



June 2016

Making allegations of corrupt conduct public Is it in the public interest?

Submission form

Lodging a submission

Send your submission to us by **5pm Thursday 30 June 2016** by any of the following methods:

Online: <www.ccc.qld.gov.au/publicisingallegations/>

Post: Publicising allegations
Crime and Corruption Commission
Policy and Research
GPO Box 3123 Brisbane Qld 4001

Email: publicisingallegations@ccc.qld.gov.au

Fax: 07 3360 6333

We may not consider late submissions.

Do you wish to maintain partial or complete confidentiality?

We will generally publish submissions on our website — including the name of the submitter but no contact details. If you would prefer to maintain partial or complete confidentiality, please indicate your preference by selecting one of the following:

- NAME WITHHELD — PARTIAL CONFIDENTIALITY**
I consent to my submission being published on the CCC website, without my name being disclosed.
- CONFIDENTIAL — COMPLETE CONFIDENTIALITY**
I do not consent to my submission being published on the CCC website.

If there is no clear selection of one of these alternatives, we will regard any submission (including an anonymous submission) as a public document, and will publish it on our website.

The CCC may quote from your submission or refer to it, either generally or individually, in publications.

Privacy statement

No submission marked as confidential will be published on our website. However, any submission may be subject to disclosure under the *Right to Information Act 2009* and the *Information Privacy Act 2009*, and applications to access submissions will be determined in accordance with those Acts.

If you provide your details, we may contact you to ask whether you consent to further consultation for the purposes of this project.

Your details

Provide as much or as little information as you wish.

Name(s):	<input type="text" value="Mr Paul Favell"/>		
Organisation:	<input type="text" value="Parliamentary Crime and Corruption Commissioner"/>		
Address:	<input type="text" value="REDACTED"/>		
Phone:	<input type="text" value="REDACTED"/>	Mobile:	<input type="text"/>
		Fax:	<input type="text"/>
Email:	<input type="text" value="REDACTED"/>		

Your submission

You may wish to address the following considerations in your submission.

Open, transparent and accountable government

The Callinan Aroney Review of the Crime and Misconduct Act 2001 devoted an entire Chapter of its report to the issue of whether disclosures should be made or publicity given to the exercise of the powers and functions of the Crime and Misconduct Commission (as it was then). I support the Review's recommendation (Recommendation 8) that, subject to three exceptions, it should be an offence for any person (including a Commission officer) to disclose that a complaint has been made to the Commission, the nature, substance or subject of a complaint, or the existence of a Commission investigation. The exceptions are: in the case of a public investigation; if authorised by the Supreme Court in circumstances where there is a compelling public interest in publication or disclosure; and if a subject officer, who has been exonerated or not proceeded against, authorised the disclosure in writing. (With regard to this last exception, I would suggest that a subject officer might be permitted to self-disclose or authorise disclosure at any stage - not only after exoneration or discontinuance of the proceedings.)

The report proposed the inclusion in the Act of a provision which it was contended would allow members of the public and the media to "investigate, report, discuss and criticise the behaviours performance and integrity of all Members of Parliament and public officials, and of government departments and agencies of all kinds, including the CMC itself. The provision would only apply to the identification of persons associated with complaints and investigations during the course of such investigations..." (p112)

In my view, if such a provision were to be judiciously worded, it would not unduly infringe upon the ideal of open, transparent and accountable government.

Freedom of speech

The CCC's Discussion Paper notes that "People are also free to express themselves through any medium including written and oral communication, the media, public protest, broadcasting, artistic works and commercial advertising, where that expression does not treat people unfairly or in a discriminatory manner." (Emphasis added.) I fully support this view but a significant consideration is whether publicly made allegations of corrupt conduct against identified persons treat those persons fairly.

Certainly pursuant to the doctrine of procedural fairness, the Commission (being a statutory authority) would not be entitled to contemplate publishing information which would diminish a person's reputation without first providing the person a full and fair opportunity to contradict or correct what was said about them. (*Ainsworth v Criminal Justice Commission* [1992] HCA 10.)

Whilst neither a private individual complainant nor a media organisation is bound to comply with this doctrine, there is anecdotal evidence of complaints to the Commission being publicly aired by media organisations on their own or at the instigation of an individual complainant for the apparent sole purpose of publishing sensational allegations, causing reputational damage to the subject officer and/or corresponding political advantage to the complainant. It might be argued that an individual's or an organisation's right to freedom of speech is forfeited in circumstances where that expression does not treat other people fairly.

According to the Commission's Media Policy, it aims to "strike a balance between the legislative emphasis on confidentiality and the media's right to report on matters of public interest, free of unnecessary official restraint or vetting of information... Where privacy and stakeholder considerations and the protection of operational information take on significance, they must ultimately outweigh the release of information to the public."

This last statement is appropriate in my view but, whereas confidentiality obligations are imposed upon Commission officers, in the absence of any prohibition against individuals or the media publicly disclosing that a complaint has been made to the Commission, it is not difficult for the Commission to be forced into confirming the existence of a complaint. A recent example was when the Commission considered it necessary to clarify prior to the 2012 election that it was merely assessing a complaint against the then LNP candidate for Ashgrove, Mr Campbell Newman – not investigating the complaint as had been reported in the media.

The report of the Callinan Aroney Review referred to similar circumstances:

"However, in cases where it is considering a complaint and the fact that the complaint has been made and is under consideration are made public by the complainant (or otherwise) the Commission confirms that the complaint is being considered if that be the case. The circulatory nature of this is obvious. "Drop a hint to the media", wait for them to publish, the CMC will then confirm, and a complainant will have achieved the purpose of damaging the subject of the complaint, no matter how unsubstantial the matter may turn out to be." (p101)

It seems to me that when the making of a complaint to the Commission can be publicised for the principal purpose of causing unwarranted, or at least premature, reputational damage to the subject officer, it is difficult to strongly advocate for the discloser's freedom of speech.

Reputation of alleged subject officers

In discussing section 56 of South Australia's Independent Commissioner Against Corruption Act 2012, which prohibits publication of information and evidence about complaints made to that body, Messrs Callinan and Aroney referred to a statement made by the Hon G E Gago in the South Australian Legislative Council concerning this issue:

"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 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” (p108)

The CCC’s Discussion Paper notes that notwithstanding the protections afforded by defamation, privacy and anti-discrimination laws, the publicising of allegations of corrupt conduct continues to occur and can significantly damage the reputation of the person the subject of the allegations.

In some instances the damage caused to the reputation of the subject officer, whilst premature, may ultimately prove to be warranted. However, it is most unsatisfactory that allegations, which are later found to be unsubstantiated or entirely baseless, effectively have the potential to haunt the subject officer and impact upon their reputation forever. This is particularly so when, as is often the case, the allegations attract significantly more media attention than the subsequent dismissal of the allegations.

Of course, it is precisely because of the (possibly unwarranted) damage that can be inflicted upon the subject officer’s reputation that some individuals publicise their complaints to the Commission. Despite the Commission’s best efforts to curtail such behaviour (particularly leading up to elections), the behaviour has continued and it seems the only way to prevent it is to legislate against it as has been done in South Australia.

The Crime and Corruption Commission should similarly be permitted to investigate allegations of corrupt conduct without the subject officer having their reputation impugned by public discourse of the unproven and sometimes baseless allegations.

I mentioned above that a subject officer should be permitted to self-disclose or authorise disclosure of a complaint made to the Commission against him or her at any stage - not only after exoneration or discontinuance of the proceedings. There have been occasions in Parliament when, in the face of allegations of corrupt conduct, Members of Parliament have stated that the allegations should be referred to the Commission. There have even been occasions when Members have announced that they have referred allegations made against them to the Commission themselves. This action effectively puts an end to repeated questioning of the Member concerning the allegations (whether in or outside of the Parliament) as the Member can simply reply that the matter is with the Commission and the Member is confident they will be vindicated.

If any person (whether a member of Parliament or otherwise) is comfortable to disclose that a complaint against them is being considered by the Commission, I do not consider it necessary to prohibit such disclosure as the person has effectively waived any concerns about possible damage done to their reputation or to their ability to receive a fair trial, and the issues relating to the effectiveness of the CCC discussed below would not be relevant.

Fair trial

It must be recognised that extensive media coverage concerning alleged corrupt conduct of a subject officer has the potential to impact upon the ability of the subject officer to receive a fair trial. It is of course difficult to discern the level of that impact. Messrs Callinan and Aroney observed, “It is easy to be too complacent about the problems caused by prejudicial pre-trial publicity. No one can ever be certain as to the extent to which entrenched prejudice or preconceptions may be displaced by directions to the contrary.

Far better that the occasion for judges to need to give directions to decontaminate a contaminated case should not arise.

It is necessary, therefore, to confine the statements that bodies such as the Police Service and the CMC (and others) may make, not only for the reasons we have earlier set out concerning the detrimental effect upon the reputation of those made subject to a complaint, but also because such statements, whether in the media or otherwise, may affect, even subliminally, potential jurors and may therefore have a real capacity to prejudice the fair conduct of criminal trials, particularly when there is no strong public interest served by making or publicising the statements. By this we mean statements to the effect that a particular person or events linked to a particular person, are under investigation.” (p90)

Effectiveness of the CCC

There will be some circumstances in which making allegations of corrupt conduct public will have a significant negative impact on the Commission’s ability to conduct an effective investigation. If a corrupt individual was not previously aware of suspicions of his or her involvement in corrupt activities, the public airing of those suspicions could provide the individual with an opportunity to destroy incriminating evidence, fabricate exculpatory evidence, interfere with potential witnesses, solicit false witnesses to give concocted evidence, or even flee the jurisdiction. Making allegations of corrupt conduct public in these circumstances would clearly have a detrimental impact on the CCC’s ability to conduct an effective investigation and should therefore be strongly discouraged.

If a complainant honestly held suspicions of an individual’s involvement in corrupt conduct and reported the matter to the Commission, there should be no reason for the complainant to make those suspicions public before the Commission had a reasonable time to investigate. Indeed, if the complainant publicised the fact that a complaint had been made to the CCC, there might be reason to suspect that the complainant’s primary motivation was to besmirch the subject officer’s reputation rather than to see the complaint effectively investigated.

There is also another consideration relevant to the issue of the effectiveness of the CCC. The Commission must be able to conduct an assessment or investigation of a complaint objectively and dispassionately, in the absence of any political, public or media pressure. Making allegations of corrupt conduct public has the potential to result in unhelpful and unwarranted media attention and public speculation. That is not to suggest that the Commission would be influenced by these factors but being forced to defend its position in the face of speculation and misinformation in the public arena, is not an effective use of the Commission’s resources.

Other

I might observe that there is some precedent for the imposition of strict confidentiality in relation to complaints. Although founded upon the doctrine of parliamentary privilege and not the issues discussed above, Standing Order 211A of the Standing Rules and Orders

of the Legislative Assembly states that proceedings of the Parliamentary Crime and Corruption Committee which are not open to the public remain strictly confidential to the Committee. Complaints considered by the Committee constitute Committee proceedings and are therefore confidential unless the Committee authorises disclosure. Disclosure of such confidential information may be considered a breach of the Standing Order and may amount to a contempt of the Parliament.



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