

JOINT MEDIA ORGANISATIONS

SUBMISSION TO QUEENSLAND CRIME AND CORRUPTION COMMISSION

MAKING ALLEGATIONS OF CORRUPT CONDUCT PUBLIC – IS IT IN THE PUBLIC INTEREST?

DISCUSSION PAPER

8 July 2016



The parties to this submission – AAP, ABC, APN News & Media, Australian Subscription Television and Radio Association, Bauer Media Group, Commercial Radio Australia, Community Broadcasting Association of Australia, Fairfax Media, Free TV, MEAA, News Corp Australia, NewsMediaWorks, SBS and The West Australian (collectively, the Joint Media Organisations) – appreciate the opportunity to make a submission to the Queensland Crime and Corruption Commission’s (Queensland CCC) *Making allegations of corrupt conduct public – Is it in the public interest?* Discussion Paper (the Discussion Paper).

Free speech, free press and access to information are fundamental to a democratic society that prides itself on openness, responsibility and accountability. This includes the public’s right to know how they are being governed, including the right to be informed about potential, or alleged, corrupt conduct of public sector officials within the jurisdiction of the Queensland Crime and Corruption Commission. This jurisdiction includes departments and statutory bodies; the Queensland Police Service; government-owned corporations; universities; local governments; courts, tribunals and boards; prisons and state and local politicians.

In short, the public interest is served through the ability to make public the allegations of corrupt conduct by Queensland public officials. To gag corruption allegations regarding public officials only serves to do Queensland and the Queensland public a disservice.

SECTION A

Section A contains detailed analysis of the elements for consideration posed by the Queensland CCC in the Discussion Paper.

OPEN, TRANSPARENT AND ACCOUNTABLE GOVERNMENT

The protection of political or public sector interests in Queensland must not be allowed to trump the Queensland public’s right to know of allegations in their own backyard.

The Discussion Paper states that public discussion and debate are important elements of open, transparent and accountable government, and that open discourse informs the development of opinions, allowing people to participate more fully in their government and hold elected and other public officials to account. We agree with this position.

The media plays a crucial role in a democracy in accessing, analysing and disseminating information about issues and events which affect our community – including holding elected and other public officials to account. This has been evidenced previously in Queensland, and also in every other state and territory and at the national level.

The unhindered ability for public scrutiny of allegations of corruption is a vital aspect of open, transparent and accountable government in Queensland. It is critical for all Queenslanders that reporting of allegations of corruption not be constrained.

FREEDOM OF SPEECH

The proposal in the Discussion Paper – that legislation and/or other measures be introduced to prevent allegations of corrupt conduct within the Queensland public sector being made public – unjustifiably undermines the Queensland and Australian public’s right to know about how the state of Queensland is being governed and administered.

Overarching issue – Australia lacks a legislative protection for freedom of speech

The right to free speech, a free media and access to information are fundamental to Australia's modern democratic society, a society that prides itself on openness, responsibility and accountability.

However, unlike some comparable modern democracies, Australia has no laws enshrining these rights. In the United States of America the right to freedom of communication and freedom of the press are enshrined in the First Amendment of the Constitution and enacted by state and federal laws. In the United Kingdom, freedom of expression is protected under section 12 of the *Human Rights Act 1998* subject to appropriate restrictions to protect other rights that are considered necessary in a democratic society.

In the absence of such clear protections, there are a number of keystones that are fundamental in Australia to ensure the public's right to know – including regarding allegations of corruption of Queensland public sector officials:

- The ability for journalists to go about their ordinary business and report in the public interest without the risk of being prosecuted, including jailed, for public interest reporting;
- Protection of confidential sources;
- Protection for whistle-blowers; and
- An appropriate balance of power between the judiciary, the executive, the legislature and the media.

The proposal in the Discussion Paper – that legislation and/or other measures be introduced to prevent allegations of corrupt conduct within the Queensland public sector being made public – unjustifiably undermines the Queensland and Australian public's right to know about how the state of Queensland is being governed and administered.

Importance of jurisprudence and implied freedom of political communication

In prompting the consideration of freedom of speech, the Discussion Paper includes reference to some of the number of existing legislative limitations on freedom of speech, for example defamation, privacy and anti-discrimination law. Such laws and associated and evolving jurisprudence provide parameters for freedom of speech. They also provide important indicators and input for the CCC to consider in the context of this Discussion Paper.

We draw particular attention to *Lange v Australian Broadcasting Commission (1997)*¹. This case is notable in the context of the CCC as, with respect to the CCC investigations into corrupt conduct, it can only investigate those holding public office per section 15 of the *Crime and Corruption Act 2001 (Qld)*², that being those in government or inherently political.

In Orders in the Lange case, McHugh J stated:

In the last decade of the 20th century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate

¹ 189 CLR 520

² http://www.austlii.edu.au/au/legis/qld/consol_act/caca2001219/s15.html

interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials. Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and political life of Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government or administration, or in any part of the country, is not of relevant interest to the public of Australia generally. If this legitimate interest of the public is to be properly served, it must also follow that on occasions persons with special knowledge concerning the exercise of public functions or powers or the performance by public representatives or officials of their duties will have a corresponding duty or interest to communicate information concerning such functions, powers and performances to members of the general public'.³

Non-disclosure laws undermine key elements of free speech

We draw to the attention of the CCC submissions made by the Joint Media Organisations to non-disclosure provisions and associated penalties in recent amendments to Commonwealth legislation, particularly national security amendments.

Issues with non-disclosure provisions include:

- *Penalising, including criminalising, journalists for undertaking and discharging their role in a modern democratic society* – particularly where non-disclosure provisions do not include an exception for journalists and the media for public interest reporting; and
- *Further eroding the already inadequate protections for whistle-blowers and having a chilling effect on sources* – particularly as penalties, including criminalisation, apply to anyone disclosing information (including public sector employees and external persons) which further discourages whistle-blowing and journalists' sources.

Such an approach does not serve a free and open society and a modern democracy, and one that is attempting to deal with transparency and corruption issues as a societal issue.

It should be stated here that our view is regardless of the penalties applied to the non-disclosure offence, including whether or not journalists are criminalised. This issue remains that freedom of speech would unjustifiably be eroded under the Queensland CCC plans.

Independent reports show non-disclosure laws are arguably invalid

With regard to non-disclosure laws, we reference two important sources of independent review.

- *Independent National Security legislation Monitor Review of section 35P of the ASIO Act*

The Independent National Security Legislation monitor, the Hon Roger Giles AO QC, issued *Report on the impact on journalists of section 35P of the ASIO Act*, in October 2015⁴.

That report states:

Section 35P is arguably invalid on the basis that it infringes the constitutional protection of freedom of political communication. Section 35P is also arguably inconsistent with Article 19

³ McHugh J, 182 CLR 21 [at 15] <https://jade.io/article/67850>

⁴ https://www.dpmc.gov.au/sites/default/files/publications/inslm_report_impact_s35p_journalists.pdf

of the International Covenant on Civil and Political Rights and so not in accordance with Australia's international obligations.

- *Australian Law Review Commission inquiry into Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*

In March 2016 the ALRC tabled the final report of the inquiry into *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*⁵.

Regarding the issues raised by the Joint Media Organisations in our submission⁶, the ALRC recommended:

- *Counter-terrorism and national security laws that encroach on rights and freedoms should nevertheless be justified, to ensure the laws are suitable, necessary and represent a proper balance between the public interest and individual rights.*

The ALRC referred the matter to the INSLM as the independent arbiter of national security related matters.

REPUTATION OF ALLEGED SUBJECT OFFICERS

We do not dispute that modern media publish widely or that a report that a particular person is being investigated by the CCC may impact on that person's reputation. However:

- There is no difference between a report that the CCC is conducting an investigation as compared with a report that ASIC, Fair Trading or any other similar body is investigating;
- Pursuant to longstanding principles of defamation law an allegation that there may be reasonable grounds to suspect a person has engaged in wrongdoing because they are being investigated is distinct from an imputation that that same person has been charged and/or that such a charge is well-founded. We note here *Favell v Queensland Newspapers* [2014] QCA 135⁷ at [31];
- There is currently no blanket ban prohibiting all reporting of CCC proceedings/the identification of those being investigated. The prohibition in section 202 of the *Crime and Corruption Act*⁸ is limited to reports of:
 - (a) An answer given, or document or thing produced, at a commission hearing, or anything about the answer, document or thing; or
 - (b) Information that might enable the existence or identity of a person who is about to give or has given evidence before the commission (witness) at a hearing to be ascertained, assuming one of the various exemptions to this prohibition does not apply.

That does not prevent, for example, a report that a particular person has been referred to the CCC for investigation, that the CCC has accepted that a particular person should, in fact, be investigated or the outcome of a CCC investigation.

⁵ <https://www.alrc.gov.au/publications/freedoms-alrc129>

⁶ http://www.alrc.gov.au/sites/default/files/subs/70.org_joint_media_organisations_final.pdf

⁷ <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/qld/QCA/2004/135.html?stem=0&synonyms=0&query=favell%20and%20queensland%20newspaper%20and%20high%20court>

⁸ http://www.austlii.edu.au/au/legis/qld/consol_act/caca2001219/s202.html

Given the point directly above – that the law currently does not gag allegations of corruption being made public – it is of concern that the Discussion Paper lacks evidence of the ‘problem’ that ‘warrants’ a ‘fix’ consisting of legislation and other options to prevent allegations of corrupt conduct of public officials being made public. We further this position at **Section B** of this submission.

With regard to considering the reputation of alleged public officials, we submit that the more appropriate and adapted way to protect reputation is to allow for a full report of CCC proceedings – which would include the person the subject of the investigation defending him or herself – and amend the *Crime and Corruption Act* to include a requirement that in the event that the CCC finds the person has not engaged in any wrongdoing that a CCC corrective notice must be published.

That amendment could include a requirement that the CCC:

- a) Provides the person the subject of their investigation with a letter of comfort or other official notice exonerating their conduct;
- b) Publish a notice on its website advising all-comers that the person has been cleared; and/or
- c) Publish notices in the media to the same effect.

We note that these are all measures which media publishers already implement to correct the record and can be engaged in on a without admission of liability basis.

FAIR TRIAL

We reiterate the position articulated under the ‘Reputation of alleged subject officers’ section of this submission, citing *Favell v Queensland Newspapers*, that there is a difference between an investigation into alleged conduct and charges being laid.

Further:

- Any matter being investigated by the CCC will be a substantial amount of time away from committal, let alone trial, by which time the “fade factor” will have taken effect. We cite *R v McNeill* [2015] NSWSC 357⁹ per Johnson J at [66]-[77]; and *Obeid v The Queen [No 2]* [2016 HCA 10]¹⁰ at [17];
- It is also well established that a fair trial can be had even in the face of extensive pre-trial publicity:
 - *R v Ferguson; ex parte A-G (Qld)* [2008] QCA 227¹¹, particularly at [43] – [44]:

‘Jury deliberations take place in an environment peculiarly conducive to the unbiased assessment of evidence with a view to determining guilt or innocence. An empanelled juror does not commence his or her role as a person undertaking a novel or foreign role. Jurors are aware consciously or subconsciously of the long tradition in this country of criminal trials in which 12 impartial men and women are the deciders of fact, of the unquestioned integrity of the process and its importance to society’s fabric. The solemnity and social significance of the jurors’ role is reinforced by the formality of the trial and the court room setting. As we have noted, jurors are sworn or make an affirmation to give a true verdict according to the evidence. The trial judge’s opening remarks are calculated to reinforce instructions already received by the jury panel.

⁹ <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NWSC/2015/357.html>

¹⁰ <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2016/10.html>

¹¹ <http://archive.sclqld.org.au/qjudgment/2008/QCA08-227.pdf>

And, of course, the trial judge's instructions should be fashioned in light of the circumstances of the case with a view to assisting the jury to give a verdict uninfluenced by any irrelevant or improper considerations. Where there has been extensive pre-trial publicity, it is customary for the trial judge to explain the obvious points of distinction between media reports and the evidence presented in criminal cases. Here, the perceived problem lies not so much with any alleged inaccuracy in reporting (although there may well have been some) but more with the revelation of prior convictions, the details of those convictions, the respondent's alleged potential to re-offend and the general opprobrium heaped on the respondent because of his convictions.'

- And more recently *Hughes v R* [2015] NSWCCA 330¹² and in the Judgement Summary of that case. We highlight here that *Hughes v R* is particularly relevant in Queensland where it is an offence for a juror to conduct independent inquiries about the accused¹³.

A more balanced and proportionate method of dealing with this concern would be to open proceedings but allow a suppression order making power in circumstances where it can be shown the order is necessary because the public interest in the right to a fair trial outweighs disclosure.

EFFECTIVENESS OF THE CCC

We take the responsibilities associated with public interest reporting seriously. As such we have responsibilities to investigate and report an allegation of corruption in the event that we become aware that such an allegation has been made. The Queensland and Australian public has a right to know of alleged corruption of public officials. We cannot express this more clearly. It is the expectation of the tax paying public that complaints processes are robust and not impacted by external forces, even in the digital age.

Further, publication of an allegation may – or may not – be the trigger by which persons involved may seek to undertake additional potentially illegal activities such as destroying evidence, developing or disseminating fabrications. A concern of this nature is better addressed by making the current offence of obstructing the CCC more robust¹⁴, for example by increasing the penalty applicable – rather than prohibiting publication of the allegations.

Lastly, with specific respect to the concern that publicity artificially elevates the credibility of the complaint, conversely publicity can also permit the subject of the complaint to defend their reputation. Publicity also provides an opportunity to anyone who has information pertinent to an investigation to come forward and share it – even those the CCC may not have previously been aware of.

SECTION B

This section deals with elements for consideration that the media organisations believe vital to considering this matter fully. We note that these elements are excluded from the Discussion Paper.

¹² <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NWCCA/2015/330.html?stem=0&synonyms=0&query=%22hey%20dad%22%20and%20apeal>

¹³Section 69A, *Jury Act 1995*, http://www.austlii.edu.au/au/legis/qld/consol_act/ja199591/s69a.html

¹⁴ See section 210 of the *Crime and Corruption Act*, http://www.austlii.edu.au/au/legis/qld/consol_act/caca2001219/s210.html

LACK OF EVIDENCE TO SUPPORT GAGGING PUBLICATION OF CORRUPT CONDUCT ALLEGATIONS

The CCC provides no evidence to justify why allegations of corrupt conduct of public officials should be gagged and/or why gagging is in the public interest

The Discussion Paper does not include any evidence or details of the ‘problem’ that the CCC is attempting to ‘fix’ by legislation and/or other measures to prevent allegations of corruption regarding public officials being made public.

Sound public policy making demands that the first step is to identify and evidence the ‘problem’ to be solved. The Discussion Paper does not do this.

Further, the Discussion Paper does not quantify the claimed issue. This makes it problematic to assess the proportionality of a proposed ‘fix’ for the ‘problem’.

We believe that this is a fundamental issue with the Discussion Paper, and on that basis alone we do not support any proposals to amend the existing framework – and certainly do not support any attempts to gag publication of corruption allegations regarding Queensland public officials.

In fact, Parliamentary scrutiny has consistently supported transparency and public scrutiny

Furthermore, the Discussion Paper states that Parliamentary scrutiny of the CCC’s predecessor, the Criminal Justice Commission, decided on multiple occasions that the ongoing requirement for openness and transparency outweighed the need for any legislative amendments¹⁵.

Callinan and Aroney Review

In 2013 the Hon Ian Callinan AC and Professor Nicholas Aroney, as the Independent Advisory Panel, undertook and reported on a *Review of the Crime and Misconduct Act 2001 and Related Matters*¹⁶ (the Callinan and Aroney Review).

We believe that the following issues must be taken into account when considering the recommendations of the Callinan and Aroney Review.

A report about the CMC, not the CCC

Callinan and Aroney made 17 recommendations (excluding the 6 parts of recommendation 3) regarding the Crime and Misconduct Commission (CMC).

The Callinan and Aroney Review was highly critical of the CCC’s ‘predecessor’, the Crime and Misconduct Commission’s (CMC) engendering of publicity and for setting out to court the media¹⁷.

Regarding the media, Callinan and Aroney stated: *‘This is no criticism of the media. They are entitled to proceed critically or otherwise as they wish¹⁸’* and in particular noted the *‘generally restrained approach to the avalanche of sensitive documents released at the behest of the CMC¹⁹.’*

¹⁵ p4 and 5 of the Discussion Paper

¹⁶ 28 March 2013,

¹⁷ p208 and 209, the Callinan & Aroney Review,

http://www.justice.qld.gov.au/data/assets/pdf_file/0020/204536/queensland-government-response-to-cmc-reviews.pdf

¹⁸ Ibid, p209

¹⁹ Ibid, p209

CASE STUDY

During the recent Brisbane City Council elections the ABC broadcast a story highlighting the LNP administration's apparent failure to divulge a proposed land deal involving an LNP donor.

The proposed deal involved public land being sold for \$3.3million without the matter being disclosed to ratepayers. This issue only came to light because of a whistle-blower, who the ABC did not identify. It was later revealed the matter was referred by a government department to the CCC for assessment.

The story raised many issues of public importance – the role of political donations in public administration, the obligations of political parties to disclose dealings with donors, and the levels of transparency in government.

As this example demonstrates, there are occasions media revelations precipitate the referral of matters to the CCC, and along with it an attempt to “political point score”. In this case, the CCC found that while it would take no action it did find that the matter highlighted how “certain practices in local government may give rise to perceptions of allegations of corruption”.

The reporting of this matter did not impact on the CCC's effectiveness in assessing the complaint, nor denied any person natural justice.

In fact, the reporting of this matter highlighted the importance of transparency and accountability for public and elected officials, as well as the need for a debate about donation disclosure obligations.