Gary Duffy

[redacted]

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Submission to the Crime and Corruption Commission

Publicising allegations of corrupt conduct Concerns:

1. damage the reputation of the person alleged to have engaged in corrupt conduct, and
2. the right to freedom of speech within current legal constraints and the need for open and accountable government.
3. may adversely affect the ability of the Crime and Corruption Commission (CCC) to perform its corruption function,
4. compromise the fair trial of persons charged with corruption.

What the Commission wish to do is make it illegal to publish that a submission has been made to the commission as this may damage the reputation of the complained of person or persons.
First, there is no evidence that any reputations have ever been harmed. In the below cases involving [redacted]

Section 1, Case 1: Damage the reputation

[redacted]

In this case we need to apply the Subjective test and allow people to form a fact based opinion and not just wait for a result.
Subjectivity testing a complaint made can be a personal expression of assessment of expressing or obtaining a CORRECT answer to any allegations.
Subjective assessment is a form of questioning which may have more than one correct answer and/or more than one way of expressing the correct answer, whereas opinion might in addition to- also consist of unsubstantiated information, in contrast to knowledge and fact-based beliefs.

[redacted]

Pursuant of Right to Information act

Requirements of Administrative Decision Makers

Decision makers are required to apply the law to each access to information application. The exercise of any powers by a delegated decision maker is subject to the common law and other principles. In case 1, we have a Mayor who had access to the information about a complaint before the CMC (CCC). [redacted]

In the Defamation act. To Publish:

The act of publishing information (verbally or in writing) about a person that insinuates or accuses them of things which would lower that person's reputation in the eyes of the public.

With what is proposed, the CCC will have to alter the definition of Publish, otherwise any person who even speaks to another person about a complaint made to the CCC would be guilty of a crime and this crime would also be a Civil matter pursuant of The Defamation Act 2005.

[redacted]

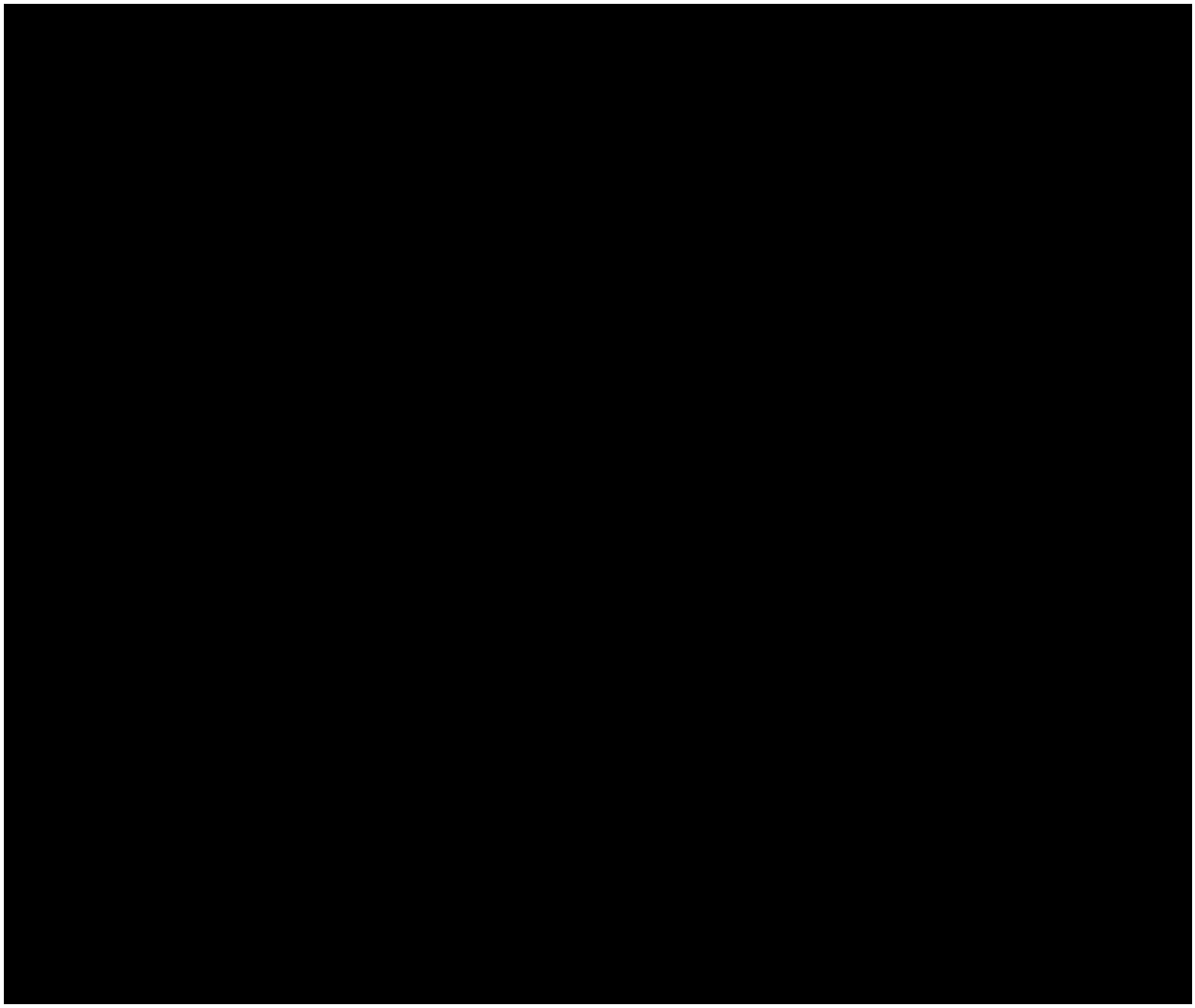
There is clear evidence that a reported investigation to be carried out by the CCC does not do reputational harm to a reasonable person who has all the correct facts and can make up their own opinion.

We do have to apply the "reasonable person test" when looking for reputational harm and this has to be applied when considering the implantation of new laws that try to qualify what a reasonable persons considers as harm.

In tribunals - and increasingly Commission investigations as well – it is clear that politicians and governments may be subject to greater criticism and insult than ordinary private individuals and that consequently the law will offer them less protection. This is due to the fact that politicians bear great responsibility for leadership and representation of their constituents and their country, and because they have greater access to remedies than most ordinary people.
This access to greater access to remedies places the public servant or elected official in a position where they have a media department who can mitigate damage and scrub the internet of negative comments and publications by assigning these publications to below the fold or into the back pages of search engines using clever catch words and key phrases, These instruments and remedies are just not available to the every day private person.

Of course the situation that has so often prevailed is the opposite: government officials often invoking charges such as criminal and civil defamation against critics and against persons making Public Interest Disclosure complaints.

Case 3:



This gives a general comparison between when a public official is referred to the CCC for investigation into their responsibilities to the position as a public servant where there is no measured damage and in fact after conclusion of the investigation the official is seen as a clean white sheet, and the reputational damage done to a private person when the Public

servant who has unlimited resources, uses the media to advantage a person who speaks out against them.

The European Court of Human Rights has ruled unanimously that because *"freedom of political debate is at the very core of the concept of a democratic society ... the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards private individuals." In addition, "the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician."*

Identifying and reporting a public official who is being complained off to a commission, a tribunal or a Committee for a determination of illegality or misconduct should be a major part of this freedom of political debate and criticism of government.

Currently there are no laws preventing the publishing of cases before the courts of private persons and as public servants, politicians and governments rightly so should be subject to greater criticism and insult than ordinary private individuals and that consequently the law should offer them less protection as they have many rules and guidelines that overlap where they can seek protection and remedy rectification of any reputational harm or damage done.

Damage to reputation needs to be an identified issue, currently the CCC has not identified or proven any cases where this has occurred. In proving and identifying any cases there needs to the reasonable thinking person test applied, and if there is no application of the test than there are no grounds for the CCC to pursue reputational damage as a just cause for introducing a law that will protect a public official or public servant from private persons but will not offer protection for the private person from a public official or public servant.

In **R v Thomas Sam; R v Manju Sam (No. 17) [2009] NSWSC 803; Johnson J P19:**

19 The identification of features of each Accused, which were to be attributed to the reasonable person in each case, must not have the effect of turning the required objective test into a subjective test.

20 I took the view that the attributes of each Accused, which could be taken into account for the purposes of the reasonable person test, ought be objective matters which the evidence demonstrated attached to each Accused."

In each case the Public should be given opportunity to form its own opinion and this opinion will be based on the knowledge that is held in the community. In the case against [redacted], the facts remained that there was a strong public interest in regards to the performance of his duty as a public official handling hundreds of Millions of dollars of public funds and being in the position where he was permitted by the council to make those decisions on contracts up to $10 Million dollars without having to put these proposals before council for approval. [redacted]

To put the reasonable person test to this, the public announcement [redacted] regarding the matter held substantial weight [redacted], [redacted]

[redacted]

There needs to be a test based on the standard of a reasonable hypothetical person: *The Queen v Lavender* [2005] 222 CLR 67 at 87-88; *R v Edwards* [2008] SASC 303 at [414]-[415].

10 Several passages in the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ in *The Queen v Lavender* shed light upon the nature of the reasonable person test. It is helpful to set these out in some detail to assist an understanding of the relevant principles, and their application to the present case.

11 Part of the directions of the trial judge to the District Court jury in *The Queen v Lavender* was extracted, without criticism, in the joint judgment at 73-74 [14] (emphasis added):

> *"Now members of the jury, they are matters for you to determine. A determination of this question of negligence and the degree of negligence is an objective test. You have to decide whether - you have to compare the conduct of the accused as you find it to have been with the conduct of a reasonable person who possesses the same personal attributes as the accused, that is to say a person of the same age, having the same experience and knowledge as the accused* [in] *the circumstances in which he found himself, and having the ordinary fortitude and strength of mind which a reasonable person would have, and determine on that basis whether the Crown has made out its case. In other words, it is an objective test. The Crown does not have to prove that the accused appreciated that he was being negligent or that he was being negligent to such a high degree. It is your task to determine whether having decided on the conduct of the accused, whether his actions amounted to negligence based upon, as I say, what you think a reasonable person in the position of the accused would have done .*
>
> *The Crown says that when you look at it on that basis, you would be satisfied beyond reasonable doubt that a reasonable person in the position of the accused, that is to say, of his age and experience and with the knowledge that he had of the circumstances at the time and being a person of normal fortitude and strength of mind would never have done what he did. A reasonable person in that situation would have realised that there was a very high risk of death or serious injury by proceeding into the bush in circumstances, the Crown says, where he knew that he could not see properly, his vision was obscured by the vegetation and by the loader itself to some extent, where he knew that there were young boys, the Crown says, behaviour was always going to be unpredictable* [sic] *, and the Crown says that when you compare the actions of the accused with what you might expect a reasonable person in his position to have done, you would be satisfied beyond reasonable doubt that those actions were negligent, they were deliberate and that they caused the*

death of Michael Milne and that they were so negligent, that is to say they fell so far short of the standard of care which a reasonable person would have exercised in the circumstances and involved such a high risk that death or really serious bodily harm would follow, that they merit criminal punishment.

If you are so satisfied members of the jury, then your verdict in respect of that count will be guilty, and you need not proceed any further. If you are not so satisfied as to all of those elements, then your verdict in relation to that count will be not guilty and you would go on to consider count 2.

Can I just reiterate members of the jury, it is immaterial in this case both in relation to count 1 and count 2 what the accused believed to be the case at the time. The test is an objective one, that is to say you must try to put yourself in a position of a reasonable person in the position of the accused, same age, knowing what he knows and a person of ordinary fortitude and strength of mind, and ask yourselves would that person have done what the accused did . Was it reasonable for him to have done that? If not, were his actions negligent, were they deliberate, and I do not mean deliberate in the sense of intending to hurt Michael Milne, no one has suggested that, but deliberate in the sense that he had control over his vehicle. Were the actions the cause of Michael Milne's death and were the actions so far short of the standard of care which a reasonable person would have exercised, and did they involve such a high risk of death or really serious bodily injury that [it] *would follow that they merit criminal punishment?"*

12 At 74 [15], Gleeson CJ, McHugh, Gummow and Hayne JJ said (emphasis added):

"For the purposes of one of the subsidiary issues, it is to be noted that, although the trial judge described the test as 'objective' he told the jury, repeatedly, to have regard to the circumstances in which the respondent found himself and 'the knowledge that he had of the circumstances at the time'. The jury were told to put themselves in the position of the respondent 'knowing what he knows' . Indeed, some aspects of what the respondent knew were relied upon by the prosecution, but the jury were invited to consider everything he knew. The reference to the immateriality of 'what the accused believed to be the case at the time', in the context in which that was said, was plainly a reference to, and a reiteration of, the earlier statement that ' [t] *he Crown does not have to prove that the accused appreciated that he was being negligent' . That the statement was so understood by those at the trial is evident from the fact that no objection was taken by trial counsel to that aspect of the directions."*

13 Their Honours stated in the joint judgment at 87-88 [59]-[62] (emphasis added):

"[59] The second reason is that the principle on which counsel based his argument, which applies in other contexts,

is a principle relating to honest and reasonable mistake of fact. The principle was recently discussed in this court in Ostrowski v Palmer [(2004) 218 CLR 493] *. As the decision in that case illustrates, the principle concerns mistakes of fact. The belief concerning which counsel sought a direction was a (supposed) 'belief that it was safe to proceed'. Such a state of mind involves an opinion. It might be based upon certain factual inferences or hypotheses (the respondent did not give evidence, so the jury were not told by him exactly what facts or circumstances were operating in his mind), but it necessarily involves an element of judgment. Indeed, it involves a conclusion by the respondent that his conduct was reasonable. The direction sought would be inconsistent with what has been described as the objectivity of the test for involuntary manslaughter. The respondent's opinion that it was safe to act as he did was not a relevant matter. If there had been some particular fact or circumstance which the respondent knew, or thought he knew and which contributed to that opinion, and the jury had been informed of that, and counsel had asked for a direction about it, then it may have been appropriate to invite the jury to take that into account .*

[60] Counsel for the respondent in this court attempted to persuade the court that Nydam v R [(1977) VR 481] *should not be followed, and that manslaughter by criminal negligence requires a subjective appreciation by the offender that the conduct engaged in is unsafe. This would bring this form of involuntary manslaughter into disconformity with the other form of involuntary manslaughter dealt with in Wilson v R* [(1992) 174 CLR 313] *. Furthermore, it is erroneous in principle. This branch of the criminal law reflects the value placed by the law upon human life. Giles JA was right to say, in the present case, that 'appreciation of risk is not necessary for a sufficiently great falling short of the objective standard of care, and … the law would be deficient if grossly negligent conduct causing death could not bring criminal punishment unless the accused foresaw the danger' .*

[61] The second issue concerns a point not taken at trial. The fact that it was not taken is significant, because it involves giving the trial judge's directions a strained interpretation, an interpretation inconsistent with what he had previously said, an interpretation that was clearly unintended, and an interpretation that did not occur to trial counsel at the time.

[62] The relevant directions are set out earlier in these reasons. As has been noted, the trial judge repeatedly told the jury to take account of the facts and circumstances known to the respondent when he was driving the front end loader near the boys. The judge also told the jury that it was not necessary for the prosecution to prove that the respondent appreciated that he was acting negligently . In the course of

saying those things (both of which were orthodox) he 'reiterate [d] *' that it was immaterial what the accused believed to be the case at the time. That is now said to be an error. In the next sentence the judge again directed the jury to take account of what was within the knowledge of the accused. Plainly, the reiteration was not intended, as is now submitted, to contradict what was said earlier, and what was said again in the very next sentence. In the context of what went before and after, the judge was reiterating that the respondent's view, at the time, as to whether his conduct was negligent, was immaterial. The jury were told to make their own judgment of the reasonableness of the respondent's conduct, taking account of what he knew at the time. They were told that his opinion, at the time that his conduct was safe, and therefore reasonable, was irrelevant. Those propositions are not contradictory. The reiteration of the second did not involve a withdrawal of the first, especially when the first proposition was repeated in the next sentence ."*

Johnson J

14 What is required then, is a comparison between the conduct of the accused person and the conduct of a reasonable person who possesses the same attributes of the accused (such as age, special knowledge and skills) in the circumstances in which he or she found himself, having regard to the ordinary firmness of character and strength of mind which a reasonable person has: *The Queen v Lavender* at 72-74; *R v Edwards* at [416]. The accused person's own knowledge of the circumstances is relevant when considering the circumstances in which the reasonable person is placed:

What we do understand is that in matters relating to public office there is a reasonable expectation that investigations are undertaken into compliance and when these suspected breaches in rules and regulations are broken the reasonable thinking person who is correctly informed does not see harm is done when there is no substantiated claims upheld, and even when there are claims where decisions are made reasonable thinking persons form their own opinion as to the effect it has made to how they think of the complained of person.

Section 2: Freedom of Speech

In India;
Right now, the conduct rules do bar government officials from criticizing the government on a radio broadcast, communication over any public media, in any document, in any communication to the press or in any public utterance. However, to make the rules specific to social media given presence of many officials on the same, a note is now proposed to be added to the All India Service (Conduct) Rules, 1968 saying: "The member of service shall also not make any such statement on television, social media or any other communication application.

Under the rules, a statement by an official is considered critical of the government if it has the effect of an adverse criticism of any current or recent policy or action of the Central Government or a State Government, which is capable of embarrassing the relations between the Central Government and any State Government or which is capable of embarrassing the relations between the Central Government and the Government of any Foreign State.

But the Government wants to also encourage officials to communicate to the media and Public using emerging platforms. This is a global position with governments to encourage accountability.

The civil law of defamation can legitimately be used to protect reputations against reckless and malicious allegations. But increasingly, courts have ruled that the scope of defamation law must be such that it does not prevent the media from carrying out their proper function - or stifle vigorous political debate. The historic judgment of the United States Supreme Court in New York Times v Sullivan (1964) established the principle that there should be greater latitude in criticizing a public official, even to the extent of mistaken or inaccurate statements, provided that these were not made maliciously. The court pointed out that public figures had far easier access to channels of communication to counteract false statements.[iii] In recent years, this approach has been adopted, in different ways, in a wide variety of other jurisdictions, including the United Kingdom, Australia, Pakistan, India, and Zambia. [iii] https://aceproject.org/ace-en/topics/me/mea/mea01i

Almost all government departments have media departments, all have greater resources and abilities to counter any criticism against a member of the department and the statements from the department counter balance any damage done either against the person involved or the department.

This was shown in the Queensland Health Payroll failures where even with all the failings the department suffered little damage and the persons charged with the administration of the failed payroll system had no reputational damage. Governments and public officials are almost expected to fail and this failure whether in compliance or in their duty is widely accepted to the general public and public officials seem to have an involuntary ability to migrate to a new department or position inside or outside the public service where reputation is restored.

Media's role as a public educator is in essence a combination of media's three other roles with a few added aspects. For example, media as a mechanism for transparency ensures voters are provided information necessary to fully evaluate the conduct of officials as well as the process at large. Media as a campaign platform ensures the public is educated in political agenda's of all participating parties and candidates equally. Media as open forum for debate and discussion ensures that voters can educate other voters, politicians, and officials. Without the freedom to communicate all aspects of the functions of a public entity there becomes the hidden aspect that will bring condemnation to the public entity.

With the CCC it is a public entity and it also needs to be open and accountable as its officers, and the freedom of speech of both private and public officials should not be shackled by laws

Media also educates through the transmission of voter information. Media also play an important analytical role, which enhances their ability to play their other roles, as watchdogs, forums for debate, and so on. For example, if media simply re-post or re-broadcast an EMB press release, transmission of information to the electorate may still warrant useful, but lacking in scope and context. Without analysis of the press release in relation to on the ground events, results, or opposing opinions, for example, the information received by the media audience is one-dimensional. In ensuring that the public has the level of informational detail required to make informed choices or action, media utilize

various tools of analysis. https://aceproject.org/ace-en/topics/me/me10/me10c These include:

- Opinion polls;
- Research and scrutiny of policies, records and reports;
- Investigative journalism;
- Use of expert input and opinion;
- Assess community needs and opinions;
- Measure candidates/parties deliveries against promises.
- Officials compliance to their public duties

Public officials have so many laws and regulations that there has to be the freedom of the public to discuss these rules and regulations and the application of these when they impact on the day to day lives of every private person from birth to death.

Section 3: affect the ability of the Crime and Corruption Commission (CCC) to perform its corruption function

I find this a really profound statement by the CCC, It almost glosses over the function of the CCC in the function of Crime.

Media informs the community and this can only enhance the function of the CCC.

The Local newspaper the Queensland Times runs a section every Monday called Name and Shame and this had its beginnings from the Queensland Police service in the publication of arrested persons on suspicion. A lot of times this encouraged others to come forward which helped build a stronger case against the accused.

Section 4: compromise the fair trial of persons charged with corruption.

Only a judge and Jury can determine this and what effect this may have, open to the court rules an application can be made to hold any trial in a different location where there will be no issue with a fair trial being compromised.

There are already dozens of rules and applications available within the legal system that the CCC does not have to bring in a new one that is suitable only for the protection of a public official or servant. Usually before a trial of a Public official there already have been many steps taken and determinations made.

A case in point is the [redacted] case where even though there was children involved, the publication and naming of [redacted] in the media did not impede the functions of a fair trial.

Signed

[redacted]

Gary Duffy