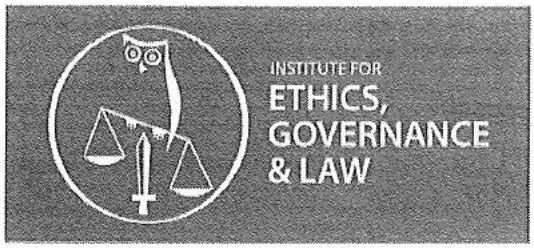

Crime and Corruption Commission
Level 2 North Tower,
515 St Pauls Tce,
Fortitude Valley QLD 4006

1 July 2016

Dear Mr MacSporran

I refer to your letter of 1 June 2016. Thank you for giving me the opportunity to make a public submission on the subject of making allegations of corrupt conduct public. Please find the submission of the Institute attached.

Kind regards

[redacted]

Charles Sampford

Professor Charles Sampford, DPhil (Oxon)
Director, IEGL, The Institute for Ethics, Governance and Law
(a Griffith Strategic Research Centre linking Griffith, QUT, ANU, Center for Asian Integrity in Manila and OP Jindal Global University, Delhi established on the initiative of the United Nations University)
President, International Institute for Public Ethics
Convenor Global Integrity Summit
Barrister at Law

MAKING ALLEGATIONS OF CORRUPT CONDUCT PUBLIC:
Is it in the public interest?

IEGL SUBMISSION

OVERVIEW

In making this submission, I recognize that I am largely defending one of the few recommendations of the Callinan-Aroney report that was rejected by the then government. The natural focus of professional and public debate was on Callinan Aroney recommendations that were legislated. I took part in those debates and lodged submissions to the PCMC and PCCC recommending the rejection and later reversal of some of those measures. This might place me in lonely political ground. But as I am not in politics I have the academic luxury of just calling it as I see it in 2016 as in 2012. In December 2012, I was interviewed by the Callinan-Aroney inquiry. I spent some time focussed on whether to make allegations of corrupt conduct public and was quoted by them. I have always taken strong exception to politicians announcing that they are taking a complaint about their opponents to the CJC/CMC/CCC. Doing so simultaneously reduces the likelihood of a successful investigation and prosecution, and increases the damage the accusation does – and raises the suspicion that it is therefore done to inflict the damage rather than to reduce corruption. Consequently, I believe that we should create disincentives for such behaviour including civil (limiting of privilege and generating a class of exemplary damages in defamation) and ultimately criminal.

I will summarize my view on the public interest.

1. Making such allegations public can be in the public interest.
2. The question is who should decide that the matter is in the public interest.
3. A mere assertion of public interest is insufficient as such assertions may be made by those with a private interest in the disclosure.
4. The CCC should be the one to make the decision in the first instance. It may decide to hold a public hearing or make calls to the public for information (as police do).
5. The bi-partisan requirements for appointment of commissioners provide a good first line of defence against the abuse of these powers.
6. Those who are aggrieved by the CCC's handling of the corruption complaint (either because they were tardy or too zealous) have an appropriate avenue through the PCCC and Parliamentary Commissioner.
7. At a certain point, those who are aggrieved by these official processes should be able to debate what they see as the failings in the process even if most are satisfied with it. But the public interest is in debating the system and the results it produces. A 'free for all' at the beginning will compromise the public interest in alerting the corrupt; preventing effective prosecutions; the destruction of the reputations of the innocent for political gain; and the aborting of trials because they cannot be fair (or the holding of trials that are unfair).

I include three pieces – the Callinan Aroney report of my views, an extract of my report to PCCC and an extract from a forthcoming book. I will then address the issues in the discussion paper.

EXTRACTS

CALLINAN-ARONEY

"Professor Charles Sampford similarly submitted that public reporting of complaints to the CMC "should have no place" in Queensland politics. He suggested that disclosure of a complaint that is done recklessly and with malice should render the discloser open to an action in defamation with aggravated damages. He considered that such disclosure should also be an offence and that prosecutions should occur upon the recommendation of the CMC. Recognising, we surmise, the need nonetheless for CMC investigations to be subject to appropriate scrutiny, Professor Sampford also submitted that complaints about inadequate investigation by the CMC should be taken to the Parliamentary Committee and protected by whistleblowers legislation."

SUBMISSION TO PCCC

The [Callinan-Aroney] Review quoted my strong criticisms of the practice of publicly reporting that you are 'going to the CMC'. I called it an 'abomination'. Victims of such practices are justifiably furious.

If a complainant really believes that another may be doing something wrong, the last thing they should contemplate is alerting the alleged wrongdoer and thereby giving the latter an opportunity to destroy evidence,

coerce potential witnesses, or concoct and share stories among potential witnesses. Such publicity reduces the chance of the alleged wrongdoer being caught.

If a complainant makes the complaint public and thereby reduces the likelihood of wrongdoers being prosecuted, it would suggest an ulterior motive – generally political or economic advantage.

I generally supported the Review's requirement of confidentiality. The exceptions should be carefully considered. They should not rule out making complaints to other bodies (for example, some corrupt behaviour might also breach other laws such as insider trading). Nor should they rule out complaining to oversight bodies if they are concerned that the complaint is not being properly investigated. Indeed, after a reasonable interval (best defined by statute), the complainant should be free to complain to the media that the CMC/CJC/CCC has not done its job investigating their complaint. By that time, the CMC/CCC would have had time to consider the matter and be able to respond so that baseless claims will be seen as such, and subject to defamation proceedings. It is one thing for someone to raise publicly a claim of corruption against another person and say they are taking it to the CMC/CCC before the CMC/CCC has had an opportunity to consider it and is therefore unable to comment. It is quite another for them to say: here is my complaint, the CMC /CCC has not dealt with it effectively and for the public to immediately hear that the CMC/ CCC has already investigated it and found it baseless. Of course, if there are legitimate grounds for criticising the CCC who are charged with investigating complaints then the press have a second, and even more important, story.

I support strong sanctions for anyone who publicly reports that they are making a complaint for the simple reason that they are putting at risk the investigation they claim to be necessary. However, the confidential reporting of an honest belief in the facts alleged should be protected.

Under new section 88L, those making complaints 'honestly and reasonably' are immune from all civil, criminal and administrative process and can claim 'absolute privilege' in cases of defamation.[1] I generally support this provision – though I would suggest that honesty is sufficient as I am not sure what the test of 'reasonableness' would involve in these circumstances. I would suggest that this privilege should be lost if the complainant discloses that the complaint has been made. Indeed, I would go further, supporting the availability of exemplary damages and criminal sanctions to match those for officials under 88M (below). However, the inability to make the complaint public beforehand and the fact that unsubstantiated complaints will not see the light of day means that there is not much point in making such complaints – dealing with the primary mischief to be addressed.

I entirely support the requirements of confidentiality placed on the CCC under new 88M of the amended act. We should be very suspicious of leaks by the CMC/CCC for the same reason as we are cautious about leaks by the police. Police leaks have been done for money, to prejudice a jury or for political motivation. All three are totally unacceptable for police as they should be for the CMC/CCC. Of course, there are reasons when the police will want to make a public call and Royal Commissions may have good reason to hold some hearings in public. Such hearings should be permitted for CCC as they are for other such commissions (and ad hoc Commissions of Enquiry). While these procedures could be abused, there are a number of safeguards (including transparency, legal representation and judicial review). There is room for more safeguards to be built in to public hearings.

I am not, at this stage, advocating criminal penalties for media who report information about complaints leaked by officials under 88M or by complainants. The issues here are the same as for reporting of other criminal investigations. They can provide a great service in some cases to encourage further information on crimes the police are publicly investigating. On the other hand, they can prejudice investigations that need to be carried out in secret – including under-cover and 'sting' operations and investigations into terrorism, spying, insider trading, collusive tendering and various forms of organised crime – including corruption. However, reporting restrictions on sensitive investigations should be considered collectively rather than for corruption by itself.

Where the media undoubtedly have a key role is in raising a hue and cry against failures to investigate – either because there is no body to carry out these investigations (as was the case when *Moonlight State* was broadcast) or because they argue that the designated body is not doing its job.

[1] Though the conditions on honesty and reasonableness give this the flavour of 'qualified privilege'.

EXTRACT FROM LAW, LAWYERING AND LEGAL EDUCATION

My next book is in the process of publication by Routledge. From that book, I extract the following comment made to a journalist who was asking me to call for the resignation of [redacted] on the basis of newspaper reports of an originating motion filed in the [redacted] Court 38 hours earlier which he could not show me. I told him that no reasonable academic could make that call and emailed this detailed reasoning.

> "As I understand it, there are accusations against [redacted] contained in a statement of claim filed in civil proceedings under privilege. I have only had second-hand reports of their contents and the evidence. I do not know if these are backed by sworn statements (which are not required at this stage). In my view, [redacted] has a *right* to stand aside to fight the allegations but no *duty* to do so. If those against whom accusations were made had a duty to stand aside it might encourage the making of allegations at critical times (elections, crucial votes). In this respect, we should recognize that not every claim made under privilege against legal and political figures ultimately proves to be well founded (e.g. those against [redacted] and [redacted].
>
> Accusations in parliament against [redacted] and [redacted] were based on concocted evidence (though not, I emphasize, concocted by their accusers who ended up the primary victims of those concoctions). Accusations against [redacted] were found to have no evidentiary basis. If [redacted] or [redacted] had been forced to resign because of those accusations, it would have been a travesty. If [redacted] or [redacted] had had to stand aside, any political benefits gained during their absence would have tainted the beneficiaries. This is why we have the presumption of innocence and the requirement of a proof before a criminal court before a parliamentarian loses his seat in parliament.
>
> There is good reason for this. When monarchs controlled the courts and the predecessors of the police they sometimes sought to exclude opponents from parliaments. This led some countries to give parliamentarians immunity during their tenure of office. With our confidence in the independence of police and judiciary we do not go that far. However, parliamentarians do not lose office without conviction for a serious offence. While the tenure of a speaker or party leader is determined by a simple majority in the relevant house or party room, it is generally wise for fellow MPs or party members to avoid a rush to judgment and wait to hear the evidence of both sides."

In citing this, I have in mind the likelihood of similar demands for resignation if complaints are made public by the accusers.

CONSIDERATIONS RAISED IN THE BACKGROUND PAPER

OPEN, TRANSPARENT AND ACCOUNTABLE GOVERNMENT

Accountability must be more than a word. It has to be supported by effective institutions – auditors-general, ombudsmen, parliamentary committees, DPP, police, anti-corruption agencies and, above all, Parliament and its committees. The question is whether the ability of those who make accusations public enhances accountability by allowing early public discussion of alleged corruption based on the claims of accusers or with the benefit of the investigations and findings of independent professional bodies. There are many fields in which accusations are made to independent bodies and can be reported (e.g. complaints to the electoral commission). Other reports are privileged (e.g. statements of claim to courts of law – though these have to be in forms approved by the courts and made by professional lawyers subject to ethical rules). However, this is not usually the case with serious crime like terrorism and spying (noting that [redacted] was sacked by [redacted] for telling someone that they were about to 'kick out a Russian').

With respect to transparency, I will cite my overview paper for the 2008 International Anti-corruption Conference.

> "Transparency does not mean that all information is provided to everybody about everything. The revelation of some information would totally compromise institutional integrity and the ability of institutions to do their jobs as well as compromising important human rights. Public revelation of those suspected of corruption would both tarnish the innocent and protect the guilty. Revelation of whistleblowers can put lives at risk as well. The details of what information particular kinds of institutions provide to their members and to those they affect may need to be carefully worked out, balancing and respecting a range of important values."

FREEDOM OF SPEECH

The paper is correct to point out that freedom of speech is implied rather than explicitly recognized in the Australian Constitution. Queensland has not enacted a statutory bill of rights which guides the interpretation of legislation as Victoria, the ACT (and the UK) have done – and Queensland had not done following an EARC review in 1992. However, Queensland did enact the Legislative Standards Act of 1992 which requires the Parliament to have sufficient regard for 'fundamental legislative principles' including 'the rights and liberties of individuals and the institution of parliament' (LSA section 4.2). It is through this mechanism that the Office of the drafters of legislation, the Parliamentary Committees and ultimately the Parliament need to take heed of the International Covenant on Civil and Political Rights (ICCPR). Under Article 19 provides that:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order or of public health or morals.

I would emphasize clause 3's recognition of the special duties and responsibilities of those who are making accusations (especially if they hold or are seeking public office) and of the media. While a free media is of great importance, issues of national security and investigations of serious crime justify limits on media reporting. Freedom of the Press does not justify publishing of a raid on terrorists. Nor does it justify the potential commencement of an investigation into corruption.

Clause 3(a) specifically refers to rights and reputations which can be legitimately protected by law – though this must be done **through** law. Clause 3(b) refers to the protection of national security and public 'morals'. There are many who suggest that corruption involves a threat to security (e.g. Sarah Chayes *Thieves of State*) and the potentially antiquated reference to 'public morals' may be seen as applying to issues of public trust and public sector ethics. See discussion of reputation below.

REPUTATION OF ALLEGED OFFENDERS

Corruption by officials entrusted with state power is a threat to democracy and should be the subject of great public interest. The level of legitimate interest in public accusations of corruption will lead to public debate and a tarnishing of reputations even if there is no subsequent conviction. This is likely to be the case unless we get to the unfortunate state that corruption is so widespread as to be unremarkable or that allegations of corruption are so widespread as to fail to raise public concern.

As indicated earlier, I think that the first protection should be the removal of any suggestion of privilege, qualified or otherwise, of unauthorized disclosure of accusations other than with the approval of the CCC (subject to oversight by PCCC). Secondly, exemplary damages should be available. Thirdly, I am happy for such disclosures to be criminalized with the safeguards indicated in my PCCC submission.

Where the accuser believes that the CCC should have gone for a public inquiry, they can go to the PCCC. One could envisage a legislated opportunity to go to court to seek an order to allow disclosure – held in camera with the CCC and the complainant as parties. However, I am not at all sure that this is needed.

FAIR TRIAL

The importance of, natural interest in, and public discussion of, corruption allegations make it difficult to ensure a fair trial even after charges are laid. This is the same problem faced for prosecutors and defenders in any high profile trial. This should not be exacerbated by debate over accusations when they are laid based on untested claims by the accuser. This will, in itself, make it more difficult to provide a fair trial - leaving the judges with the invidious choice of proceeding with a compromised process or aborting the trial because it is unfair and thereby allowing a probably corrupt person to get away with it.

EFFECTIVENESS OF THE CCC

The passage in the paper follows a similar line to those in my submissions (see, especially, first three paragraphs of PCCC report).