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Corrupt Conduct Issues Paper
Department of Justice and Attorney-General
GPO Box 149
Brisbane QLD 4001

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Attention: Corrupt Conduct Issues Paper Review Team at:

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ATSILS' (Qld) Ltd. Submission on the Corrupt Conduct Issues Paper

We understand that this call for submissions arises out of an election commitment to ensure Queensland has a government that lives up to the highest standards of integrity, the Government has committed to widening the definition of 'corrupt conduct' in the *Crime and Corruption Act 2001*.

The definition of corrupt conduct sets the bounds of the Crime and Corruption Commission's jurisdiction in relation to addressing public sector corruption. This issues paper has been developed to provide the opportunity for public consultation on the definition of corrupt conduct.

The purpose of the issues paper is to seek information about:

- issues arising from the current definition of corrupt conduct
- potential changes to the current definition to address these issues.

Summary of ATSILS' Position

1. ATSILS supports a change in the definition of "corrupt conduct" to a broader application such as the definition of "official misconduct" contained in the Act prior to the July 2014 amendments.
2. We believe that the vast majority of our clients are inclined to make complaints that are in good faith, are not made for a mischievous purpose, nor made recklessly or maliciously; and we do not wish to expose our clients to possible prosecution for making a complaint; and we consider that the requirement that a client make a statutory declaration when lodging a complaint to the CCC should be abolished.
3. We support all allegations of corrupt conduct or police misconduct being investigated by a body totally independent of the police service - be it the CCC or otherwise, needs to be properly resourced so that this vital aspect of police accountability can be overseen in a transparent and impartial manner.

Preliminary Consideration: Our background for meaningful comment

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd ("ATSILS") provides legal services to Aboriginal and Torres Strait Islander peoples throughout mainland Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education; and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). As an organisation which, for over four decades, has practised at the coalface of the justice arena, we believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences. We trust that our submission is of assistance.

Further, please note: It is important to bear in mind that this submission is not cast with the vast majority of police in mind; namely, those who perform a highly demanding role in often trying circumstances, with honour and integrity. For such individuals, this Review is to some extent (barring false complaints etc) relatively academic. Rather, our submissions are based

upon our first-hand experiences and are aimed at that small percentage of serving police officers who tarnish the otherwise good name of the Police Service. Those who perform their duties in the true spirit of the Police Service ["With Honour We Serve"], deserve no less – as do the citizenry of Queensland (whether Indigenous or non-Indigenous).

Legislative Changes

The Crime and Misconduct Commission Amendment Act 2014 introduced a range of significant changes to the functions, operation and governance arrangements of Queensland's corruption watchdog, the Crime and Misconduct Commission (CMC).

We understand that the changes implemented by the Amendment Act were the result of two reviews, the review by the Independent Advisory Panel (established in October 2012 and constituted by former High Court Justice the Honourable Ian Callinan AC and Professor Nicholas Aroney) which was followed by the Parliamentary Crime and Misconduct Committee Inquiry into the CMC's release and destruction of Fitzgerald Commission of Inquiry documents.

We understand that many of the recommendations made by these two reviews formed the basis of the Crime and Misconduct Commission Amendment Act 2014.

One of the key policy driver behind many of the changes in the Amendment Act was to focus the functions of the CMC on "corruption" and the investigation of serious corruption.

The name of the Crime and Misconduct Commission was even changed by the Amendment Act to the Crime and Corruption Commission to reflect these changes.

The key substantive amendments set out in the Amendment Act are detailed below.

Definitional change from "official misconduct" to "corrupt conduct"

A key finding of the Independent Advisory Panel was that the definition of "official misconduct" in the CMC Act had a broader application as compared with other definitions in equivalent anti-corruption statutes in other Australian jurisdictions.

The Independent Advisory Panel also found that the resources of the CMC were, in part, being applied to the investigation of trivial and vexatious complaints.

The Amendment Act makes several changes to sections 14 and 15 of the CMC Act to now define "corrupt conduct" as opposed to "official misconduct".

The previous definitions of the terms "conduct" and "official misconduct" have been amended, and the legal threshold for establishing whether specific conduct will trigger the Commission's anti-corruption functions has substantially changed.

Under the current Act, for conduct to constitute "corrupt conduct" the conduct in question must satisfy a number of cumulative threshold tests, being whether the conduct:

- adversely affects, or could adversely affect, directly or indirectly, the performance of functions or the exercise of powers of an agency or a public office holder; and
- results, or could result, directly or indirectly, in the performance of functions or exercise of powers in a way that is not honest or impartial; involves a breach of the public trust; or involves a misuse of information; and
- is engaged in for the purpose of providing a benefit to the person or another person or causing a detriment to another person; and
- would, if proved, be a criminal offence or a disciplinary breach providing reasonable grounds for terminating the person's services. The requirement that the conduct in question satisfy one of these elements was included in the previous definition of "official misconduct".
- The difference being that the test is now "would" the relevant conduct, if proven, satisfy one of these criteria. The approach of changing the relevant test from "could " to "would" was recommended by the Independent Advisory Panel.

Previously under section 38 of the CMC Act, Chief Executive Officers were required to notify the CMC of a complaint or information or a matter (complaint) if the Chief Executive Officer "suspected" that the complaint involved, or may involve, official misconduct.

The Amendment Act changed the notification requirements for Chief Executive Officers by only now requiring that the Commission be notified where a Chief Executive Officer "reasonably suspects" that the complaint involves corrupt conduct.

This amendment is consistent with the finding of the Independent Advisory Panel that the Commission's focus should be on investigating serious cases of corrupt conduct.

ATSILS Position regarding the 1 July 2014 Amendments

Prior to the 1 July 2014 amendments to the Act, the majority of complaints made against Police Officers or other public sector officials, which in ATSILS case was primarily Queensland Corrective Service's Officers, the complaints were sent directly to the then CMC.

However, since the amendments, most complaints against Police Officers are now sent to the Ethical Standards Command, QPS, Professional Practices Managers, QPS, or Officers in Charge of Police Stations for less serious complaints involving customer service issues, such as rudeness or delays.

Complaints against Queensland Corrective Service's Officers are now sent to the Ethical Standards Unit, Justice and Attorney General, who now administer the Corrective Services Act 2006.

We believe that the vast majority of our clients are inclined to make complaints that are in good faith, are not made for a mischievous purpose, nor made recklessly or maliciously; and we do not wish to expose our clients to possible prosecution for making a complaint; as this could have the effect of discouraging our clients from making a legitimate complaint due to fear of prosecution, and we therefore do not support the requirement that complaints to the CCC be made by way of statutory declaration.

Complaints made by way of Statutory Declaration

Reports of suspected corrupt conduct to the CCC should be made by statutory declaration.

This would help ensure that any complainant has sufficient reason to believe corrupt conduct has occurred (section 36).

However, a person can claim an exemption under exceptional circumstances if any of the following adversely affects the person's ability to make their complaint by a statutory declaration:

- fear retaliation (reprisal or detriment) in relation to their employment, property, personal safety or wellbeing
- are illiterate, or not literate in English
- have a disability or impairment
- have a personal or physical disadvantage
- are in a remote geographical location (e.g. you are unable to access appropriate signatories for a statutory declaration)
- are a child (under 18 years).

There are also some circumstances where a person may report corruption to the CCC without a statutory declaration.

The Explanatory Notes to the 1 July 2014 amendments to the Act stated that:

“Commission’s new complaints management system Callinan / Aroney were of the view the commission’s focus should be on investigating serious cases of corrupt conduct. In addition to changing the definition of ‘official misconduct, Callinan / Aroney also recommended a number of other strategies designed to reduce the number of complaints the commission has to deal with.

Consistent with the goal to reduce the number of matters referred to, and investigated by the commission, the Bill:

1. *raises the threshold of when public officials are to notify the commission of corrupt conduct so that notification is only required when the public official reasonably suspects corrupt conduct (this is being done by amendment to section 38, which currently only requires the public official to suspect the conduct involves or may involve official misconduct);*
2. *expands the use of section 40 directions issued to units of public administration to ensure only the more serious corrupt conduct matters will be referred to the commission. Directions under section 40 will now also include what complaints need or need not be notified to the commission as well as when and how complaints are to be notified to the commission;*
3. *requires the commission must only investigate the more serious cases of corrupt conduct (amendments to sections 5 and 35);*
4. *expands the grounds upon which the commission may dismiss or take no action in relation to a complaint to also include when the complaint is: not made in good faith; made for a mischievous purpose; made recklessly or maliciously; not within the*

commission's jurisdiction; not in the public interest or has been dealt with by another entity (amendment to section 46(2)(g)); and

5. *enlarges the grounds upon which the commission may prosecute a person in relation to making a complaint that is: vexatious; not made in good faith; made for a mischievous purpose; or made recklessly or maliciously (new section 216A)."*

Overview of Current process of Investigation

Under the *Crime and Corruption Act 2001*, the Crime and Corruption Commission (CCC) essentially investigates complaints of serious corrupt conduct, police misconduct, or cases involving the public interest.

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

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

"Police misconduct' in the Schedule is defined as misconduct (other than corrupt conduct) by a police officer that:

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

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

The CCC has primary responsibility for dealing with complaints of ‘Corrupt conduct’, (section 45); and monitoring how the Commissioner of Police deals with police misconduct (section 45 (2)).

However, the Commission does have power to refer even ‘corrupt conduct’ allegations to the Police Commissioner, but as noted above the CCC must be kept informed and is responsible for monitoring the way in which the Police Commissioner deals with the complaint (sections 42(5) and 45(2)).

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

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

In summary, from a practical point of view the CCC ordinarily only investigates complaints of corrupt conduct with a significant public interest component, with the bulk of complaints are referred back to the Police Service.

ATSILS Position on the Current System

Public interest in our view should always be the overarching principle governing the investigation of conduct of police officers. The community is entitled to expect that law enforcement officers are scrupulously ‘clean’ and their actions highly defensible. Not only must justice be done – but it must be seen to be done. This also raises the question as to what criteria are used by the Commission to determine the weight of ‘public interest’ in a particular case.

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

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

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

Answers to Questions posed by the Corrupt Conduct Issues Paper

Question 1:

Do the concerns raised at the time of the proposed change to the definition of ‘official misconduct’ to ‘corrupt conduct’ still exist?

We have always maintained our general view in relation to the investigation of police complaints that we consider it inappropriate for police officers to investigate other officers against whom a complaint is made.

Furthermore, we are of the view that to require same also places the investigating officers in an invidious position – all the more so given the collegiate mind-set of the Queensland Police Service.

We therefore would support a change back to a definition of Official Misconduct with its less stringent requires as this would allow the CCC to investigate more matters against police officers or other public sector officials, such as Corrective Services Officers without having to refer the matters back to the QPS or relevant department or agency to investigate the

Question 2:

Is there any evidence that these concerns have been realised since the new definition has been in place?

The majority of complaints made by ATSILS on behalf of clients involve Police Misconduct or customer service type issues.

Most of the complaints made by ATSILS clients against Queensland Corrective Services Officers or staff involve issues such as excessive force / unlawful assault by CSOs, or issues regarding breaches of discipline or separate confinement.

ATSILS is not aware of any instances since the 2014 amendments where a complaint/incident should have been investigated by the CCC but was not able to because it was outside the definition of corrupt conduct.

Question 3:

What type of specific conduct is not captured in the definition of 'corrupt conduct' but should be?

Several types of conduct which may not fit within the definition of corrupt conduct, but were captured by the definition of official misconduct, possibly affecting ATSILS clients include:

- minor maladministration – failure to act, improper use of discretion, this can occur in Correctives Services type settings where prisoners might miss their court appearances, or have mail sitting around which was of an urgent nature such as letters to parole boards etc., because QCS staff simply forget to properly conduct these tasks due to overwork or inadvertence;
- accessing personal government records or patient/client records (own records or records of others but not disclosed or used by third parties);
- bullying / harassment / uncooperative behaviour, by QCS staff towards prisoners and other employees; and
- inappropriate behaviour (threatening) – peer on peer.

Question 5:

Should Queensland adopt the approach to defining 'corrupt conduct' taken in another jurisdiction and why?

The definition of "corrupt conduct", as defined in the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"), is deliberate or intentional wrongdoing, not negligence or a mistake.

It has to involve or affect a NSW public official or public sector organisation.

While it can take many forms, corrupt conduct occurs when:

- a public official improperly uses, or tries to improperly use, the knowledge, power or resources of their position for personal gain or the advantage of others
- a public official dishonestly exercises his or her official functions, or improperly exercises his or her official functions in a partial manner, breaches public trust or misuses information or material acquired during the course of his or her official functions
- a member of the public influences, or tries to influence, a public official to use his or her position in a way that is dishonest or partial
- a member of the public engages in conduct that could involve one of the matters set out in section 8(2A) of the ICAC Act where such conduct impairs, or could impair, public confidence in public administration (*Independent Commission Against Corruption Amendment Act 2015*).

We consider that this definition would be a good starting point for discussion, as the Queensland public expects public officials to perform their duties with honesty and in the best interests of the public.

Corrupt conduct by a public official involves a breach of public trust that can lead to inequality, wasted resources or public money and reputational damage.

Question 6:

Given the new definition of 'corrupt conduct' has only been in place for one year, is it too early to evaluate the effect of the new definition?

Since the new definition has been introduced, ATSILS has referred the majority of complaints to the Ethical Standards Command, QPS where the complaints involve police misconduct; whereas, before the 2014 amendments, these complaints would have been forwarded directly to the then CMC, who would in turn refer the majority of complaints to the ESC, QPS for investigation under the devolution principal.

ATSILS has also referred a number of complaints regarding Queensland Corrective Services Officers directly to the Ethical Standards Unit, whereas before the 2014 amendments these complaints would have been sent directly to the then CMC, who would then generally refer the matters back to the ESU, JAG, for investigation.

ATSILS averages around 80 complaints against police officers per year and around 5 to 7 complaints against QCS.

Twelve months is probably too soon to properly evaluate the effect of the 2014 amendments.

ATSILS General View of the Current Police Complaints System

We have always maintained our general view in relation to the investigation of police complaints that we consider it inappropriate for police officers to investigate other officers against whom a complaint is made.

Furthermore, we are of the view that to require same also places the investigating officers in an invidious position – all the more so given the collegiate mind-set of the Queensland Police Service.

Although we consider that it is not necessarily in the public interest for an independent body outside of the Police Service to investigate every claim that a police officer's conduct and behaviour in law enforcement is questionable, we note that the first three principles that the CCC must consider when deciding whether to refer the matter back to the Police, most

notably capacity building and devolution, seems to weigh in favour of referring complaints back to the Police Service.

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

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

Conclusion

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

We cannot emphasise enough the importance of Aboriginal and Torres Strait Islander people receiving a competent and consistent policing service, and confidence that when police officers act inappropriately, their conduct will be investigated in a thorough and transparent manner.

This will go some way in ensuring that Aboriginal and Torres Strait Islander people can build a stronger relationship with the Police Service, which has often been less than satisfactory in the past for a number of reasons, resulting from historical legacies that include the Police

Service's role in enforcing laws, carrying out government policy and the ongoing issue of building trust and confidence between the police and Aboriginal and Torres Strait Islander people.

We close by thanking you for this opportunity to have input into this very important consideration. We hope and trust that this submission is of assistance with your deliberations. Please do not hesitate to contact us should you require anything further.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Shane Duffy". The signature is written in a cursive, flowing style with a large initial 'S'.

Mr. Shane Duffy
Chief Executive Officer