WHISTLEBLOWERS ACTION GROUP (QUEENSLAND)
[redacted]

28 June 2016

Commissioner
Crime and Corruption Commission
GPO Box 3123
BRISBANE Q 4001

Dear Commissioner

RE: MAKING ALLEGATIONS OF CORRUPT CONDUCT PUBLIC – IS IT IN THE PUBLIC INBTEREST

I refer to your advertisement for submissions on the subject matter, carried by *The Courier Mail* on 4 June 2016.

During the election campaign may not be the best time to get a full response from parties likely to be active in that election. Those parties are likely to be principal contributors to an idea that may be perceived by many to be threatening to a democracy and to the administration of justice, as is anticipated by your statements to the media.

I need therefore to be economic in this contribution from Queensland whistleblowers, and hope to be given an opportunity to make-up for this hasty response in any forum activated after the election.

There are several ways that such a law, presumably administered by the CCC, could adversely impact upon the law and justice institutions in Queensland. Your statements to the media identify three. This submission will outline other impacts and mechanisms into which the proposed law could potentially morph. There are also problems for your organisation to involve itself in the administration of such laws.

These matters are discussed below in turn.

Impacts on Law and Justice Institutions

Disadvantages already Admitted. Your statements to the media indicate your understanding that the proposed laws would diminish the following:

- Freedom of speech;
- Freedom of the Press; and
- Open and accountable government

Getting around Privileges, Immunities, and Protections. The other aspects of our freedoms and justice protocols that may be affected adversely are:

- Privileges held by participants, including witnesses, expert witnesses, legal counsel and judges in the conduct of courts and before quasi-judicial inquiries;
- Whistleblower protection currently provided to public officers (and all citizens and others in particular circumstances proscribed by the PID Act) for making public interest disclosures to appropriate authorities; and
- Parliamentary privilege.

Our concern about the loss of absolute privilege (a privilege that has been supported by our justice system for many centuries to successfully achieve its constitutional obligations without outside interference) arise from the recent decision by the Legal Services Commission in its prosecution of a solicitor appearing before the Carmody Commission of Inquiry. Notwithstanding rights of appeal. that prosecution was successful, and thus, at least for the time being, may be regarded as 'the law'. That prosecution appears to rely on certain constructs of the legislation relied on by the LSC that may displace many concepts in the administration of justice previously held to be sacrosanct.

The legislation that you propose may take on the same properties as the LSC legislation, and have applicability much wider within the justice system than the LSC legislation ever proposed.

[redacted] a solicitor [redacted] submitting [redacted] evidence on behalf of his client [redacted] to a Commissioner [redacted] The evidence was accepted [redacted] then published [redacted] without any redaction of allegations of suspected wrongdoing [redacted] lodged complaints with the NSW and Queensland Legal Services Commissions against the client's legal team alleging that the allegation [redacted] was baseless and untrue.

The protective barrier of absolute privilege provided to the solicitor for actions conducted in the quasi-judicial proceedings, seem to have been overcome by the LSC entertaining the proposed disciplinary action by an assertion that the legislation relied on by the LSC invented a new category of law (say, *'LSC*

Law'). That is, this new category of law may have been held not to be civil law, that the absolute privilege relied on by the solicitor only protected the solicitor from civil law actions like defamation, and that therefore the solicitor was not protected by absolute privilege from *'LSC Law'*. Further, this was the case even when submitting evidence [redacted] to the proceedings of the authorised legal forum before which the solicitor was appearing on his client's behalf.

[redacted]

The witness, the expert witness and the whistleblower, in any quasi judicial inquiry into alleged wrongdoing by judges or generals or cardinals or Ministers, are also affected by *'the LSC Law'*, from the impact that *'the LSC Law'* will undoubtedly have upon their access to fearless legal representation and to

fearless legal opinions. Some experts, such as medical professionals, are like lawyers also subject to legislation determining their registration as doctors and nurses, and may be vulnerable to their own equivalent to *'the LSC Law'*, and vulnerable as experts to be disciplined for presenting baseless medical opinion in the eyes of another. In determining whether their technical opinions are baseless, such experts will not have any relevant clause in the *Constitution of Queensland 2001* to protect them from any decisions politicised by Registration Boards selected by government, or by decisions from adversarial colleagues favoured by government.

The whistleblower (and any witnesses) remain safe from prosecution under *'the LSC Law'* for obtaining [redacted] opinion and following the processes of the quasi-judicial procedure to submit the relevant allegation to the Inquiry that is inquiring into the whistleblower's matter.

The law proposed by the CCC, however, administered by another Commission like the LSC, may be proposing a parallel law that the CCC would claim is also not a part of civil law. On this logic, the CCC and agencies could claim that this law operated outside of privilege and immunity and protection legislation. The CCC might argue this, as has been argued for *'the LSC Law'*, and thereby allow itself (and other agencies) to take adverse actions against whistleblowers and witnesses when a whistleblower, for instance, sought to make disclosures to another proper authority, or to a Senate Committee, or to a quasi-judicial inquiry.

The circumstances that the CCC and the agencies could respond to, relying on this new type of CCC Law, includes:

- Where the CCC refers allegations of wrongdoing to agencies to investigate, the agencies could take years to investigate the wrongdoing, all the time imposing the CCC Law to suppress disclosure of the wrongdoing and of the delay;
- In the same situation, the agencies could continue and/or worsen the wrongdoing; with the whistleblower required to be silent;
- In the same situation, the agencies could take action against the whistleblower, with the whistleblower required to be silent, or to be silent regarding the disclosure to which the alleged retaliations were linked;
- Where a quasi-judicial inquiry has been initiated, the agency (or the CCC through one of its officers) could refer the matter to the CCC (or to itself, respectively) so as to prevent the participation of the whistleblower in the quasi-judicial inquiry;
- Where the wrongdoing has been taken to a Parliamentarian whose privilege might also be held by the CCC not to cover action under the CCC Law, the agency (or the CCC through one of its officers) could refer the matter to the CCC (or to itself, respectively) so as to prevent the participation of the Parliamentarian in Parliamentary debate or in any committee proceedings within that Parliament;

- Where the wrongdoing has been taken to a Royal Commission initiated by the Federal Government, such as the current Royal Commission into the Institutional Response to Child Sexual Abuse, the above impacts could also be imposed on Queensland participants to such Royal Commissions

The proposal also does not appear to allow for the case where the CCC, or whatever commission administers this law, or whatever government agencies are allowed to initiate proceedings under this law, may have been captured by the alleged wrongdoers or their embarrassed superiors, or may have otherwise become politicised or corrupted on relevant issues, or more generally.

The Problems with CCC Administering such Laws

'Colonisation' of the Justice System. The watchdogs like the CCC, LSC, Office of Ombudsman and others may be 'colonising' the justice system in Queensland. This proposed law, if asserted to be the same or similar in effect to *'the LSC Law'*, could complete this process.

By 'Colonisation' is meant:

- The use by watchdogs of legal opinions, opinions that contradict the legal precedents firmly established in the traditional law that was made up of civil law and criminal law only, acting to displace or oust those precedents and the courts who traditionally operate according to those precedents, from influence on justice outcomes;
- The procedures of watchdogs, that may examine allegations about the behaviour of judges outside of the procedures stipulated by the Constitution, without the approval of the Parliament, that may be acting to displace or oust the operation of that Constitution from influence on justice outcomes, and to oust the Parliament from its traditional role of determining legislation that complies with the *Constitution*;
- The interpretations by watchdogs of legislation, that may find or invent a new category of law, outside of the traditional categories of Civil Law and Criminal Law, that may be displacing the prerogative of the Parliament to establish legislation and to define protections, privileges and immunities.

The 'colonisation' processes thus described - if this is a reasonable metaphor - appears to relegate precedents, the Courts, legislation, the Parliament and the *Constitution* to being the 'traditional owners' of the law in Queensland, if the metaphor is continued.

The Conflict of Interest Held by the CCC. Major allegations of corruption and wrongdoing continue against the CCC, the reputation of which organisation is being affected by the history of actions taken regarding whistleblowers. Their disclosures should have been properly, thoroughly and impartially

investigated by the CCC, and the whistleblowers should have been protected by the CCC, it is alleged. Such matters as:

- the Heiner Affair,
- the disclosures in the Bingham Reports regarding the treatment of Police Inspector Colin Dillon and the allegations of continuing harassment of whistleblower police officers,
- the treatment Department of Mines inspector Jim Leggate, and the pollution from mine sites that he disclosed that may now be destroying the Barrier Reef,
- the manipulation of the statistical methods used in the whistleblower research program steered and chaired by an ancestor of the CCC,
- the treatment of the disclosures about the fire ant program as the fire ants spread nationally,

exemplify the troubled history of the CCC with matters that continue to be raised in quasi-judicial inquiries and Parliamentary business.

The 1997 Connolly/Ryan Judicial Inquiry into the Effectiveness of the CJC was started and abruptly ended by court order for bias showed by a Commissioner. Notwithstanding the monitoring roles at law of the PCCC and Parliamentary Commissioner (which can be strictly limited), which might be asserted as being sufficient by some, the CCC nevertheless, through its ability to use the proposed law to silence those continuing with these allegations, is likely to be a principal beneficiary of the proposed new law.

Tricks and Ploys. The CCC may also have been caught out engaging in alleged tricks and ploys designed to disadvantage the whistleblower and his or her disclosures. Examples by the CCC, or by the agencies to which the CCC refers disclosures for investigation, include:

1. **Referral of complaints against agencies back to agencies, and then allowing those agencies to breach standards of reasonable procedures in those conflicted agency investigations;**
2. **Switching complaints, investigating disclosures or referrals that were not made, not the disclosures or referrals that were made;**
3. **Using rogue legal constructs, interpretations of legislation and of standards of procedures that are unreasonable interpretations not supported by legal precedents or of the intent of laws, regulations and documented practices;**
4. **Disposing or destroying evidence;**
5. **Excusing wrongdoing by labelling it as 'technical' wrongdoing or as 'good faith' wrongdoing;**
6. **Refusing to give reasons for decisions, forcing any appeal to be undertaken without any knowledge of the basis for the decision under appeal;**
7. **Denying the status quo to remain in place until matters are investigated; or employing the trick of firstly adversely changing the circumstances of the whistleblower, and then making a declaration of recognised whistleblowing, such that the 'status quo' is regarded to be the adverse circumstances;**
8. **Failing to investigate, or delaying the investigation until termination is effected, and then terminating the investigation because the member is no longer a public servant;**
9. **Failing to investigate fairly, say, by appointing a person with a conflict of interest in the matter;**
10. **Failing to interview witnesses;**

11. **Wilful blindness, by not referring to the document(s) that contain the evidence of the wrongdoing, or to the law that pertains to the issue;**
12. **The refusal to act based on a belief, say, that public servants would never behave in the way alleged;**
13. **The 'Reading-for-purpose' claim, that a watchdog can only read a document for one purpose, and that prevents the watchdog from recognising any other indications raised by that document outside of the purpose for which the document was read.**

Systemic corruption of watchdog authorities may be indicated where two or more watchdogs cooperate to frustrate investigation of disclosed wrongdoing. A common example is where one watchdog authority refuses to investigate the disclosure claiming that the investigation is the responsibility of a second authority, and the second authority refuses to investigate claiming that the first watchdog has the responsibility.

The outcome from this continuing history of alleged tricks is that the CCC cannot reasonably expect to be trusted with legislation that disempowers those who are genuinely working in the public interest to arrest wrongdoing.

[redacted]

Notions of Public Interest. One aspect of the CCC's record of major concern in responding to whistleblower disclosures - and it is directly relevant to this current CCC process and to the proposed law - is the alleged misuse by the CCC and its ancestors of the definition of "***the public interest***". It is submitted that the CCC has used and is using its own purported notion of ***'the public interest'*** to excuse the CCC from pursuing disclosed corruption and wrongdoing. On such matters, the CCC would be enabled to use ***'the public interest'*** to deny investigation against corruption, and to deny publicising of CCC's refused, delayed or deficient investigation.

Previously, the CMC, in the wake of the relevant decision in R v Ensbey in 2004 which roundly rebuffed the CJC/CMC's flawed interpretation of the relevant provision (i.e. section 129 of the Criminal Code), still asserted that it **was not** into "***the public interest***" to review [redacted] initial disclosure, let alone its own handling of the matter.

The CCC may thus have already used an unacceptable interpretation of ***'the public interest'*** to allow alleged crimes escape investigation. It is reasonable to expect that the CCC may use that unacceptable definition to avoid investigation of corruption again. Under the proposed law, the CCC could also misuse notions of the public interest in application of the new law.

The Significance of the Heiner Affair

The Heiner Affair is at the core of allegations against the CCC and its predecessors. It was one of the principal allegations (of mismanagement) against the CJC that went to the Connolly/Ryan Judicial Inquiry in 1997 which was not resolved by that terminated Inquiry. The correctness of the legal position taken by [redacted] over the preposterous position of the CCC when misinterpreting section 129 of the *Criminal Code*, was finally established by the Carmody Inquiry. [redacted]

This may be a case where the CJC's alleged ignorance of the law at s129 of the Criminal Code, may have been matched only by the CMC's alleged ignorance of what is in the public interest where the chief offices of the State destroy documents sought for impending legal action. The proposed law requires that the public interest be interpreted with the interests of the public in mind. The mire of situations for the justice system in Queensland gathering around the unresolved Heiner Affair may indicate what can happen when the public interest is not served.

About ignorance of the law, the High Court of Australia has said (Windeyer J in ***Iannella v French*** [1968] HCA 14 at 26, quoting from *Scott L.J. in* ***Blackpool Corporation v. Locker*** *(1948) 1 KB 349, at p 361).*

> ***"Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried."***

That wisdom should also be applied to 'the public interest', ***otherwise there is no saying to what extent the excuse of ignorance of the public interest might not be carried.***

The public may just not be able to trust the CCC, in situations of most significance, to interpret the public interest otherwise, when applying the proposed law. The current interpretation of the public interest held by the CCC regarding the Heiner Affair may be preposterous, and may be giving the appearance, rightly or wrongly, that the CCC is sanctioning illegality rather than investigating illegality in this matter. The alleged trick used in the recent purported investigation re Heiner turned that investigation into a trick.

Reasonably, what else should the public go by, other than the CCC's record with such interpretations.

Yours faithfully

G. McMahon
President