Mr A J MacSporran QC
Chairperson
Crime and Corruption Commission
GPO Box 3123
Brisbane Q. 4001

Dear Mr MacSporran

Publication of allegations of corrupt conduct

Thank you for your letter of 1 June 2016 in relation to the Commission's examination of public interest questions arising in the context of the publication of allegations of corrupt conduct, and possible legislative or other responses, and your invitation to lodge a submission.

The Commission and the Crime and Corruption Act

The Crime and Corruption Act provides a sophisticated mechanism for the investigation and rooting out of corruption and persons engaged in it, with statutory processes for the making or notification of complaints to the Commission about corruption both by members of the public and public officials. The Commission itself, in its corruption investigation role, is an important mainstay of our democratic system of government, and it plays a fundamental part in the promotion and maintenance of integrity in public office.

The established systems for the investigation of corruption are not, and must not be allowed to be used as, playthings or weaponry in political contests of the political class. The integrity of the systems must be protected from abuse. Otherwise the system itself will be brought into disrepute and become diminished in the eyes of the public, and the Commission will be distracted from its critically important functions.

The scope of the Commission's examination

Your letter identifies the scope of the Commission's examination as –

> *whether, on balance, it is in the public interest to make allegations of corrupt conduct public and, if not, what legislative or other options are available to prevent it.*

The accompanying discussion paper observes[1] –

> *Publicising allegations of corrupt conduct may adversely affect the ability of the Crime and Corruption Commission (CCC) to perform its corruption function, damage the reputation of the person alleged to have engaged in corrupt conduct, and compromise the fair trial of persons charged with corruption. However, identifying a solution that ensures allegations of corrupt conduct are kept confidential must be balanced against the right to freedom of speech within current legal constraints and the need for open and accountable government.*

Whilst it must be accepted that the publication of an allegation of corrupt conduct which is or may become the subject of a Commission investigation might tend adversely to affect the efficiency and progress of that investigation and have the other impacts identified in the discussion paper, it also must be recognised that the freedom to speak publicly on political and governmental matters is an incident of our free and democratic society.

[1] *Making allegations of corrupt conduct public. Is it in the public interest?,* Crime and Corruption Commission, June 2016, at p.4

Freedom of speech is a fundamental pillar of our free society, to be carefully and diligently protected and preserved. The right to freedom of speech is not unfettered, but the fetters imposed upon it, in areas such as the law of defamation, national security legislation, the secrecy provisions of the Crime and Corruption Act and other legislation, and the rules about contempt of court and the Parliament, must always be cast so as to go no further than is reasonably necessary for the protection and maintenance of that free society.

Subject to restrictions such as those, Australians have traditionally been free to speak their minds, including making allegations against one another as to involvement in corrupt conduct and almost anything else. It would be a big step indeed to legislate to prevent Australians from outing public corruption where they perceive it or, as the issue is framed in your letter, making allegations of corrupt conduct public. The LNP does not consider that such a step could be justified, or should be contemplated.

A concomitant of the right to freedom of speech is the Commonwealth Constitution's implied freedom of governmental and political communication. It operates not as a right to freedom of communication, but as a fetter on governmental intrusion upon that freedom. Whilst this is not the place for an analysis of the impact which the implied freedom would have upon legislation prohibiting a person from being able "to make allegations of corrupt conduct public", the LNP considers that any such legislation would be unlikely to survive scrutiny.

However, the LNP considers that there is much to be said as to the placement of restrictions upon the publication of the fact that a complaint or notification of corrupt conduct has been made or given to the Commission.

Publication of complaints and notifications to the Commission

Recently Queensland has witnessed repeated abuses of the corrupt conduct complaints and notification system in the pursuit of short term political advantage. Time and again persons and entities involved in the politics of Queensland have made complaints alleging corruption on the part of a political opponent for the purpose, or for purposes which included the purpose, of being able then to publicise the fact that the complaint had been made. Their intention has been that the media should then disseminate the fact that the complaint had been made, often without details or an analysis of its merits.

Having made and publicised the making of the complaint, the complainant has then typically hidden behind the Commission, saying that he or she can say nothing more because the matter is in the hands of the Commission.One result of this sort of conduct is that the subject of the complaint is then left to confront not so much an allegation to which some response might be made, but a report that an unparticularised complaint has been referred to the Commission for investigation.

Media reporting of the making of a complaint to the Commission, particularly where the complaint has been made by a high profile member of the Government or Opposition, even without anything much in the way of details of the alleged corruption, or analysis of any relevant law or circumstances, will usually lead to great reputational harm to the impugned person, and will often yield significant political advantage for the proponents of the complaint.

It is said that where there is smoke, there is fire, but as the Honourable Ian Callinan AC and Professor Nicholas Aroney observed in their 2013 Report of their Review of the Crime and Misconduct Act and Related Matters, "there is a human tendency for people to see not merely a fire, but a conflagration if there is the merest wisp of smoke"[2].

The LNP considers that there should be changes with a view to restricting the capacity of the proponent of a complaint or notification to the Commission, and anyone else who might be aware of it, from publishing the fact that the complaint has been made or the notification has been given.

Past recognition of the problem

The Criminal Justice Commission commenced operations in April 1990, and it did not take long for the politicisation of the complaints process to be recognised.

[2] *Report of the Independent Advisory Panel*, Parliamentary Paper No. 5413T2447, 18 April 2013, at p. 87

In September 1991 the Criminal Justice Commission put a submission to the Parliamentary Criminal Justice Committee in which it proposed an amendment to the Criminal Justice Act as follows[3] –

> *A new section be included to make it an offence for a person who has made a complaint or given information to the Commission to wilfully disclose or cause to be disclosed to any person other than the Commission, a Commissioner or an officer of the Commission or a member of the Parliamentary Committee or any person who is an officer or employee of the Committee, that fact, or the contents of any document or the description of any thing or any other information which might enable that fact to be inferred, without the authorisation of the Chairperson or his or her delegate.*

In its report of 3 December 1991[4] the Parliamentary Criminal Justice Committee set out a series of principles which it said should be observed by the Committee, the Commission, and others involved in matters arising under the Criminal Justice Act. Principle 10[5] was in the following terms –

> *Where practical, all information from parliamentarians, and local councillors and candidates should be forwarded to the Commission in confidence so that a complaint procedure can not be used for political purposes.*

The Committee made the following observations in relation to that principle[6] –

> *This principle is intended to prevent the situation where a complaint is forwarded or allegedly forwarded to the Commission and then publicised to cause embarrassment.*
>
> *This is a particular problem area and should be the subject of further examination by the CJC and the Committee*.

In its submission of August 1992 to the triennial review of its activities the Criminal Justice Commission referred to the Committee's Principle 10 and to its previously suggested amendment, and observed[7] –

> *Although the concern which was the catalyst for this proposal was first highlighted in the political arena, the amendment was intended to protect the privacy of any citizen against whom a complaint is made to the Commission, including police officers and other public servants. It has been sought for reasons of fairness to all persons against whom complaints are made. It is for the same reason that the Commission makes orders preventing the identification of persons named in its public inquiries.*
>
> *It would also ensure the Commission investigations are not prejudiced by premature public disclosure.*
>
> *In seeking the amendment, the Commission was conscious that because of its powers and position, significant stigma may attach to people publicly identified as under investigation by it.*
>
> *The amendment would not prevent debate in Parliament or the community on matters under investigation by the Commission or the conduct of Commission investigations.*

In reiterating its earlier request for the statutory amendment the Criminal Justice Commission stated[8] –

> *It is regrettable that the Commission has found it necessary to seek this amendment, but as indicated, it was forced to do so in light of its experience to that time. In light of subsequent experience, the Commission remains of the view that a legislative mechanism, as opposed to*

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[3] *Submission on the Three-Year Review of the Criminal Justice Commission's Activities,* Criminal Justice Commission, August 1992, at p. 50

[4] Parliamentary Criminal Justice Committee Report No. 13, *Review of the operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission,* 3 December 1991

[5] op. cit., at p. 100

[6] ibid.

[7] *Submission on the Three-Year Review of the Criminal Justice Commission's Activities,* Criminal Justice Commission, August 1992, at p. 50

[8] at p.51

protocols, is the only way to prevent persons publicly disclosing that they have made a complaint to the Commission against another citizen.

Indeed, some recent examples of publicity surrounding complaints to the Commission highlight the necessity for such an amendment.

In a submission to the Parliamentary Crime and Misconduct Committee's 2006 triennial review of the activities of the Crime and Misconduct Commission, the Local Government Association of Queensland took the issue up in the following terms[9] –

In the LGAQ's view public confidence in the honesty and integrity of the system of both State and local government is waning, due in no small part to the inappropriate level, and unbalanced nature, of publicity that presently occurs after the mere making of a complaint, regardless of its merits.

It is the LGAQ's submission that complainants should be obliged to keep the existence and nature of complaints against Councillors (and other public officials) confidential until a proper and balanced investigation of the matters of complaint has occurred and the person subject of the complaint and complainant has received the CMC advice of the outcome.

Confidentiality is clearly appropriate prior to the conclusion of an investigation so that the presumption of innocence (in the public's mind) is not lost.

In a reversal of the position taken by the Criminal Justice Commission, the Crime and Misconduct Commission responded to the Local Government Association of Queensland's submission –

It is not difficult to understand why there would be reluctance on the part of any government to introduce such legislation, as it would leave itself open to the criticism that both the government and the CMC would be less open and accountable. There would also be significant difficulties in enforcing any such legislation if the media were to publish details asserting them to be from 'anonymous sources'. Further problems would arise in maintaining confidentiality in the course of an investigation.

The Commission's view is that it would be difficult to justify such an amendment where there is a public expectation that the work of the Commission in politically controversial or sensitive matters be open and transparent. It is important that public debate is not stifled by any legislative proscription. Consequently, the Commission does not support such an amendment.

However, we will continue to publish on our website, before the next local government and state elections, a message to all candidates seeking their cooperation to ensure that the CMC's complaint processes are not misused for political purposes. The Chairperson will also make media statements at the appropriate times to reinforce this message.

In the LNP's view that submission is a capitulation in the face of difficulty.

The assertion that a legislative amendment limited to preventing the disclosure of the making of a complaint or notification would expose the government to criticism that it had made the Crime and Misconduct Commission "less open and accountable" is difficult to understand. Such an amendment would do nothing to diminish the openness or accountability of the Commission, but it would do much to protect the reputation of the subject of a complaint, and it would remove an impediment to the efficiency of the Commission's investigations.

The resort to the argument about the media's citing "anonymous sources" was misconceived. Legislation which prohibited the publication of the fact that a complaint had been made would operate to prevent such reporting. There would be no difficulty in enforcing it, because it would operate on the publication by the media, irrespective of the source.

The reference to the stifling of public debate is also misconceived. A legislative amendment so limited would not inhibit public debate as to the subject matter of the complaint. It would remain open for the complainant or anyone else to make an accusation against the subject of the complaint, if they

[9] Parliamentary Crime and Misconduct Committee Report No. 71, *Three Year Review of the Crime and Misconduct Commission,* October 2006, at p. 50

were inclined to doing so. But, by precluding reference to the making of the complaint, it would force those wishing to ventilate their concerns to do so on the basis of the concerns themselves, rather than the smear that a complaint to the Commission had been made.

The making of a complaint or the giving of a notification to the Commission says very little, if anything at all, as to the culpability of the subject of the complaint or notification.

On the receipt of a complaint or notification the Commission first embarks upon an assessment to determine whether there is sufficient to justify a commitment of its resources to an investigation - and it may or may not decide to do so.

If the Commission decides to conduct an investigation, the investigation might or might not lead to adverse findings or a criminal prosecution.

If there are adverse findings at the conclusion of an investigation, those findings might withstand challenge, or they might not.

If there is a criminal prosecution, the accused might be found to be guilty, or not.

The publication of the fact of a complaint has the potential to prejudice the interests of the subject of the complaint in a way which is entirely disproportionate to the probative value of the fact that the complaint was made. In itself it says almost nothing about the subject of the complaint, but as Queenslanders have seen on many occasions over the past 26 years since the establishment of the Criminal Justice Commission, the publication of the fact of a complaint usually does great harm, and in so many cases, the subject of the complaint is subsequently exonerated.

The assurance given by the Crime and Misconduct Commission that it would continue to publish pamphlets on its website before local government and State elections asking candidates and their supporters to play nicely was naive and facile. As a strategy it had been repeatedly demonstrated to be ineffectual, and it afterwards continues so.

The Parliamentary Crime and Misconduct Committee adopted the Commission's concerns about the possibility of criticism for reducing accountability and openness, and difficulty in enforcing the legislation, and opted for the "please play nicely" approach.

The issue was raised again in the report of the Parliamentary Crime and Misconduct Committee following its 2009 triennial review of the activities of the Crime and Misconduct Commission. It observed[10] -

> *The referral of the person to the CMC for investigation has the potential to cause significant damage to that person's reputation.*

However, without any detailed analysis of the issues, it adopted the approach of the previous Parliamentary Committee, referring to the public expectation of openness and transparency and that public debate should not be stifled, and the practical difficulties associated with enforcement of offence provisions.

The issue was reviewed again by the Parliamentary Crime and Misconduct Committee in the course of its 2012 triennial review of the Crime and Misconduct Commission. In its report[11] it traversed the history of references to the issue in the reports of the previous Parliamentary Committees and, without referring to the diametrically opposed position which had been taken over several years by the Criminal Justice Commission, observed that the Crime and Misconduct Commission's "position on this matter is clear and remains consistent with the position it held in 2006", and it referred approvingly to the "please play nicely" brochure which the Commission had released in November 2011.

The Committee also referred to the publicity which had been given to complaints relating to Campbell Newman at around the time of the 2012 Queensland State general election, and comments by Mr

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[10] Parliamentary Crime and Misconduct Committee, Report No. 79, *Three Yearly Review of the Crime and Misconduct Commission,* April 2009

[11] Parliamentary Crime and Misconduct Committee, *Three Yearly Review of the Crime and Misconduct Commission,* Report No. 86, May 2012, at pp. 74 - 79

Terry O'Gorman, President of the Australian Council for Civil Liberties, to the effect that "politicians were abusing the CMC's role, trying to score cheap points".

The Committee concluded that enforcing a legislative amendment to preclude the publication of the making of a complaint to the Commission "would prove to be problematic given the media's ability to publish details from anonymous sources".

The Committee also observed that a legislative provision preventing the Commission from being able to provide information on its operations during an election campaign or otherwise would fly in the face of the independence of the Commission and its status as the lead integrity organisation in Queensland, and it referred again to the previous argument about openness and transparency.

The Committee made no recommendation for legislative change. However, it concluded its consideration of the issue by acknowledging[12] "that public discussion of a 'CMC Investigation' may have an impact on persons running for public office, regardless of the outcome of the investigation, or whether an investigation is actually being conducted at all".

The most thorough consideration of these issues is to be found in the Callinan and Aroney report[13]. After a careful examination of the influence of media reporting, the law of defamation, the rules about contempt and the Parliamentary Standing Orders they turned to a consideration of the then recently enacted South Australian Independent Commissioner Against Corruption Act and in particular to s.56 –

> *A person must not, except as authorised by the Commissioner or a court hearing proceedings for an offence against this Act, publish, or cause to be published—*
>
> *(a) information tending to suggest that a particular person is, has been, may be, or may have been, the subject of a complaint, report, assessment, investigation or referral under this Act; or*
>
> *(b) information that might enable a person who has made a complaint or report under this Act to be identified or located; or*
>
> *(c) the fact that a person has made or may be about to make a complaint or report under this Act; or*
>
> *(d) information that might enable a person who has given or may be about to give information or other evidence under this Act to be identified or located; or*
>
> *(e) the fact that a person has given or may be about to give information or other evidence under this Act; or*
>
> *(f) any other information or evidence publication of which is prohibited by the Commissioner.*
>
> *Maximum penalty:*
>
> *(a) in the case of a body corporate—$150 000;*
>
> *(b) in the case of a natural person—$30 000.*

Callinan and Aroney referred[14] to an observation of the Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for Tourism, and Minister for the Status of Women, the Honourable Gail Gago –

> *Investigations into corruption conducted by the ICAC will be conducted in private. This is because persons under investigation by the ICAC have not been charged with any criminal offence. As is currently the case with criminal investigations undertaken by SA Police, a suspect is publicly identified once an investigation is completed and a charge or charges have been laid (subject of course to any suppression order that may be in place). To make an investigation undertaken by the ICAC into corruption public, would prematurely and unnecessarily prejudice the reputation of a person or persons, who may or may not end up being charged with any offence.*

[12] at p. 78

[13] *Report of the Independent Advisory Panel,* Parliamentary Paper No. 5413T2447, 18 April 2013, chapter 6

[14] at p. 108

As observed by Callinan and Aroney[15], s.56 does not prohibit publication of information about suspected corruption, or of the identity of person who is said to have engaged in corruption. Publication of matters of that kind is regulated by the general law, especially the law of defamation. The only publication which s.56 prohibits is publication of information which tends to identify a person as having a specified association with a complaint to or an investigation by the Independent Commissioner. That is to say, publication as to the substance of the corruption allegation or identification of the persons said to be involved is not inhibited. The section operates only with respect to the complaint and the investigation.
The Crime and Misconduct Commission commented in its submission to Callinan and Aroney that it would be unlikely that a law modelled on s.56 "would be able as a matter of practicality to defeat internet chatter by bloggers and other social media", to which they responded[16] –

> *"…simply because there may be some doubt about whether or not all who breach section 56 would or could be punished does not mean that none should be.*
>
> *Not all of the law can ever, as a practical matter, be fully enforced all of the time. That is not a reason not to enforce it when it can be, for deterrence purposes among others."*

The restrictions imposed by s.56 are temporally indefinite, subject only to a Court order or the authorisation of the Independent Commissioner. The LNP considers that that goes too far.

Limits on the right to disclose the fact of a complaint

The potential for harm to arise from the publication of the fact that a corruption complaint has been made to the Crime and Corruption Commission is present whatever the nature of the complaint, or the identity of its subject. However, experience dating back to shortly after the commencement of the Criminal Justice Commission in 1990 shows that the vast preponderance of instances of the publication of the fact of such complaints falls within the electoral environment, and mostly proximately to an approaching election.

There is far more temptation to abuse the corruption complaint processes within the electoral environment than at other times, and to do so in relation to persons who are seeking or are closely connected with persons who are seeking elected office. Nevertheless, the political class does not have a monopoly on such behaviour, and there have been multiple instances of complainants with complaints not involving political players who have taken them public, whether with the intention to inflict harm, or for self promotion, or for other reasons. Whatever the motivation, the publication of the fact that a complaint has been made has the same potential for reputational damage, and to impede the work of the Crime and Corruption Commission, whether the subject of the complaint is a member of the political class or not.

The LNP is concerned to limit any legislative restriction insofar as can reasonably be done so as to limit the impact upon ordinary discourse and freedom of speech, while at the same time eliminating the blight on the corruption control processes under the Crime and Corruption Act.

Consequently, the LNP considers that the restrictions should operate only until the earlier to happen of –

(i) the Crime and Corruption Commission itself publicly discloses the fact of the complaint, its subject matter, and the identity of the subject of the complaint, or

(ii) the Crime and Corruption Commission publicly discloses that it has decided to conduct, is conducting or has conducted an investigation into the subject matter of the complaint, and discloses the identity of the subject of the complaint, or

(iii) the Crime and Corruption Commission gives approval for the disclosure, or

(iv) a Court order authorises the disclosure.

In the case of disclosure following Commission approval or a Court order, disclosure of the fact of the complaint should be required to comply with any conditions imposed as part of the approval or order.

[15] at p. 109
[16] at p. 110

The restrictions should not prevent the subject of the complaint from disclosing the fact that it has been made in relation to himself or herself, should he or she wish to do so.

It is important that these changes should not prevent public discussion of the conduct of the Crime and Corruption Commission in relation to a complaint. For example, if the Commission decides following receipt of a complaint that an investigation is not warranted, the disappointed complainant should not be prevented from publicly commenting on that decision notwithstanding that to do so would inevitably disclose the fact of the complaint. It is not in the public interest that there should be any such restriction on the freedom of Australians to engage in discourse about the performance of the Crime and Corruption Commission in the discharge of its very important functions and responsibilities.

The LNP considers that limiting the operation of the restriction in that way will ensure compliance with the compatibility and proportionality requirements of the freedom of political communication on governmental and political matters[17].

Recommendation

The LNP considers that there should be restrictions on the publication of the fact that a complaint has been made to the Crime and Corruption Commission, but that its operation should be limited in the ways mentioned above.

The restriction should be introduced by amendment to the Crime and Corruption Act. There should also be some changes to the Standing Orders of the Queensland Parliament to regulate disclosure within the House of the fact of a corruption complaint.

I reiterate that the imposition of a restriction on the publication of the fact of a corruption complaint should be cast so as not to impede debate in Parliament or the community in relation to the matters which are the subject of the complaint.
The LNP would be pleased to provide further comment if it would be of assistance.

Angela Awabdy
Party Secretary

[17] McCloy v New South Wales [2015] HCA 34 at [1] – [2]