



Parliamentary Crime and Corruption Committee

Parliament House
George Street
Brisbane, Qld 4000

29 June 2016

Mr Alan MacSporran QC
Chairperson
Crime and Corruption Commission
GPO Box 3123
BRISBANE QLD 4001

Dear Mr MacSporran

RE: Publicising allegations of corrupt conduct – discussion paper

Thank you for your letter dated 1 June 2016, inviting the Parliamentary Crime and Corruption Committee ('Committee') to make a submission in relation to the Crime and Corruption Commission ('CCC') discussion paper entitled "Making allegations of corrupt conduct – Is it in the public interest?", a copy of which was enclosed with your correspondence.

Please find **enclosed** the Committee's submission to the CCC discussion paper. The Committee welcomes the CCC's decision to canvass wider public opinion on this important issue. The Committee acknowledges the CCC's efforts, in its current and previous iterations, to discourage the abuse of the CCC's complaints process for ulterior purposes and to raise awareness among the general public of the potential harms that can arise from the making of baseless allegations of corrupt conduct.

Yours sincerely

Lawrence Springborg MP
Chair

CRIME AND CORRUPTION
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COMMISSION

Prior consideration by the Parliamentary Crime and Corruption Committee

The Commission and predecessors of this Committee have given extensive consideration to the issue of whether the making of a complaint should be subject to an obligation of confidentiality.¹ The issue was first considered in 1992, when the then Parliamentary Criminal Justice Committee 'attempted to catalogue some principles which the Committee will observe, as far as possible, in the discharge of its functions'.² These principles were not intended to be exhaustive nor binding, but were to 'guide the Committee in the processes that it adopts and the decisions it makes, in report and recommendation formulation, and generally when it undertakes its functions'. The Committee hoped that these principles would also provide guidance to others, including the Commission.

One such principle was that 'where practical, all information from parliamentarians and local councillors and candidates should be forwarded to the Commission in confidence so that a complaint procedure can not be used for political purposes'.³ This principle was 'intended to prevent the situation where a complaint is forwarded or allegedly forwarded to the Commission and then publicised to cause embarrassment' to the subject of the complaint. The Committee observed that this had already become 'a particular problem area'.

The principle of confidentiality, as formulated by the Committee, was accepted by the Commission.⁴ In the public hearings held by that Committee during the first three-year review of the operations of the Commission in 1991, the Commission submitted that 'use was likely to be made of the complaints process in this way regardless of the operation of a code of conduct, unless the principle espoused had the force of statute, thus ensuring that the duty of confidentiality be subject to appropriate sanctions'. To this end, the Commission submitted to the Committee a proposal to amend the then *Criminal Justice Act 1989* to create:

*an offence for a person who has made a complaint or given information to the Commission to wilfully disclose or cause to be disclosed to any person other than the Commission, a Commissioner or an officer of the Commission or a member of the Parliamentary Committee or any person who is an officer or employee of the Committee, that fact, or the contents of any document or the description of any thing or any other information which might enable that fact to be inferred, without the authorisation of the Chairperson or his or her delegate.*⁵

According to the Commission, the proposed amendment had several objects. First, the amendment was intended to protect the privacy of any person against whom a complaint is made to the Commission, including police officers and other public servants. In so doing, it would ensure that natural justice is accorded to persons against whom complaints are made and would act as a deterrent

¹ Parliamentary Criminal Justice Committee, *Review of the Operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission: Part C – A Report Pursuant to Section 4.8(1)(f) of the Criminal Justice Act 1989-1992*, Report No. 18, 1992, pp 49-51; Parliamentary Crime and Misconduct Committee, *Three Year Review of the Crime and Misconduct Commission*, Report No. 71, 2006, pp. 50-1; Parliamentary Crime and Misconduct Committee, *Three Yearly Review of the Crime and Misconduct Commission*, Report No. 79, 2009, pp 37-8; Parliamentary Crime and Misconduct Committee, *Three Yearly Review of the Crime and Misconduct Commission*, Report No. 86, 2012, pp 73-9.

² Parliamentary Criminal Justice Committee, *Review of the Operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission: Part B – Analysis and Recommendations*, Report No. 13, 1991, p 91.

³ *Ibid*, p 100 (Principle 10).

⁴ Parliamentary Criminal Justice Committee, *Review of the Operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission: Part C – A Report Pursuant to Section 4.8(1)(f) of the Criminal Justice Act 1989-1992*, Report No. 18, 1992, p 66.

⁵ Parliamentary Criminal Justice Committee, *Review of the Operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission: Part C – A Report Pursuant to Section 4.8(1)(f) of the Criminal Justice Act 1989-1992*, Report No. 18, 1992, p 50.

against making complaints in order to disparage the reputation of an individual by publicising this fact. In this regard, the Commission acknowledged that 'because of its powers and position, significant stigma may attach to people publicly identified as under investigation by it'.

That the Commission had found it necessary to seek this amendment was, in the Committee's view, 'regrettable'.⁶ The Committee noted, however, that 'some recent examples of publicity surrounding complaints to the Commission highlight the necessity for such an amendment'. The Committee also considered it to be 'unfortunate that recent public discussion of this issue proceeded upon the fundamental misconception that the Commission had proposed the amendment with the intention of preventing public debate on matters under investigation by it'.⁷

As the Committee's comments suggest, the amendment sought by the Commission was at the time a matter of controversy and, ultimately, was not accepted by the then Government. The issue remained in abeyance until 2006 when the 6th PCMC completed its three-yearly review. The Local Government Association of Queensland submitted to the PCMC that the Act should:

*... be amended to provide that complainants are obliged to keep the existence and nature of complaints against Councillors (and other public officials) confidential until a proper and balanced investigation of the matters of complaint has occurred and the person subject of the complaint and complainant has received the CMC advice of the outcome.*⁸

The Association submitted that 'confidentiality is clearly appropriate prior to the conclusion of an investigation so that the presumption of innocence (in the public's mind) is not lost'. It also recommended that breach of the obligation of confidentiality should be subject to an 'appropriate sanction', such as that imposed by s. 216(3) of the then *Crime and Misconduct Act* (i.e. 85 penalty units or one year's imprisonment).

On this occasion, however, the Commission opposed the introduction of an obligation of confidence. In respect of the Government's decision in 1992 not to implement the recommendation made by the Commission to the PCJC, the Commission stated that:

It is not difficult to understand why there would be reluctance on the part of any government to introduce such legislation, as it would leave itself open to the criticism that both the government and the CMC would be less open and accountable. There would also be significant difficulties in enforcing any such legislation if the media were to publish details asserting them to be from 'anonymous sources'. Further problems would arise in maintaining confidentiality in the course of an investigation.

*The Commission's view is that it would be difficult to justify such an amendment where there is a public expectation that the work of the Commission in politically controversial or sensitive matters be open and transparent. It is important that public debate is not stifled by any legislative proscription. Consequently, the Commission does not support such an amendment.*⁹

The Committee decided 'on balance and having regard to the need for transparency', against recommending that the Act be amended so as to impose on complainants an obligation of confidentiality.¹⁰ The then Government agreed, noting that 'any amendment would be criticised as

⁶ Ibid, p 51.

⁷ Ibid, p 50.

⁸ Local Government Association of Queensland, Submission no. 17, p 4 (emphasis in original).

⁹ Crime and Misconduct Commission, Submission no. 34, p 4.

¹⁰ Parliamentary Crime and Misconduct Committee, *Three Year Review of the Crime and Misconduct Commission*, Report No. 71, 2006, pp 51 (Recommendation 14).

reducing openness and accountability'.¹¹ After briefly considering the issue, in 2009 the 7th PCMC endorsed this view.¹²

The issue was again considered by the 8th PCMC in the course of its three-yearly review, which was completed in 2012. At that time, the issue re-emerged after the Commission commenced investigations into allegations of impropriety made against Mr Campbell Newman, the then candidate for the seat of Ashgrove in the 2012 State election, relating to his time in office as Lord Mayor of the Brisbane City Council. The Commission was publicly criticised for initiating the investigations before the election, given that there was little prospect of it completing the investigations prior to that time. The Commission eventually determined that the allegations against Mr Newman were unsubstantiated.

Consequently, the 8th PCMC examined the issue in detail and reaffirmed the view that legislative amendment was undesirable. The Committee stated that:

*Looking at this matter from a broader perspective, however, the Committee does not consider that any amendment is required to the C&M Act, imposing a statutory obligation upon persons to keep the existence and nature of complaints against public officials confidential before finalisation. The Committee considers that enforcing such a provision would prove to be problematic given the media's ability to publish details from anonymous sources and furthermore, as stated by the CMC in previous reviews, despite its best efforts to do so, it would be difficult to enforce confidentiality throughout the course of an investigation.*¹³

The Committee also considered it undesirable to place any fetters upon the ability of the Commission to make public comment during an election campaign for the purposes of correcting information that is, or is about to be, incorrectly reported to the media:

*The Committee considers that any legislative prohibition on the CMC in being able to publicly provide information on its operations during an election campaign or otherwise, if it deemed such release necessary, would fly in the face of the independence of the CMC and its status as the lead integrity organisation in Queensland. The public should be able to have confidence in the CMC to be impartial in its operations and the Committee considers that the Government should also have sufficient confidence in the CMC to maintain its impartiality and allow it to perform its functions as required. The Committee considers the ongoing requirement for openness and transparency in the CMC's operations, outweighs the need for any legislative gagging of the CMC or any politician or aspiring politician, for that matter, during an election campaign.*¹⁴

The Committee instead recommended that the Commission should review its current media policies to determine 'whether any amendments are required to enhance the public confidence in the conduct of its operations'.¹⁵ The Committee also recommended that the Commission 'consider developing a specific, publicly available policy on dealing with matters referred to it about serving public officers or candidates for public office during an election campaign'.¹⁶

¹¹ Queensland Government, Department of Premier and Cabinet, *Government Response to PCMC Report No. 71: Three Yearly Review of the Crime and Misconduct Commission*, 5 April 2007, p 5.

¹² Parliamentary Crime and Misconduct Committee, *Three Yearly Review of the Crime and Misconduct Commission*, Report No. 79, 2009, p 37.

¹³ Parliamentary Crime and Misconduct Committee, *Three Yearly Review of the Crime and Misconduct Commission*, Report No. 86, 2012, p 78.

¹⁴ Ibid.

¹⁵ Ibid, pp 78-9 (Recommendation 25).

¹⁶ Ibid, p 79 (Recommendation 26).

Consideration by the Independent Panel

In contradistinction to this approach, in 2013 Callinan and Aroney recommended that the Act be amended to create an offence 'for any person (including an officer of the CMC) to disclose that a complaint has been made to the CMC, the nature or substance or the subject of a complaint, or the fact of any investigation by the CMC'.¹⁷ They recommended that the offence, which is based on s. 56 of the *Independent Commissioner Against Corruption Act 2012* (SA), should be accompanied by a 'suitable deterrent penalty for unlawful publication or disclosure by anyone'.¹⁸

Under this proposal, the offence would be subject to three exceptions:

*The first exception should be that, in the case of a public investigation, fair reporting of, and debate about it, will be permissible. The second exception should be as authorised by the Supreme Court in advance of publication or disclosure if there be a compelling public interest in such publication or disclosure. The third is the case of a person cleared or not proceeded against who authorises in writing disclosure of it. Disclosure could of course occur if otherwise required by law, such as by Court processes or Court order.*¹⁹

Callinan and Aroney also recommended that the restriction on publication or disclosure should remain permanent in circumstances where the Commission decides to take no further action in relation to a complaint or that the allegations made in a complaint are not substantiated, unless the subject of the complaint publishes or otherwise discloses that material themselves or gives their prior written consent to do so.²⁰

According to Callinan and Aroney, if 'carefully drawn' this proposed provision would:

*... continue to allow members of the public and the media, subject to the general law, to investigate, report, discuss and criticise the behaviour, 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 ...*²¹

The then Government indicated in its response to the Callinan and Aroney report that it accepted this recommendation in principle.²² The Government stated that the introduction of a prohibition on the disclosure of information about a complaint made to the Commission 'is consistent with most investigative processes undertaken by police or other bodies'. The dissemination of such information can not only jeopardise any ongoing investigation by the Commission, but may also 'lead to irreparable damage to the subject of the complaint and his or her family or associates'. The Government therefore recommended that the Act should be amended to include provisions that prevent the disclosure of information about a complaint once it has been made to the Commission. However, the Government ultimately decided not to proceed with this amendment.

¹⁷ Callinan AC, Hon I., & Aroney, N., *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, 28 March 2013, p 216 (Recommendation 8).

¹⁸ *Ibid*, p 217.

¹⁹ *Ibid*, p 216.

²⁰ *Ibid*, p 217.

²¹ *Ibid*, p 112.

²² Queensland Government, Department of Premier and Cabinet, 'Parliamentary Crime and Misconduct Committee – Inquiry into the Crime and Misconduct Commission's Release and Destruction of Fitzgerald Commission of Inquiry Documents; The Honourable Ian Callinan AC and Professor Nicholas Aroney – Review of the *Crime and Misconduct Act 2001* and Related Matters: Government Response', 3 July 2013, p 29.

Treatment in other jurisdictions

The Committee notes that South Australia is the only State in which an obligation of confidentiality is imposed on complainants. Section 56 of the *Independent Commissioner Against Corruption Act 2012* provides that a person must not, except as authorised by the Commissioner or a court hearing proceedings for an offence against this Act, publish, or cause to be published:

- (a) information tending to suggest that a particular person is, has been, may be, or may have been, the subject of a complaint, report, assessment, investigation or referral under this Act; or
- (b) information that might enable a person who has made a complaint or report under this Act to be identified or located; or
- (c) the fact that a person has made or may be about to make a complaint or report under this Act; or
- (d) information that might enable a person who has given or may be about to give information or other evidence under this Act to be identified or located; or
- (e) the fact that a person has given or may be about to give information or other evidence under this Act; or
- (f) any other information or evidence publication of which is prohibited by the Commissioner.

The maximum penalty for breach of s. 56 is \$150,000 in the case of bodies corporate and \$30,000 in the case of natural persons.

In New South Wales, there are protections against actions for defamation afforded to those who provide the Independent Commission Against Corruption with information, which are forfeited where the complainant publicises a complaint.

In Victoria, s. 42(1) of the *Independent Broad-based Anti-corruption Commission Act 2011* allows the IBAC to issue confidentiality notices during an investigation to persons who have provided information to it, where the IBAC is satisfied that there are reasonable grounds that the disclosure of this information would be likely to prejudice:

- (a) that investigation; or
- (b) the safety or reputation of a person; or
- (c) the fair trial of a person who has been, or may be, charged with an offence.

A person who is duly served with a confidentiality notice must not disclose information specified in the notice. Breach of this obligation carries a penalty of 120 penalty units or 12 months imprisonment or both.

However, a person is not prevented from disclosing information regarding a complaint prior to being issued with a confidentiality notice.

Submissions to the Committee's five-yearly review

The Committee received only one submission during its five-yearly review of the Commission that directly addressed this issue. That submission, by Professor Charles Sampford, 'generally supports' the proposal made by Callinan and Aroney. Professor Sampford described 'the practice of publicly reporting that you are "going to the CMC"' as an 'abomination'.²³ He submits that publicising a complaint should give rise to a presumption of ulterior motives – 'generally political or economic advantage' – since 'the last thing [a complainant] should contemplate is alerting the alleged wrongdoer and thereby giving the latter an opportunity to destroy evidence, coerce potential

²³ Professor Charles Sampford, Submission No. 15, p 7.

witnesses, or conduct and share stories among potential witnesses'. Professor Sampford therefore supports 'strong sanctions', including criminal penalties and exemplary damages, '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'.²⁴

However, in contrast to Callinan and Aroney, Professor Sampford submits that the complainant should be free to complain to the media after a 'reasonable interval (best defined by statute)' that the Commission has not fulfilled its statutory obligation to expeditiously assess the complaint. This interval should be sufficient to allow the Commission the 'time to consider and respond so that baseless complaints will be seen as such, and subject to defamation proceedings'.²⁵

More recently, the Legal Affairs and Community Safety Committee (LACSC) considered the issue as part of its consideration of the Crime and Corruption Amendment Bill 2015. In a dissenting report, the non-government members of the LACSC commended Professor Sampford's submission as 'sensible' and recommended that this Committee investigate as part of its five-yearly review 'a legal framework, broadly along the lines of that proposed by Professor Sampford'.²⁶

Recent developments

The issue has been revived by the recent Queensland local government elections. The Committee notes the Commission's advice that for the period January to March 2016, the Commission received complaints in relation to 29 of the 77 local governments.²⁷ For the period 13 February 2016 to 26 April 2016, the Commission received a 17 percent increase in complaints involving local governments relative to the same period in 2015, with complaints relating to local government accounting for approximately 25 percent of all complaints relating to public sector agencies received by the Commission.²⁸

The Committee understands that this increase in complaints occurred despite the Commission's attempts to discourage the use of its complaints process for political advantage and to raise public awareness of the reputational damage that can be caused by the making of baseless allegations.²⁹ The 'Don't Risk Your Campaign' education initiatives, which were promoted by the Commission and the Local Government Association of Queensland ahead of local government elections between 2004 and 2012, also failed to arrest an increase in complaints about candidates in the period immediately preceding the 2004, 2008 and 2012 local elections. The fact that significant increases in complaints about the conduct of candidates in local government elections are recorded quadrennially in the lead-up to each local government election, creates a strong presumption that many of these complaints are politically motivated.

In these circumstances, the Committee accepts the Commission's view that the steps taken by the Commission to increase public awareness of these issues and to discourage the publication of complaints made or purportedly made to the Commission have not resulted in 'an effective solution'

²⁴ Ibid, p 8.

²⁵ Ibid, pp 7-8.

²⁶ Queensland Parliament, Legal Affairs and Community Safety Committee, *Crime and Corruption Amendment Bill 2015*, Report No. 21, 55th Parliament, March 2016, p 21.

²⁷ Parliamentary Crime and Corruption Committee, 'Public Meeting with the Crime and Corruption Commission', Transcript of Proceedings, 14 March 2016, p 5.

²⁸ Crime and Corruption Commission, *Public Report to the Parliamentary Crime and Corruption Committee: Activities of the Crime and Corruption Committee for the period 13 February 2016 to 30 April 2016*, 23 May 2016, p 16.

²⁹ Crime and Corruption Commission and Local Government Association of Queensland, 'Local Government Candidates Urged to Conduct Honest Campaigns', Media Release, 8 February 2016; Crime and Corruption Commission, 'Local Government Elections 2016: A Message for Candidates from Alan MacSporran, Chairman of the CCC', Media Release, 7 March 2016.

to this issue. The Committee therefore supports the Commission's decision to canvass wider public opinion on this issue.

At the joint public meeting between the Commission and the Committee on 23 May 2016, the CCC Chairperson, Mr MacSporran QC advised the Committee that the Commission is considering making a recommendation that the Act be amended to include a strict liability offence in respect of publicising that a complaint has been made to the Commission before the Commission or the Queensland Police Service has had the opportunity to assess it.³⁰ The offence would operate in a similar way to public interest disclosures made under the *Public Interest Disclosure Act 2010*.

The Commission's discussion paper identifies a number of considerations as being central to the question of whether it is, on balance, in the public interest to allow allegations of corrupt conduct to be made public. On the one hand, considerations of openness, transparency and accountability tend to militate against the introduction of a confidentiality requirement for complaints because 'open discourse informs the development of opinions, allowing people to participate fully in their government and hold elected and other public officials to account'.³¹ So too does the implied right of freedom of political communication under the Australian Constitution.

On the other hand, several other considerations appear to support the introduction of a confidentiality requirement. These include the right to a fair trial and the potential for significant damage to the reputation of the person who allegedly engaged in corrupt conduct, which with contemporary means of mass communication, can be disseminated instantaneously and widely and may remain on the public record in perpetuity. Publicising allegations of corrupt conduct can also compromise the Commission's ability to effectively exercise its statutory functions inasmuch as it provides the individuals involved in the matter with the opportunity to destroy information that might support the allegation, anticipate the investigation by fabricating a false explanation or justification, or interfere with witnesses.³²

Although the issue is not addressed in the Commission's discussion paper, both the Commission and predecessors of this Committee have highlighted the practical difficulties involved in enforcing an obligation of confidentiality, especially in relation to complaints made anonymously.

Comment

The Committee commends the Commission's decision to canvass broader public opinion on this issue, consideration of which has hitherto been confined to this Committee, the Commission and the LGAQ. The Committee acknowledges that attempts to develop a lasting solution to this issue have not resulted in an 'effective solution'. The Committee considers it desirable in the public interest that a more effective means of resolving this problem be identified and implemented that properly takes considerations of openness, transparency and accountability into account.

The Committee considers, however, that if the proposal now under consideration by the Commission is to be effective, consideration will also need to be given to whether amendments are also required in relation to the *Local Government Act 2009* and the *Public Service Act 2006* to ensure that a similar obligation is imposed upon complainants who refer matters to the responsible authorities under those Acts, which are then referred by the relevant CEOs to the Commission for assessment. Unless this is done, the potential for abuse of the complaints system will remain.

³⁰ Parliamentary Crime and Corruption Committee, 'Public Meeting with the Crime and Corruption Commission', Transcript of Proceedings, 23 May 2016, p 7.

³¹ Crime and Corruption Commission, *Discussion Paper – Making allegations of corrupt conduct public – Is it in the public interest?*, June 2016, p 6.

³² *Ibid*, pp 6-7.