to another entity.

The Bill's restriction of the CJC's responsibility to investigate all complaints and other evidence of police misconduct is of very serious concern, especially as it has been raised without any consultation or specific discussion. This is particularly so in relation to the QCC's proposed discretion not to refer such evidence to the CJC. There appears to be no justification for police officers working on QCC references to be subject to any lesser disciplinary processes than other members of the QPS.

This aspect of the Bill appears contrary to the scheme of both section 37(3) of the *Criminal Justice Act 1989*, which requires the Police Commissioner to refer all complaints of suspected police misconduct to the CJC, and section 7.2 of the *Police Service Administration Act 1990*, which requires all police officers to report suspected police misconduct to the Police Commissioner or the CJC. It seems that those provisions would still operate to require police officers working with the QCC to refer potential police misconduct to the CJC, even if the QCC is not similarly obligated. Thus, police who suspect misconduct could be placed in the difficult position of having to determine their responsibilities under conflicting statutory requirements.

Consideration of this issue may be assisted by some explanation of the difference between official misconduct and other police misconduct. The CJC's separate jurisdiction in these areas is established in section 29 of the *Criminal Justice Act*, which gave statutory recognition to recommendations 10(g) and (h) of the Fitzgerald Inquiry (Fitzgerald Report, p. 374). Section 29(3)(d)(I) provides for the investigation by the CJC of misconduct by members of the Police Service, while subparagraph (ii) provides for the investigation of official misconduct by persons holding appointments in units of public administration.

Official misconduct is defined in section 32(1) of the Act to be conduct that:

- adversely affects the honest and impartial discharge of public duties; or which involves discharging public functions in a way which is not honest or impartial; or which involves a breach of trust placed in a public official; or the misuse of information acquired in public office; *and*
- could constitute either a criminal offence or a disciplinary breach of sufficient seriousness to justify dismissal.

Hence, official misconduct must be related to public duties, functions or information, and involve potential criminal or serious disciplinary offences. This was expressed in a decision of the Supreme Court (*Re Mullen 1994*):

There must be misconduct by the officer in the course of or pertaining to the exercise of the powers, function, duties or responsibilities attaching to his or her office. (p. 11)

Misconduct is defined in section 1.4 of the *Police Service Administration Act 1990* as conduct that:

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

Simply stated, all official misconduct must also be misconduct, but not all misconduct is also official misconduct. Penalties for misconduct are provided in section 7.4(3) of the *Police Service Administration Act* to include dismissal, demotion in rank, reprimand, reduction in salary, forfeiture or deferment of salary increment or increase, or fines.

Section 7.2 of the *Police Service Administration Act* requires all matters raising a suspicion of misconduct to be reported to the CJC. Approximately 20 per cent of matters involving possible misconduct are currently referred back to the QPS for investigation, with the CJC retaining a role to monitor the processes and outcomes of such investigations.

Misconduct matters, therefore, are capable of being very serious. They may involve allegations of serious criminal conduct that is not work-related and, therefore, not official misconduct. For example, CJC data suggest that about 20 per cent of all assault complaints against police relate to off-duty conduct, some of which conduct may nevertheless show the officer's unsuitability to policing. There are examples of such conduct where investigating police 'demonstrated a reluctance to investigate their off-duty colleagues with the same vigour a civilian could anticipate in similar circumstances' which supports the retention of the CJC's responsibility for such matters (Queensland Police Service Review 1996, p. 219). Even where evidence in such cases is not sufficient to maintain a criminal prosecution, it may be sufficient to suggest the need for serious disciplinary measures.

It is therefore important that the CJC maintain its ability to exercise oversight over misconduct investigations. It is also important that equity and consistency of disciplinary processes be maintained among all police. It should be noted that police seconded to the CJC are liable to exactly the same disciplinary processes as other QPS officers, and this should also be the case with those police working on QCC references.

The CJC therefore submits that the Crime Commission Bill, if it is to proceed, should be amended to ensure the CJC's continuing responsibility to investigate all matters of police misconduct as well as official misconduct. In particular, the QCC should be obliged to refer to the CJC all suspected police misconduct as well as official misconduct.

SECTION 3

PASSING OF COMPLAINTS TO THE CJC

The Bill contains several provisions dealing with the passing of complaints or information relating to official misconduct from the QCC to the CJC. Those provisions are as follows:

- Clause 33 requires the QCC to advise the CJC as soon as practicable if it has evidence of official misconduct. However, the QCC need not so advise the CJC if such advice 'is likely to prejudice an investigation the QCC is conducting'. In those circumstances, the QCC must advise the Parliamentary Commissioner, who must monitor the delay in giving the advice to the CJC and decide when it must be given to the CJC.
- Clause 51 requires the management committee to refer to the CJC any complaint it receives which provides evidence of official misconduct against the QCC or a QCC officer.
- Clauses 62 and 63 require the Parliamentary Commissioner, at the CJC's request, to review any QCC decision to deny information relating to official misconduct to the CJC. Clause 66 enables the Parliamentary Commissioner to order the QCC to give the CJC access to such information, if satisfied that the information is relevant and will help the CJC's investigation, and that the benefit in giving access to the information outweighs any detriment and is not otherwise against the public interest.

The CJC has serious concerns about several aspects of these provisions, in addition to the exclusion of police misconduct that is not official misconduct (see section 2).

The first such concern is that the obligations imposed on the QCC and the management committee in clauses 33 and 51 respectively apply only where the QCC has evidence of official misconduct, and where the management committee receives a complaint that provides evidence of official misconduct. Thus, no duty arises to refer all suspected official misconduct. This contrasts with the obligation on other public officials under section 37(2) and (3) of the *Criminal Justice Act* to refer to the Complaints Section of the CJC 'all matters that the person suspects involve, or may involve' official misconduct and, in the case of police, misconduct.

Therefore, the duty imposed on the QCC and the management committee appears to be considerably less than that applying to the rest of the public sector. In addition, the provision would appear to involve the QCC or the management committee in some preliminary investigation to determine whether there is sufficient evidence of official misconduct to warrant referral to the CJC.

The involvement of the QCC or the management committee in investigating any matters of official misconduct contravenes the whole intent of the *Criminal Justice Act*, and the Government's own stated commitment to preserving the anti-corruption and official misconduct role of the CJC. Indeed, the Minister for Police in his second reading speech on the Crime Commission Bill, said that one of the effects of the Bill would be to:

... free the CJC to concentrate more fully on its very important charter of corruption detection and prevention — a function that has this Government's wholehearted and unreserved support. (p. 2)

The Minister went on to describe the requirement of the QCC to pass complaints to the CJC, saying:

It is important to emphasise that the CJC will have jurisdiction over the QCC with regards to official misconduct, and the management committee will be obliged to refer matters of suspected official misconduct by QCC officers to the CJC. (p. 4)

The provisions of the Bill do not accord with the Minister's statement, because they would allow the police-dominated QCC and management committee to determine which complaints are referred to the CJC, thus diminishing, rather than preserving, the CJC's anti-corruption role.

The CJC's second concern with these provisions is the proposal to allow the QCC to withhold from the CJC information concerning official misconduct, under clause 33(2). This provision appears to be based on a fear that if possessed of the information, the CJC may in some way blunder in and damage QCC investigations. It would be much more appropriate for any such concerns to be met by inter-agency cooperation and negotiation, rather than a blanket statutory provision such as that in clause 33.

The withholding of such information from the CJC may effectively destroy the opportunity for proactive CJC investigations to be engaged in simultaneously with QCC investigations. There are many circumstances where joint or simultaneous operations could take place. There are also circumstances where delays caused by the withholding of relevant information could effectively destroy altogether the prospects of success for any official misconduct investigation. This means that the corruption which enabled the relevant criminal activity to occur or remain undetected may not be investigated, and may therefore be allowed to be repeated.

As the Bill currently stands, clause 62 provides that the CJC may request the Parliamentary Commissioner to review QCC decisions not to pass information to the CJC. However, in the absence of any requirement under clause 33 for the QCC to notify the CJC of decisions to withhold information, the review procedure is inherently very limited. It is feasible that many such decisions would never come to the attention of the CJC, which would mean that reviews could not be sought.

The CJC's third concern is that the Parliamentary Commissioner will be placed in a very difficult position in determining review applications and in deciding under clause 33(4) when the QCC must provide the CJC with information concerning official misconduct. In the absence of the information having been given to the CJC, the Parliamentary Commissioner will be dependent on material provided by the QCC in determining the relative importance of QCC organised crime or paedophilia investigations on the one hand, and CJC misconduct investigations on the other hand. The Bill gives little assistance to the Parliamentary Commissioner, merely requiring that the Commissioner consider the relative benefits and detriments in giving the CJC access to the information.

How is the Commissioner to determine whether the public interest in pursuing a QCC investigation is more important than that involved in a corruption investigation? Such matters should be negotiated, with both agencies given the opportunity to present all relevant arguments, rather than the CJC being kept, or arguing, 'in the dark', as the Bill requires.

The CJC submits that, at a minimum, the Bill should be amended to oblige the QCC to advise the CJC of all suspected official misconduct or police misconduct, but also to allow either agency to request the Parliamentary Commissioner to order the other to refrain from acting on certain investigations in certain circumstances. In this way, both the CJC and the QCC could argue to preserve the integrity of various investigations, with the Parliamentary Commissioner making determinations in the light of full information from both sides.

SECTION 4

PROPOSED INTELLIGENCE ARRANGEMENTS

The Bill contains numerous provisions aimed at restructuring current responsibilities for intelligence gathering and oversight in Queensland. The provisions include:

- Clause 28(1)(e) and (f) give the QCC responsibility to maintain intelligence about relevant criminal activity and major crime, to monitor that data, and to liaise with other agencies.
- Clauses 60(a) and 61 give the Parliamentary Commissioner a function to conduct an annual review of intelligence data in the possession of the QCC, Police Service and the CJC to consider:
 - whether such data are appropriately held
 - whether there is any unnecessary duplication, and
 - the levels of cooperation between the agencies in relation to the data.

The Parliamentary Commissioner must advise in writing on his or her review, and may also, under clause 65, order an agency to remove unnecessary restrictions on the use of its data by other agencies.

- Clauses 134, 136, and 139 would amend the *Criminal Justice Act* to remove from the CJC and its Intelligence Division all functions and responsibilities in relation to intelligence concerning organised and major crime and police misconduct that is not official misconduct, and the function to monitor the intelligence activities of the QPS.

The CJC has a number of concerns about these provisions. First, the policy that the QCC should maintain intelligence data on organised and major crime and paedophilia, while the CJC is restricted to intelligence on official misconduct, assumes a neat division between the respective areas of responsibility. Such a division does not exist.

Much information on public sector and police corruption derives from intelligence collected about criminal activities. It is the public official's contact with such criminals and their activities which very frequently raises the first concerns of the possible corruption or misconduct of that official. Thus, information about an organised crime figure that reveals repeated contacts with a particular police officer, prompts further investigation of that officer. In such circumstances, no complaint of misconduct has been made, there is no immediately apparent evidence of such misconduct, but the pattern of events suggests the need for further investigation. Such linkages will not be made if separate databases are kept. While the QCC will be obliged to pass on complaints or evidence of official misconduct, there will be no capacity for the passing on of intelligence which simply suggests the need for the gathering of further intelligence. It is this sort of intelligence activity which feeds pro-active, rather than complaint-driven, corruption investigations. For example, much of the recent Operation Shield, which investigated police misconduct, arose from such a pro-active approach. This aspect of the CJC's work will undoubtedly suffer if the Bill is implemented as currently drafted.

It is inevitable that if the current proposals proceed, over time there will be considerable duplication of intelligence activities. Organised crime frequently depends on the corruption, or other official misconduct, of public officials. Many of the complaints of paedophilia made in recent times involve elements of official misconduct, because public officials are alleged to have been involved in the behaviour either directly or by way of cover-up. Intelligence on these activities will therefore, unavoidably, need to be maintained by both the QCC and the CJC. Given the substantial up-front and continuing costs involved in the maintenance of intelligence databases, there are major funding implications arising from such duplication.

The CJC's second concern about the intelligence provisions in the Bill also relates to organised crime, and particularly the proposed removal of the CJC's capacity to maintain strategic intelligence on organised crime. As drafted, the Bill would shift from the CJC to the QCC responsibility not only for tactical intelligence on such matters, but also strategic intelligence. This appears to have been done without any understanding of the differing natures and requirements of these two types of intelligence data.

The tactical or day-to-day intelligence function engaged in by agencies such as the QPS is directed to meeting the needs of operational police work, in a necessarily reactive way. By contrast, the CJC has concentrated specifically on pro-active strategic analysis of organised crime. To be effective, a strategic intelligence function must be:

- staffed by specialist analysts
- independent from Executive control to ensure the absence of political or bureaucratic influence
- objective and independent from organisations that may benefit from its assessments in terms of resources
- free from operational demands to ensure resources are not diverted in times of operational need
- able to meet the needs of a number of clients.

Agencies such as the QPS and QCC with predominantly operational functions run the strong risk of having strategic functions overtaken by pressing operational demands. By contrast, locating such a function in the CJC protects against the diversion of resources, and ensures objective research and analysis by specialist civilian analysts who can meet the needs of a number of clients without prejudice.

The CJC considers that the strategic intelligence function is a discrete and vital function that should remain with the CJC. Such a view has been supported in the past by the PCJC, which in 1995 noted the difficulty experienced by the QPS Bureau of Criminal Intelligence in gaining and retaining intelligence expertise, and commended the pro-active, longer-term intelligence efforts of the CJC (Report No. 26, pp.146-147).

The retention of the strategic intelligence function within the CJC would also enable the skills and expertise of the Research Division to be drawn upon to provide comprehensive overviews of the nature and extent of organised crime in Queensland. The QCC, which is to be dominated by police and lawyers, will lack this capacity.

The CJC submits that the Bill should be amended to retain sections 23(d) and (j), 56(3)(g) and 58(2) of the *Criminal Justice Act*, at least to the extent necessary to enable the Research and Intelligence Divisions of the CJC to maintain a strategic intelligence collection and research role in relation to organised crime.

The CJC's third concern about the Bill's provisions relating to intelligence is that the proposed changes will lead to a decrease in monitoring of QPS intelligence activities. Currently, in addition to its own intelligence-collection functions, the CJC oversees QPS intelligence activities on an ongoing, day-to-day basis. This responsibility arises through:

- section 2(a)(iii) of the *Criminal Justice Act* requiring the CJC to investigate (as opposed to combat) the incidence of organised or major crime

- section 23(d) requiring the CJC to oversee and manage criminal intelligence matters
- section 58(1) requiring the Intelligence Division to function as the hub of a specialist criminal intelligence unit
- section 58(2)(d) requiring the Intelligence Division to assume or oversee the performance of QPS intelligence functions.

The Bill specifically deletes the relevant part of each of these provisions, thus removing the CJC's specific function to oversee police intelligence activities.

Currently, CJC supervision of QPS intelligence activities includes the CJC Intelligence Division having regular contact with the QPS Bureau of Criminal Intelligence, the Commissioner's Inspectorate, and the QPS security and technology areas. Regular meetings are held with officers in these areas and the CJC participates in committees and projects to facilitate ongoing development and oversight of the QPS intelligence function. The CJC participates actively in the QPS Intelligence Management Board, the QPS Information Security Project Board, the Security Intelligence Branch Target Control Committee, and from time to time other relevant projects and working groups, such as the soon to be completed Project Horizon on the issue of child sexual abuse.

These regular, varied contacts enable the CJC to maintain ongoing oversight of QPS intelligence activities. That oversight serves to assist in raising the standards of QPS intelligence gathering, which was much criticised in the Fitzgerald Report. But the CJC's oversight is also important to ensure that appropriate guidelines are used and observed in the collection of data, so as to prevent the development of inappropriate and irrelevant intelligence files, such as those recently reported as having been maintained by Victorian police.

The only mechanism created by the Bill to replace this CJC oversight role is the annual review of intelligence matters to be undertaken by the Parliamentary Commissioner under clauses 60 and 61. The CJC does not object to the Parliamentary Commissioner conducting audits of the intelligence activities of the CJC, QCC or police, particularly as the PCJC and the Parliamentary Commissioner are already entitled to monitor such activities of the CJC under the *Criminal Justice Act*. However, it cannot sensibly be suggested that a once-per-year audit is an adequate alternative to the current CJC day to day supervision of QPS intelligence activities.

As well, the issue of whether the Parliamentary Commissioner will be qualified to perform this role arises. Given that under the *Criminal Justice Act*, the Parliamentary Commissioner is required to be a person qualified for appointment as a judge, the Commissioner seems highly unlikely to have sufficient expertise in intelligence matters to perform the audit and coordination functions given to the office under the Bill.

The removal of regular CJC oversight of QPS intelligence functions has been unsupported by any argument or justification. It amounts to a decrease in accountability for an important and sensitive aspect of police activity, for no apparent reason, and apparently in contradiction of the Government's stated intention to focus the CJC on its police oversight role. Continuing oversight by the CJC has previously been supported by senior officers within the QPS.

The CJC submits that notwithstanding the intelligence oversight role given to the Parliamentary Commissioner, the CJC's QPS intelligence overview role should be maintained through amending clauses 136(1) and 139 of the Bill to retain the oversight role set out in sections 23(d) and 58(2)(d) of the *Criminal Justice Act*.

SECTION 5 PUBLIC INTEREST MONITOR

The Bill, in clause 141, proposes amendments to the *Criminal Justice Act* which would give to the Public Interest Monitor responsibility to:

- monitor compliance by the CJC with the Act in relation to applications for approval for the use of listening devices;
- appear at hearings of applications for such approval to test the validity of the application, present questions for the applicant to answer, and make submissions on the appropriateness of granting the application;
- gather statistical information about the use and effectiveness of approvals for the use of listening devices; and
- report to the PCJC on non-compliance by the CJC with the Act.

It is important to note that the proposal for a Public Interest Monitor was developed to balance extra surveillance powers to be given to police under the new Police Powers and Responsibilities Bill 1997. The aim of the proposal apparently was to ensure that greater powers were balanced by increased, external accountability mechanisms.

The CJC has some concerns about the practicalities of the Monitor concept (see the CJC's submission on the Police Powers and Responsibilities Bill), but acknowledges that if the concept is to be adopted, logically it should also apply to the QCC. The QCC, in common with the QPS, is subject to only very limited external accountability.

The situation of the CJC, however, is very different. The CJC is already accountable for its use of powers to the PCJC, which has always possessed, and occasionally used, its capacity to closely examine the CJC's use of powers. Under the recent amendments to the *Criminal Justice Act*, the PCJC's capacity to undertake such scrutiny has been further enhanced by the appointment of the Parliamentary Commissioner. The imposition of the monitor on these existing accountability arrangements will lead to an unnecessary duplication, with the potential for confusion of responsibilities and functions.

In addition, the CJC is concerned at the appointment process provided by the legislation for the proposed monitor and deputy monitors. In contrast to the bipartisan appointment process for the CJC Commissioners, Parliamentary Commissioner, and even the members of the QCC and its management committee, the appointments are to be made purely by the Government.

A Government appointment to such a position not only detracts from the authority and non-partisan nature of the office, but in the case of the CJC, creates particular concerns. The Bill will limit the CJC's investigations to those of official misconduct. It is feasible that highly confidential and sensitive applications for listening devices relating to possible Government corruption could have to be made in the presence of a person appointed by that Government, and maintaining close links with it. The potential for conflicts of interest to arise is very high. Further, the public perception of this appointment process would be such as to undermine public confidence in those investigations being able to proceed free from Government interference.

In these circumstances, the CJC submits that it is undesirable, as well as unnecessary, for the Public Interest Monitor to have functions in relation to the CJC and the relevant provisions of the

Bill should be deleted. Other concerns of the CJC concerning the Monitor proposal are discussed in more detail in the submission on the Police Powers and Responsibilities Bill.

SECTION 6

CONSTITUTION OF THE MANAGEMENT COMMITTEE OF THE QCC

As signalled in its earlier submission, the CJC has real concerns about the constitution of the management committee as provided for in clause 39(1). In particular, the CJC reiterates its earlier submission that the presence on the management committee of the Chairperson and deputy Chairperson of the PCJC is inappropriate.

This concern is reinforced by the functions given in the Bill to the management committee, which include to:

- refer relevant criminal activity and major crime to the QCC for investigation;
- arrange and as appropriate coordinate joint investigations by the QCC and a police task force or other entity;
- receive complaints or concerns about the QCC or a QCC officer; and
- review and monitor the work of the QCC.

In making referrals to the QCC, the management committee is required to consider whether investigations can effectively be carried out using powers ordinarily available to the Police Service (clause 39(4)). Additionally, the management committee is empowered to give the QCC directions limiting or ending particular investigations (clause 47), and to refer criminal activity to the Police Commissioner for investigation (clause 48).

In summary, the management committee will be involved in deciding what should and should not be investigated by the QCC, and how investigations should proceed.

There are obvious dangers in allowing such decisions to be affected by political considerations. Decisions to investigate politicians or political conduct, for example in relation to paedophilia allegations, may well be opposed so as to avoid political embarrassment, and such a view might well be supported by members of opposing parties. Equally, politicians on both sides might support investigations into politically popular issues, where investigations would not otherwise be undertaken because of the tenuous or unsupported nature of the allegations.

A particular concern arises from the present drafting of the Bill, which enables the management committee a degree of discretion in determining which complaints provide evidence of official misconduct requiring referral to the CJC for investigation (see above). Therefore, as the Bill currently stands, the politicians on the management committee would be involved in assessing whether complaints alleging corruption should be referred to the CJC. Political involvement in decisions of this nature is contrary to the whole scheme of the *Criminal Justice Act*, and to the Government's stated commitment to maintaining the independence of the CJC's anti-corruption role.

The long-term preservation of public confidence in the administration of justice requires the removal of political influences from such decision making. In addition, it is likely that many politicians would lack the knowledge and expertise in criminal investigations that would enable them to make a reasoned contribution to the work of the management committee.

A further concern arises from the invidious position in which politicians on the management committee may find themselves should allegations be made of information leaking from the committee. In the past, parliamentarians have not been investigated as the potential source of such leaks largely because of the operation of parliamentary privilege. That privilege, however, attaches only to the performance of parliamentary functions, and members of Parliament performing Executive functions on the management committee would be in no different position to that of other public officials. It is feasible that leaks involving possible breaches of the secrecy provisions of the Bill could be investigated as potential official misconduct, which is an investigatory responsibility of the CJC. Such circumstances would involve an obvious conflict between the parliamentarians' duties as members of the PCJC, and their functions and behaviour on the management committee.

Another potential concern which does not appear to have been considered is whether the participation of members of Parliament on the management committee could be regarded as the performance by them of an office of profit under the Crown, and thus disqualify them constitutionally from continuing to hold their Parliamentary positions. It is well established that members of Parliament need not actually receive payment in order for them to occupy such an office of profit under the Crown. It is at least arguable that should, for example, the community representatives appointed to the management committee receive payment for their duties, then that circumstance would be sufficient to characterise the position of management committee member as one of profit under the Crown.

Furthermore, members of the PCJC already have important and onerous responsibilities to monitor and review the CJC. In the past, there has been some concern expressed, including by the PCJC itself, about its capacity to meet those responsibilities, given the workload placed on its members. In these circumstances, the imposition of new, demanding and serious responsibilities on the two most senior members of the PCJC, seems ill-considered. The proposed arrangement also appears to contradict the Government's stated policy in introducing recent amendments to the *Criminal Justice Act*, to improve supervision of the CJC.

The CJC reiterates its submission that the Bill should be amended to remove the Chairperson and deputy Chairperson of the PCJC from the management committee of the QCC.

SECTION 7

DEFINITIONS OF CRIMINAL PAEDOPHILIA

The Bill defines the jurisdiction of the QCC to include relevant criminal activity (clause 28(1)), which is defined in clause 9 to include criminal paedophilia, which is defined in clause 6(1) to mean 'activities involving offences of a sexual nature committed in relation to children, or offences relating to obscene material depicting children'.

The CJC has serious concerns at the breadth of this definition. These concerns arise partly because clause 46(7) of the Bill gives the QCC a standing reference to investigate suspected criminal paedophilia. The combination of these provisions means that the QCC's ability to use its coercive powers arises instantly it suspects criminal paedophilia, without any need for consideration or individual reference by the management committee.

It is possible for the management committee, under clause 47, to set limitations on investigations, including limits on the exercise of the QCC's powers. Nevertheless, as the Bill currently stands, the instant a complaint is made of a parent engaging in sexual abuse of their child, perhaps on a one-off occasion, the QCC may begin investigating that matter. In theory, it could seek approval to install listening devices in the bedrooms of the person's home, and even, in certain circumstances under clause 83, place such devices without prior judicial approval. As part of the investigation, the QCC could apply for a search warrant to search the person's home, perhaps covertly. It is possible that the person, or indeed the child, could be required to attend a hearing of the QCC and be forced to answer questions on oath, even those involving potentially self-incriminatory answers.

In addition to the civil liberties concerns raised by this prospect, there is much existing evidence to suggest the complete inappropriateness of such a police-dominated approach to abuse within the family, and indeed the potential for further harm to be inflicted on child victims. Many reports have stressed that it is essential for the needs of the victim of abuse to be handled in a much more integrated way, requiring the involvement of welfare agencies, counsellors, educational institutions and the like. Queensland's existing SCAN teams — involving police officers, medical practitioners, specially trained prosecutors, social workers and child protection officers of the Department of Families, Youth and Community Care working in a case-management style with suspected victims of abuse — are an attempt to set up such a multi-agency response. The further development and improvement of SCAN teams as a response to child sexual abuse, particularly within the family, has been endorsed by the Queensland Children's Commission, among others.

The CJC submits that the definition of criminal paedophilia should be amended to require, at the least, elements of sexual offences against victims outside the perpetrator's family, and/or some element of networking or organisation showing the need for the QCC's special powers. The investigation of alleged intra-familial abuse should continue to be dealt with through SCAN teams.

SECTION 8

DEFINITION OF ORGANISED CRIME

Clause 8 of the Bill defines organised crime according to five criteria, each of which must be present to bring the activity within the meaning of relevant criminal activity. Despite the criticisms which have been made of the CJC's past approach to determining organised crime, the five criteria appear remarkably similar to those used by the CJC. However, the definition is in one respect significantly narrower than that used by the CJC, in requiring that all, rather than most, criteria be present. It is conceivable that under the Bill's definition, systematic or continuing activity involving serious offences by two or more persons, engaged in for profit, would not be classed as organised crime because of the lack of evidence of substantial planning or organisation. Thus, the QCC's special powers could be excluded in circumstances where their use could be both justified and necessary.

The CJC submits that clause 8 of the Bill be amended to require only that *most* of the five criteria be present for activity to constitute organised crime.

In addition, the QCC will face a major jurisdictional hurdle before commencing any organised crime investigations. The five criteria required to establish organised crime, and hence the jurisdiction of the QCC, are very rarely initially apparent. Some preliminary investigation is necessary to discover, for example, whether suspected activity is continuing, and involves substantial planning or organisation. The QCC, however, has no jurisdiction to commence such preliminary investigations until it already knows that the criteria are present. While clause 9(c)(ii) of the Bill does include within the definition of relevant criminal activity something that is 'preparatory to the commission of criminal paedophilia or organised crime', that jurisdiction still does not arise until the five criteria establishing the presence of organised crime are met. Therefore, the QCC will not be able to undertake preliminary investigations to discover whether the criteria of organised crime exist, and will have to wait for circumstances where those criteria are self-evident.

This requirement will represent a very substantial hurdle to the QCC in commencing organised crime investigations. The CJC's experience has been that many such investigations occur on a continuum basis:

- (i) initial intelligence inquiries — including, if appropriate, the use of surveillance devices — indicate the need for
- (ii) a preliminary investigation, which establishes the presence of the criteria for organised crime, and only then is the basis for
- (iii) a full-scale investigation established

The QCC will be denied access to the first two stages of this three-stage process, except by relying on QPS support, which may be inappropriate in some circumstances.

The CJC submits that if the QCC is to be proceeded with, consideration should be given to empowering the management committee to authorise the QCC to undertake appropriate preliminary investigations to establish whether a particular activity meets the criteria for organised crime. The management committee should be required to set limits on such preliminary investigations, in the form of their nature, duration, and in relation to the resources and powers to be used.

SECTION 9 POWERS OF THE QCC

The powers of the QCC are provided for in Part 6 of the Bill, and in very large part are modelled on Parts 5, 6 and 10 of the Police Powers and Responsibilities Bill 1997, currently before the Parliament. The CJC has a number of concerns with some aspects of those powers, which will be addressed in a separate submission to be made in the near future on the Police Powers and Responsibilities Bill. To avoid duplication, those concerns will not be raised here.

However, some additional issues arise in respect of the Crime Commission Bill, including some apparent drafting inconsistencies. For example:

- Clause 74(7) empowers a magistrate when issuing a search warrant to direct persons in possession of documents at the relevant place to give the QCC officers all documents that are evidence of relevant criminal activity or major crime. It is not apparent why a Supreme Court Judge issuing a warrant under clause 74(2) lacks the ability to make a similar direction.
- Clause 97 of the Bill dealing with arrest warrants make no provision for bail.

In addition to these concerns, the CJC notes that clause 98 gives the QCC a general power to do all things necessary or convenient to be done for, or in connection with, or reasonably incidental to, the performance of its functions. The need for this general power is not clear, given the very specific and extensive powers given to the QCC in the rest of Part 6. No assistance is gained from the Explanatory Memoranda accompanying the Bill, which merely repeats the wording of the provision.

The clause seems intended to extend the QCC's specific powers to include incidental matters. As a matter of principle, it is undesirable for a general, incidental power to be given to a body such as the QCC with its capacity for intrusive use of coercive powers. It is highly likely that the courts will narrowly interpret such a general provision.

Nevertheless, the CJC submits that if the need for such a power as that which is contained in clause 98 cannot be made clearer and more specific, it should be deleted.

Generally, the CJC notes that the powers given to the QCC are far more specific, and in some instances broader than the powers of the CJC. For example, the following powers in the Bill are specifically provided for, while they may only arise more generally, or do not arise at all, under the *Criminal Justice Act*:

- power to enter a place or class of place stated in the warrant, covertly or through subterfuge, to install, maintain, replace or remove a surveillance device (clause 84(a)(i));
- power to enter a vehicle or another moveable object, to install, maintain, replace or remove a tracking device (clause 84(a)(ii));
- power to take electricity for using a surveillance device (clause 84(c));
- power to use one or more surveillance devices, whether of the same or a different kind, in the same place (clause 84(e));
- power to pass through, over, under or along a place to get to the place where the surveillance device is to be used (clause 84(f)); and

- the notice to produce power in clauses 93 and 94, unlike the similar provision in the *Criminal Justice Act*, specifically prevent the recipient from disclosing information in the notice to anyone.

Given that the CJC has functions to investigate matters which may be at least as serious as investigations undertaken by the QCC, the CJC submits that its powers should be amended to bring them into line with those which it is proposed give to the QCC. This is also desirable in the interests of achieving consistency of powers among law enforcement agencies in the State.

SECTION 10 OTHER MATTERS

THE APPOINTMENT OF QCC AND MANAGEMENT COMMITTEE MEMBERS

Clauses 15 and 16 deal with the appointment of QCC members. The Minister is required to consult with members of the selection panel before making a nomination for appointment, but is not required to nominate a person who has the support of members of the selection panel, including that of the Opposition representative.

Similarly, in appointing the two community representatives on the management committee, the Minister is required to consult the leader of the Opposition, but there is no requirement for the approval of the leader of the Opposition for the actual nominees.

The CJC submits that the bipartisan process would be strengthened by amending these provisions to require bipartisan approval for appointments, rather than simply consultation.

GUIDELINES TO POLICE TASK FORCES

Clause 30 of the Bill provides that any police task force working on QCC matters is under the control and direction of the Police Commissioner, subject to any directions or guidelines given to the QCC and the Police Commissioner by the management committee. However, the capacity of the management committee to give these guidelines and directions appears to be limited to the actual 'establishment of the task force' and does not extend to operational issues. Given that the purpose of the management committee is to coordinate, review and monitor the work of the QCC, a broader power to give guidelines and directions may be justified.

JURISDICTION OF MISCONDUCT TRIBUNALS

It is not clear whether, in the absence of specific provisions, officers of the QCC or their positions will be able to be prescribed for the purpose of giving the Misconduct Tribunals jurisdiction to determine disciplinary matters. As the QCC is a law enforcement agency, there appears to be no justification for QCC officers to be subject to any lesser or different disciplinary regime than that applying to police officers, who are subject to the jurisdiction of the tribunals. This is particularly the case given that the Bill establishes no separate disciplinary regime.

The Bill should be amended to make clear that the QCC and its officers are subject to the jurisdiction of the Misconduct Tribunals.

HEARINGS

The Bill contains, in clause 101, a provision similar to section 92(1) of the *Criminal Justice Act* to the effect that in conducting hearings the QCC is not bound by the rules of evidence. However, there is no equivalent of section 93(1)(b) of the *Criminal Justice Act* requiring any reports to include an objective

summary of all relevant matters including those opposing the report's recommendations. Similarly, there is no requirement in the Bill equivalent to section 22 of the *Criminal Justice Act*, requiring the QCC to at all times act 'independently, impartially, fairly, and in the public interest'.

There is some ground for concern that this absence of express statutory confirmation could lead to a lack of attention to the need for procedural fairness in the conduct of QCC hearings, and more generally in its operations.

Given the similarity in hearings powers between the QCC and CJC, the Bill should include similar provisions protecting procedural fairness to those applying to the CJC.

NON-PUBLICATION ORDERS

The CJC has grave concerns about the likely effects of clause 142 of the Bill, which would amend section 88 of the *Criminal Justice Act*. In common with clause 111 of the Bill, which applies to the QCC, the provision would enable the breach of non-publication orders in respect of identifying a witness or proposed witness at CJC investigative hearings, provided the publication is made directly or indirectly by the person giving the evidence. In effect then, a police officer called to give evidence about the potential corruption of another officer would be able to advise that other officer of the fact that he or she has been summonsed. The target officer may then have the opportunity to destroy relevant evidence, or concoct defences.

Given that clause 142 affects only the CJC, and has no apparent connection with the QCC, it is difficult to understand why it was not included in the very recent and comprehensive separate legislation amending the *Criminal Justice Act*, rather than being included as an apparent afterthought in the Crime Commission Bill.

The CJC strenuously submits that the proposed amendment in clause 142 to section 88 of the *Criminal Justice Act* will have the potential to destroy the efficacy of many of anti-corruption investigative hearings, and, on that basis, it should be deleted from the Bill. Similar arguments support the deletion of clause 111 of the Bill applying to the QCC.

INCLUSION OF THE CJC AS A LAW ENFORCEMENT AGENCY

Clause 31 of the Bill, dealing with QCC liaison with other entities, and clause 85(2)(e), dealing with the disclosure of information gained by the QCC through a surveillance warrant, authorise the QCC to reveal, in certain circumstances, confidential information to 'other law enforcement agencies' and 'a declared law enforcement agency' respectively. The Schedule to the Bill defines a declared law enforcement agency to be an agency declared by regulation to be a law enforcement agency. The CJC is concerned that there may be some doubt as to whether it can be regarded as a law enforcement agency.

Given the stated policy of the Government that it intends the QCC and CJC to liaise closely and wherever possible, work cooperatively, the CJC submits that all doubt as to the sharing of confidential information under clauses 31 and 85(2)(e) should be removed by including in the Bill explicit reference to the CJC as a law enforcement agency.

TRANSITIONAL PROVISIONS

Clause 132 of the Bill establishes a procedure for the audit of CJC investigations to determine those to be passed to the QCC. Upon commencement of clause 132, the CJC will lose all basis to continue such investigations, which must be passed to the QCC or another law enforcement agency. It seems likely that there will be a hiatus in that it will take some time for the QCC to be established, staffed, housed, and resourced, and for the management committee to make its assessment of all such investigations. Yet in the meantime the CJC will have lost its jurisdiction to continue investigations. Some such investigations could be seriously jeopardised, if not fatally compromised, by such a delay. For example, many informants essential to such investigations will already face the transfer of responsibility for liaison with them, and perhaps their personal safety, to a new, unknown and perhaps untrusted agency. Their continued cooperation will be extremely doubtful if, as well as that transfer, they are effectively placed in limbo for two or three months while the mechanics of transfer take place.

The CJC submits, therefore, that the Bill should be amended to make provision to continue the CJC's jurisdiction in such matters pending their assessment by the management committee, and transfer to the QCC or QPS has been effected.