

12 August 2016

Mr Alan MacSporrان QC  
Chairperson, Crime and Corruption Commission  
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Brisbane QLD 4001

Dear Mr MacSporrان

### **Publicising corrupt conduct allegations**

Thank you for the opportunity to make a late submission to your current inquiry on this important topic.

Your discussion paper acknowledges the complexity of this important issue, along with the various times that it has been considered, without fruitful resolution, in the past.

In my view, the complexity of the issue is underscored by at least three considerations which are not explicitly identified in your discussion paper:

- The difficulty of reconciling any blanket restriction on the ability of complainants or other interested parties to publicly confirm or discuss a corruption allegation, with the fact that such discussion may be quite justifiable, or even desirable or inevitable, in a number of circumstances – for example:
  - Where there is a legitimate public interest in a matter because it has already found its way into the public domain by some other means (whether legitimate or illegitimate);
  - Where the Commission itself determines that it is in the public interest to confirm that it is conducting a particular investigation;
  - Where the Commission itself determines that it is in the public interest to maximise publicity surrounding the matter, for example where it decides to proceed by way of public hearing, and when it decides to itself make public statements or reports about a matter, whether of an interim or final nature.
- The problem, reflected in the above, that while ‘publicising of allegations of corrupt conduct may adversely affect the CCC’s ability to perform’ its corruption function (to quote your discussion paper), it is also true that this function may also be *served* by official or unofficial publicising of allegations, for example where this has the effect of prompting the disclosure of other allegations or information relevant to the matter. This gives an element of unreality, disingenuousness or unreasonableness to any blanket rule prohibiting other individuals from discussing particular matters.
- Of necessity, any blanket e.g. criminal prohibition upon discussion of allegations would necessarily have to be subject to a proviso, such as ‘without reasonable excuse’ – which begs the same questions as to when such discussion is or is not reasonable, and makes difficult the chances of successful prosecution of the offence, even when justified. If the

result is the creation of an offence which is never likely to be easily prosecuted, then law reform of this kind is plainly inadvisable.

In my submission, any regime to reduce the incidence of unreasonable, anti-social or malicious discussion of corruption allegations must properly take these challenges into account, and will likely be composed of a number of more subtle elements than may have been previously considered. Any such regime should recognise that there are two overriding policy objectives aimed to be served by such a restriction:

- The primary objective of protecting the reputations of individuals who have not (yet) been made the subject of any adverse findings, charges or convictions through due process; and
- A lesser objective of providing the Commission with greater ability to control when and how the public discussion of allegations occurs, in order to help minimise unhelpful discussion and maximise helpful discussion.

Options that should be considered for better achieving these objectives include any or all of:

- 1) Creation of an overall legal obligation upon complainants or third parties to not disclose the fact of an allegation or investigation to any other person, without reasonable excuse – but not in the types of forms previously suggested:
  - Examples of ‘reasonable excuse’ should be provided – such as disclosure in the course of seeking legal or other professional or personal assistance, or if reasonable in order to respond to a matter already in the public domain, or if the disclosure constitutes a public interest disclosure made consistently with the *Public Interest Disclosure Act* (for example, a public disclosure made after the Commission has failed to act on a matter within a reasonable time);
  - The liability should be a civil rather than criminal one, given that the damage of disclosure is primarily damage to personal reputations – i.e. any law reform should fill the gap in current defamation law by creating a right for aggrieved persons to sue for damages in circumstances where normal defamation law would not protect them;
  - The relevant provisions could enable the Commission to take this action on behalf of the aggrieved person, with their consent, and with the ability to recover costs in the normal way, in order to give the Commission a greater role in ensuring that the creation of this penalty is regarded as a real threat by those abusing their current freedom to publicise allegations.
- 2) A power for the Commission to make a declaration that a particular matter or class of matters are ones where the complainant or other parties must not disclose the fact of the complaint or investigation to any person, again without reasonable excuse – supported by a criminal penalty in the event that the declaration is contravened.

Such a power would reinforce the general civil obligation above, by enabling the Commission to more directly impose restrictions on an ‘as needs’ basis. The classes of matters involved could include, for example, any allegation made against any political candidate within three months of an election. The onus would appropriately lie on the Commission to make reasonable declarations that match the circumstances, or particular higher sensitivity matters.

The relevant provisions should stipulate the purposes for which it is valid for the Commission to make such a declaration, including to provide additional protection to the reputations of individuals, to safeguard the effective investigation of a matter, to ensure the protection of the complainant or of other sources, and so on.

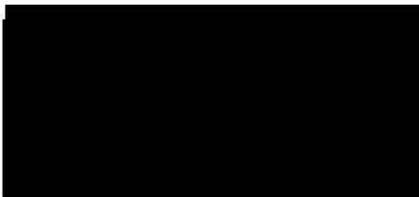
- 3) The Commission could be provided with the power to require individuals to enter into an enforceable undertaking not to make public disclosures, without reasonable excuse, regarding the allegation or investigation, so that complainants are asked to acknowledge and sign their obligations in this respect, before their complaint is accepted. Appropriate penalties would apply if the undertaking is breached. Again, guidance would be needed on what represented reasonable disclosure/discussion, and what represents unreasonable disclosure/discussion.

This mechanism would be substantially similar to (2) above, but would have the advantage of ensuring that individual complainants had no basis on which to claim that they were unaware of their obligations.

I hope that these suggestions may be useful to the Commission.

You are welcome to publish this submission.

Yours sincerely



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