

TITLE:

***It is in the Public Interest for the Media to be Able
to Publicise Allegations of Corrupt Conduct***

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On

Queensland Crime and Corruption Commission Discussion Paper

Making Allegations of Corrupt Conduct Public: Is it in the Public Interest? (June 2016):

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Queensland Crime and Corruption Commission

via Dr Rebecca Denning

Director, Policy and Research

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1. INTRODUCTION

I make this submission in my personal capacity following an invitation to make a submission in response to the Queensland Crime and Corruption Commission's (QCCC) 'Discussion paper and invitation for public submissions'. The invitation was in response to my comments published in *The Australian* newspaper on 8 August 2016, written by the newspaper's Legal Affairs Editor, Mr Chris Merritt.¹

I thank the Commission for the invitation.

In this submission the above discussion paper is referred to as 'the Discussion Paper'.² All text appearing within quotation marks in this submission are drawn from the Discussion Paper unless otherwise stated.

¹ Merritt, C. (2016, 8 August). Media proprietors denounce Queensland CCC on penalties. *The Australian*. Retrieved from <http://www.theaustralian.com.au/business/media/media-proprietors-denounce-queensland-ccc-on-penalties/news-story/cd199b093bdf3e8d79ac4ad147f0fed8>

² Crime and Corruption Commission Queensland (2016, June). Making allegations of corrupt conduct public: Is it in the Public Interest. Discussion paper and invitation for public submissions. Retrieved from <http://www.ccc.qld.gov.au/research-and-publications/publications/ccc/publishing-allegations/publicising-allegations>

The central question in the Discussion Paper is ‘whether, on balance, it is in the public interest to make allegations of corrupt conduct public and, if it is not, what legislative or other options are available to prevent this’.

2. IDENTIFYING THE ISSUES

The issues or problems the Discussion Paper identified are as follows:

- 2.1 Publicising allegations of corrupt conduct, as defined by the QCCC,³ ‘may adversely affect’ the ability of the QCCC to: (a) perform its corruption function; (b) damage the reputation of the person alleged to have engaged in corrupt conduct; and (c) compromise the fair trial of persons charged with corruption.
- 2.2 Identifying a solution that ensures allegations of corrupt conduct are kept confidential must be balanced against the right to freedom of speech within current legal constraints and the need for open and accountable government.
- 2.3 The tension between the competing interests is longstanding and complex. The Discussion Paper listed previous examinations of the question of competing interests and these examinations indicate that different conclusions were reached in the five examinations between 1992 and 2013. The primary question was whether it should be an offence to disclose whether a complaint had been made against a person or what the details of the complaint were. An ‘effective solution has not been implemented’ to date and ‘allegations of corrupt conduct continue to be made public, particularly in the lead-up to elections’.
- 2.4 ‘Consequently’ (that is, on the basis of the situation set out in items (2.1)–(2.3) above, the QCCC is examining ‘whether on balance, it is in the public interest to publicise allegations of corrupt conduct and, if it is not, what legislative or other options are available to prevent this.

These matters are discussed below.

3. MATTERS ARISING FROM THE DISCUSSION PAPER

3. The following matters arise in relation to **item (2.1)** above.
- 3.1 The Discussion Paper, states that ‘publicising allegations of corrupt conduct **may** adversely affect’ three matters (emphasis added):
 - 3.1.1 the QCCC’s ability to perform its functions in dealing with corruption;
 - 3.1.2 the reputation of the person alleged to be corrupt; and
 - 3.1.3 the fair trial of those charged with corruption.

Given the serious implications of any proposed ‘legislative or other options’ it is critical that any change that imposes new reporting restrictions is grounded in strong justifications supported by evidence of the malaise supposedly addressed. It is not enough for legislative or other change to be introduced based on mere speculation (‘publicising allegations of corrupt conduct **may** adversely affect’ – above) that the adverse effects listed above would result if such change were not introduced.

- 3.2 This submitter acknowledges that publicising allegations of corrupt conduct does give rise to issues or difficulties for the various stakeholders (e.g. the QCCC, the alleged wrongdoer, the investigators, the media and the public). In purporting to address such issues or difficulties, however, it is critical to be precise about these issues or difficulties before attempting to introduce ‘legislative or other options’ that impair the media’s ability to fulfill its obligations.

³ The Discussion Paper points to this reference for a definition of ‘corrupt conduct’:
<http://www.ccc.qld.gov.au/corruption/what-the-ccc-investigates/what-is-corrupt-conduct>

- 3.3 In reference to the three matters the QCCC referred to above (3.1), very different issues arise for each of the three matters identified. It would be too unrealistic to seek a single solution to address the three matters. The Commission's role is to combat corruption. Such a role should not be unduly concerned with damage to personal reputations. It is in the normal scheme of things that a person who is the subject of investigation would inevitably attract unfavourable attention or suffer reputational damage. That burden is unavoidable. That said, however, a body charged with combatting corruption should not be given unlimited powers or be permitted to exercise its powers in an oppressive manner or be permitted to abuse its powers so as to cause unnecessary damage to a person's reputation.
- 3.4 Where damage is caused to a person's reputation and where such damage is unjustified, the current legal framework provides some remedies, commonly through the law of defamation. Defamation, however, provides a remedy only for *unlawful* damage to reputation, not for *lawful* damage. In other words, as noted above, a defendant can escape liability if a successful defence is mounted. That said, however, Australia's defamation law regime is far less generous to defendants than in some other established democracies. For example, the threshold for suing in Australia is 'set rather low'.⁴ Furthermore, higher hurdles for suing can be found in the United States and the United Kingdom. As one former Australian newspaper editor has observed:

'The most direct threat we face every day is the operation of our defamation laws. They are being used far too often in an attempt to hinder or shut down journalism.'⁵

The absence of entrenched freedom of expression protection in Australia, unlike those found in country's national Constitution or Bill of Rights, adds to the media's burdens.

The question of ensuring that court trials are conducted fairly attracts other considerations, for example, the operation of the law of contempt of court. The legal framework governing the conduct of trials is elaborate and strict and needs no further tightening.

- 3.5 The following matters arise in relation to **item (2.2)** above
- 3.6 The Discussion Paper says that 'identifying a solution that ensures allegations of corrupt conduct are kept confidential must be balanced against the right to freedom of speech within current legal constraints and the need for open and accountable government.'
- 3.7 The QCCC raises what is arguably the most critical question in the context at hand. The tension between the public interest in the freedom of expression and the need for open and accountable government, on the one hand, and on the other hand, the need for this tension to be 'balanced' with the interests of 'identifying a solution that ensures allegations of corrupt conduct are kept confidential'. The following points arise from this stated tension:
- 3.7.1 The Discussion Paper refers to freedom of speech (or expression) as a 'right'. The Australian Constitution, however, does not include an express guarantee of free speech.⁶ In other countries, bills of rights or human rights statutes provide some protection for freedom of speech e.g. US; UK; Canada; and New Zealand.⁷

⁴ Gillooly, M. (1998). *The Law of Defamation in Australia and New Zealand*, Federation Press, 15.

⁵ Andrew Holden, then editor-in-chief of *The Age*, quoted in Bennett, L. (2015, 30 September). Publishers back calls for metadata law review. *The Newspaper Works*. Retrieved from <http://www.thenewspaperworks.com.au/publishers-back-calls-for-metadata-law-review/>

⁶ Butler, D and Rodrick, S. (2012). *Australian Media Law* (4th ed). Pyrmont, NSW: Thomson Reuters, 14.

⁷ Australian Law Reform Commission. (2015, December). *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*. Report No 129, 85. Retrieved from <https://www.alrc.gov.au/publications/freedoms-alrc129>

3.7.2 Freedom of speech has been described as ‘the freedom *par excellence*; for without it, no other freedom could survive’.⁸ In Australia, freedom of speech has been characterised as one of the ‘fundamental values protected by the common law’.⁹ The High Court of Australia has developed a freedom of speech rule derived by implication from the Commonwealth Constitution to the effect that the Constitution allows for freedom ‘in relation to the expression of concerns about government or political matters’ and further it has been referred to by the High Court as ‘the ultimate constitutional foundation in Australia’.¹⁰ That freedom, however, is ‘that which everyone has in the absence of laws which curtail it and that freedom does not find its origins in the Constitution at all, either expressly or by implication’.¹¹ Professor Michael Chesterman described that freedom sixteen years ago as ‘indeed a “delicate plant” within Australian law’.¹² He added: ‘It is alive as an important value to be protected, and it is **growing**’ (emphasis added). All signs since then, however, point to deterioration in the protections available for freedom of speech. As the CEO of Australia’s peak media body the Media, Entertainment and Arts Alliance, Paul Murphy noted:

‘Government has been so determined to inoculate itself from embarrassment that it has developed a battery of laws to punish and imprison those who expose the truth, whether they are whistleblowers or journalists...There is a great deal of effort being expended by government to avoid scrutiny. And it’s getting worse. These attacks undermine democracy and, once started, it is very hard to turn back the tide.’¹³

Given the delicate prevailing position in respect of freedom of expression, great care needs to be taken when introducing any legislative change that has the potential to impair the existing protections for freedom of speech.

3.7.3 The Discussion Paper raises the matter of the ‘tension’ between the competing interests, viz., between the ‘right to freedom of speech’ and ‘legal constraints and the need for open and accountable government’. Among these tensions are those freedom of speech faces with: (a) personal privacy; (b) damage to reputation; and (c) complaints being politically motivated or designed to damage a person’s reputation.

As noted above, the existing law provides remedies for damage to reputation. It does not prohibit defamation *per se*, only unlawful defamation. Liability arises only if the defamer is not successful with a defence. Any inadequacies in respect of privacy protection are for the law of privacy to resolve. Many law reform examinations have been conducted in this area.¹⁴ A common law tort for invasion of privacy, however, has not yet been developed in Australia.¹⁵

⁸ Campbell, E and Whitmore, H. (1966) cited in ALRC Report No 129, above, 77.

⁹ *Nationwide News v Wills* (1992) 177 CLR 1, 31; *Monis v The Queen* (2013) 249 CLR 92, [60].

¹⁰ *Monis v The Queen* (2013) 249 CLR 92, [60].

¹¹ *Levy v Victoria* (1997) 189 CLR 579, 607; *Monis v The Queen* (2013) 249 CLR 92, [61].

¹² Chesterman, M. (2000). *Freedom of Speech in Australian Law: A Delicate Plant*. Sydney: Ashgate, 1.

¹³ Murphy, P. (2016). Foreword. In Dobbie, M (ed). *Criminalising the Truth, Suppressing the Right to Know: The Report into the State of Press Freedom in Australia in 2016* (Press Freedom Report 2016): Redfern, NSW: MEAA Press. Retrieved from <https://www.meaa.org/resource-package/press-freedom-report-2016/>

¹⁴ For example, see Australian Law Reform Commission Reports: *Unfair Publication: Defamation and Privacy* (1979) Report No 11; *For Your Information: Australian Privacy Law and Practice* (2008) Report No 108; and *Serious Invasions of Privacy in the Digital Era* (2014) Report No 123.

¹⁵ Australian Law Reform Commission. (2014). *Serious Invasions of Privacy in the Digital Era*. Discussion Paper No 80. Para 3.52. Retrieved from <https://www.alrc.gov.au/publications/3-overview-current-law/common-law-action-breach-privacy-australia>

As for the making of unfounded or malicious complaints, as seen below, existing laws provide avenues for redress but have not been fully engaged.

- 3.7.4 The Discussion Paper juxtaposes the freedom of expression right with the public interest in ‘identifying a solution that ensures allegations of corrupt conduct are kept confidential’. The contemplation of a solution that ensures allegations of corrupt conduct are kept confidential is fraught with difficulty, if it is not altogether inimical to fighting corruption.

Tackling corruption should be high on every country’s agenda. A global coalition against corruption, Transparency International, in its Corruption Perceptions Index, notes that Australia’s position in the index has deteriorated, as its four-year slide continues, ranking 13th in 2015 – behind New Zealand (4) and Singapore (8).¹⁶ The report further notes that while some countries have improved, Australia is among countries – including Brazil, Libya, Spain and Turkey – that ‘have deteriorated’.¹⁷

More recently, for example, questions have arisen over political donations and allegations of the bribery of foreign officials by Australian entities. In respect of political donations, the interest of the public in knowing the source and extent of political donations is recognized in Pt XX of the *Commonwealth Electoral Act 1918*.¹⁸ Despite this serious ambiguity infests this area and the media can and does play a role in exposing impropriety. The issue of political donations is closely linked with corruption, as most recently shown in the findings made by the New South Wales Independent Commission Against Corruption.¹⁹ Those findings have exposed several instances of prohibited political donations. The ICAC’s findings also highlight the consequence of lengthy delays in bringing improper conduct to light. One victim of the delay in exposing the improper conduct says it has taken five-and-a-half years for this to come to light.²⁰ More recently, concerns have been raised about ‘foreign donations’ that could be ‘skewing’ Australia’s democracy.²¹ The Director-General of the Australian Security Intelligence Organisation has also raised such concerns.²² Various allegations concerning Australian involvement in bribery overseas have also been raised.²³ The media plays an important role in bringing the allegations to light or in the

¹⁶ Transparency International. (2015). Corruption Perception Index 2015. Retrieved from <http://www.transparency.org/cpi2015#results-table>

¹⁷ Transparency International. (2015). Corruption Perception Index 2015. Retrieved from <http://www.transparency.org/cpi2015#results-table>

¹⁸ *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA 652, [354].

¹⁹ The principal findings are set out here: Independent Commission Against Corruption, New South Wales. (2016, August). *Investigation into NSW Liberal Party Electoral Funding for the 2011 State Election Campaign and Other Matters*. (ICAC Report), 18ff.

²⁰ McGowan, M. (2016, 30 August). ICAC Operation Spicer: election was stolen from me, Mckay.

²¹ Greene, A. and Uhlman, C. (2016, 22 August). Foreign donations could be ‘skewing’ Australia’s democracy after China payments, politicians warn. *ABC News*. Retrieved from <http://www.abc.net.au/news/2016-08-22/foreign-donations-could-skew-australias-democracy-politicians/7775060>

²² Uhlman, C. (2016, 1 September). Domestic spy chief sounded alarm about donor links with China last year. *ABC News*. Retrieved from <http://www.abc.net.au/news/2016-09-01/asio-chief-sounded-alarm-about-donor-links-with-china-last-year/7804856>

²³ For a recent example containing references to such instances see: (a) McKenzie, N. and Freudenthal, E. (2016, 24 August). Sundance Resources, Snowy Mountain Engineering embroiled in bribery scandals in Sri Lanka and Congo. *ABC 7.30 Report*. Retrieved from <http://www.abc.net.au/news/2016-08-24/australian-companies-embroiled-in-bribery-scandals/7778324>

See also Hoy, G. (2014, 6 January). Australia’s attitude to big business bribery cops criticism. *ABC 7.30 Report*. Retrieved from <http://www.abc.net.au/7.30/content/2013/s3921362.htm>

reporting of the investigations into these allegations and in teasing out important issues connected with such matters. As the OECD has noted:

The role of the media is critical in raising public awareness, promoting integrity and detecting and reporting on corruption. Successful action against corruption is dependent on knowledge and information which can be delivered by media. First, media raises public awareness about corruption, its causes, consequences and possible remedies and thus can foster a culture of integrity. Second, media can investigate, detect and report incidences of corruption, bringing corruption cases into the public sphere and instigating judicial involvement. OECD analysis shows that 5% of foreign bribery cases are brought to the attention of the authorities through the media (reference omitted). The effectiveness of the media, in turn, depends on access to information and freedom of expression, as well as a professional and ethical cadre of investigative journalists. Governments, media owners and journalists have a shared responsibility to ensure that the media can and does effectively contribute to enhance accountability and curb corruption. For the media to fulfill this function, a number of elements should be in place such as freedom of information laws and procedures, effective competition between a plurality of media firms, and sufficient protection of journalists who expose corruption or investigate the interests of powerful private and public sector leaders.²⁴

- 3.8 In the Discussion Paper's caution concerning the balance that must be maintained between *freedom of speech/the need for open and accountable government* and 'allegations' of corrupt conduct we must be careful not to dismiss *all* allegations as unmerited. It is submitted that generally, the actual finding of corrupt conduct originates from an allegation of corruption. To completely forestall the airing of allegations would unduly stifle the exposing of corruption.
- 3.9 Against the above backdrop extreme caution is needed before introducing any measure that increases the level of confidentiality regarding allegations of corrupt conduct. While there appears to be official recognition of the need for greater transparency, reform is very slow and may even be unappealing to those who themselves may have found expediency, for example, in the area of political donations. As one commentator has observed, even though the Australian Electoral Commission releases annual figures on political donations 'much of the real action remains hidden due to Australia's political donations laws, which are among the laxest in the Western world.'²⁵
- 3.10 In summary, while confidentiality serves useful purposes, it also provides fertile ground for impropriety. The media, armed with its core obligation to shine a light in dark corners must not be curtailed in this quest. Laws that are introduced must be compatible with the imperatives of transparency and freedom of expression. Allegations of corrupt conduct do not by itself justify the imposition of confidentiality. Where the argument for the imposition of confidentiality is made, it must only be considered as a last resort and after the alternatives for the prevention of harm caused by the absence of confidentiality are exhausted. It would be too high a price to pay to impose a confidentiality cloak over allegations of corrupt conduct when such allegations may well be justified and may well, by their public airing, complement efforts to combat corruption.

²⁴ Organisation for Economic Cooperation and Development (OECD). (2016). Putting an end to corruption, 11. Retrieved from <http://www.slideshare.net/OECD-GOV/putting-an-end-to-corruption>

²⁵ Leslie, T. (2016, 1 February). Political donations: Here's what the latest data doesn't tell us. *ABC News*. Retrieved from <http://www.abc.net.au/news/2016-02-01/here-s-what-the-latest-political-donations-data-doesn-t-tell-us/7130126>

3.11 The following matters arise in relation to **item (2.3)** above

3.12 The Discussion Paper says that the tension between the competing interests is longstanding and complex. The Discussion Paper listed four previous examinations of the question of competing interests and these examinations indicate that different conclusions were reached between 1992 and 2012 as to whether it should be an offence to disclose whether a complaint had been made against a person or what the details of the complaint were. An 'effective solution has not been implemented' to date and 'allegations of corrupt conduct continue to be made public, particularly in the lead-up to elections'.

3.13 The five previous examinations of the issue set out in the Discussion Paper are:

- 3.13.1 Parliamentary Criminal Justice Committee (1992): The Criminal Justice Commission had sought a legislative amendment that would make it an offence for a person who had made a complaint, or given information to it, to disclose that fact or any details of the complaint. This was to 'protect privacy' and 'deter complaints that were politically motivated or designed to damage a person's reputation'. The Committee noted that 'the "confidentiality of complaints" was problematic'.
- 3.13.2 Parliamentary Crime and Misconduct Committee (2006): The Committee did not favour the introduction of a legislative amendment to impose confidentiality on the existence and nature of complaints against public officials.
- 3.13.3 Parliamentary Crime and Misconduct Committee (2009): The Committee again did not favour such legislative amendments as in item 3.13.2 above.
- 3.13.4 Parliamentary Crime and Misconduct Committee (2012): The Committee again did not favour such legislative amendments as in item 3.13.2 above. It found that 'the ongoing requirement for openness and transparency in the CMC outweighed the need for any legislative amendments.'
- 3.13.5 Independent Advisory Panel led by Hon Ian Callinan and Professor Nicholas Aroney (2013): This panel found in favour of making disclosure of 'the fact of, or the identity of a person who is the subject of a complaint to the CCC' an offence.

Thus, according to the Discussion Paper, after five separate examinations of the question three of the examinations did not favour the imposition of confidentiality, while one did and the other noted that the confidentiality of complaints was problematic.

3.14 The following matters arise in relation to **item (2.4)** above

3.15 The Discussion Paper says that '[c]onsequently' (that is, on the basis of the various prior considerations of the question of 'confidentiality of complaints'), the QCCC is examining 'whether on balance, it is in the public interest to publicise allegations of corrupt conduct and, if it is not, what legislative or other options are available to prevent this. Of the five prior considerations of the matter only one – the Callinan & Aroney examination – is said to have favoured imposing confidentiality on the disclosure of the fact of, or the identity of a person who is the subject of a CCC complaint. In making the recommendation for disclosure to be made an offence Callinan & Aroney also noted, however, that:

It is clear to us that there has been an **unjustified and unsatisfactorily explained reluctance** to engage sections 216–218 of the *Crime and Misconduct Act* with a view to discouraging vexatious or reckless complaints, or those made without reasonable basis, or indeed even trivial or unsubstantiated ones whose initial assessment require the deployment of so many staff, other resources or money. **Those provisions could, but have not been applied** to seek to achieve their purposes. We would **recommend some improvements** to them so as to **increase their capacity to discourage those who**

would seek to make complaints for ulterior and improper motives or without due care (emphases added).²⁶

It is submitted that the proper approach, therefore, should be to exercise the powers already in place to prevent the making of complaints that are 'vexatious or reckless'; or those 'made without reasonable basis'; or those that are 'indeed even trivial or unsubstantiated', or those made 'for ulterior and improper motives or without due care'; or those 'made irresponsibly or unreasonably or maliciously or vexatiously'.²⁷

The Callinan and Aroney Report found that the 'vast majority of [the high number of complaints processed by the Crime and Misconduct Commission, CMC] were trivial, vexatious, or misdirected'.²⁸ It said 'ways should be found to deter baseless complaints'.²⁹

The proper approach in addressing the issue at hand should not be to resort to the imposition of confidentiality in the first instance. The confidentiality solution should only be considered when all other options – for example, those Callinan & Aroney identified above – have been exhausted. As Callinan & Aroney note 'something must be done'³⁰ regarding vexatious, reckless or malicious complaints. Shooting the messenger (the media), however, is an undesirable way to address the problem. Any further censoring of the media runs the real risk of permitting unsavoury or illegal practices to continue undetected. The confidentiality tool can on occasion serve a useful purpose. In the present context it is far from established that the confidentiality tool needs to be deployed in the manner proposed. The blanket imposition of confidentiality would be a disproportionate response to the problem and would be in conflict with currently available limits on freedom of expression. Where an authority is armed with extensive powers akin to those of a 'star chamber', the greater the need for checks and balances, including those that can be provided by the media. One observation made about the Queensland CCC's hearings power and procedures is:

'The most coercive and contentious investigative power available to the Commission officially sanctions the compulsory interrogation of witnesses under oath by a person in authority... This inquisitorial style procedure constitutes a dramatic departure from the accepted rules governing ordinary criminal investigations and a severe abridgement of civil liberties traditionally enjoyed in common law countries like Australia. The so-called "star chamber" power has the collateral effect of restricting the freedom of movement curtailing the freedom of speech and association overriding the privilege against self-incrimination and the right to silence abrogating marital privileges and curtailing property and privacy rights.'³¹

²⁶ Callinan, I. and Aroney, N. (2013, 28 March). Review of the *Crime and Misconduct Act 2001 (Qld)*, 126. Retrieved from <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2447.pdf>

²⁷ Callinan, I. and Aroney, N. (2013, 28 March). Review of the *Crime and Misconduct Act 2001 (Qld)*, 126. Retrieved from <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2447.pdf>

²⁸ Callinan, I. and Aroney, N. (2013, 28 March). Review of the *Crime and Misconduct Act 2001 (Qld)*. Chapter 11. Summary of Conclusions and Recommendations: http://www.justice.qld.gov.au/__data/assets/pdf_file/0003/178518/CMA_Review_Summary_Recommendations.pdf

²⁹ Callinan and Aroney. Review of the *Crime and Misconduct Act 2001 (Qld)*. Chapter 11. Summary of Conclusions and Recommendations: http://www.justice.qld.gov.au/__data/assets/pdf_file/0003/178518/CMA_Review_Summary_Recommendations.pdf

³⁰ Callinan, I. and Aroney, N. (2013, 28 March). Review of the *Crime and Misconduct Act 2001 (Qld)*, 116. Retrieved from <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2447.pdf>

³¹ Carmody, T. (2001). The role of the Queensland Crime Commission in the investigation of organised and major criminal activity. Paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses, Canberra, 21–22 June 2001, 12.

The courts take the view that: 'Publicity is the very soul of justice. It keeps the judge her/himself, while trying, under trial.'³² Corruption commissions should not be exempt from such a principle. They should, in fact, embrace it.

- 3.16 Merely stopping allegations of corrupt conduct is not an effective solution. To do so would be tantamount to throwing the baby out with the bathwater. It should not be presumed that all allegations are baseless or made with questionable motives. The primary focus should be on preventing baseless allegations from being made and this can be addressed by more actively engaging the laws currently in place for this whether by the investigating agencies or by the parties claiming to have been wronged. It is inevitable that the intensity of allegations would correspond to particular events, for example, during election periods. Election periods are critical because they are aimed at ensuring that only those who are fit and proper for the role are selected. As such those offering themselves for office should expect to be closely scrutinised. Society benefits from timely scrutiny. And as the High Court has recognised:

'[T]he general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials...a narrow view should not be taken of the matters about which the general public has a legitimate interest in receiving information.'³³

- 3.17 It should not be overlooked that some of the concerns the Discussion Paper seeks to address – in particular, the unfair damage to personal reputations – may be attributable to the harsh manner in which corruption authorities generally – not necessarily the Queensland CCC alone – carry out their functions. Some examples reported in the news media are: (a) claims of misfeasance;³⁴ (b) claims that an authority exceeded its powers;³⁵ (c) the admission by one authority that it 'had no authority to seize' a document that was 'outside of the terms of their search warrant';³⁶ (d) the finding by the High Court that one Commission had no power to pursue certain individuals;³⁷ (e) one Commission inspector in an annual report warned that if the Commission is to be taken seriously it must not be perceived as 'culturally projecting an almost breathtaking arrogance in relation to its own powers';³⁸ (f) the view of one former government minister that the Commission is 'notorious for its public hearings, naming names, broadcasting intercepted private telephone calls and subjecting even entirely innocent people to scrutiny of public examination';³⁹ (g) a former premier, speaking in reference to the QCCC, said the Commission 'needs to be scrutinised publicly to ensure' their powers are not being

³² *Scott v Scott* [1913] AC 417 (House of Lords).

³³ *Stephens v WA Newspapers* 182 CLR 211, McHugh J, at 286; cited in *Lange v ABC* (1997) 189 CLR 520, at 570.

³⁴ Merritt, C. (2016, 1 August). NSW ICA in the doc for 'misfeasance in public office'. *The Australian*: <http://www.theaustralian.com.au/business/legal-affairs/nsw-icac-in-the-dock-for-misfeasance-in-public-office/news-story/206b25a0c7cd56a4b1aa008a65a58ae7>

³⁵ Perpitch, N. (2016, 31 July). Time to review Corruption and Crime Commission, WA Premier says. *ABC News*: <http://www.abc.net.au/news/2016-07-31/wa-premier-flags-re-write-of-ccc-legislation/7676084>

³⁶ Markson, S. and Merritt, C. (2015, 28 October). Caught on tape: another ICAC raid goes beyond search warrant. *The Australian*: <http://www.theaustralian.com.au/national-affairs/state-politics/caught-on-tape-another-icac-raid-goes-beyond-search-warrant/news-story/602df29584e4d7892f11adf9ec57667f>

³⁷ Merritt, C. (2015, 21 April). ICAC seeks to share the embarrassment. *The Australian*: <http://www.theaustralian.com.au/business/opinion/chris-merritt-prejudice/icac-seeks-to-share-the-embarrassment/news-story/88e994d631db0c909daf6684273b9605>

³⁸ Office of the Inspector of the Independent Commission Against Corruption. (2015). Annual Report 2014–2015, 1; see also Coultan, M. (2015, 4 December). ICAC criticised by own inspector over Margaret Cunneen probe. *The Australian*. Retrieved from <http://www.theaustralian.com.au/news/icac-criticised-by-own-inspector-over-margaret-cunneen-probe/news-story/b707f5620bc51c648293a0db55fde0af>

³⁹ Noel Crichton-Browne. (2014, 2 June). Call for inquiry into the CCC culture. *The West Australian*, 22. (Letter to the Editor).

abused;⁴⁰ and (h) a criminology and justice professor, speaking in reference to the QCCC, described its present structure and functions as being ‘inconsistent with democratic principles and with the science of government accountability and public sector integrity management’.⁴¹

- 3.18 Where, after a person has been subjected to the processes of the Commission and is found to be in the clear, that fact should be made abundantly clear. There are ample methods of fully vindicating the party concerned through devices such as a letter of comfort, exoneration and vindication; through the publication of relevant notices.⁴² Where such damage was inflicted through contumelious disregard, spite, ill-will or other questionable motives, such culpable parties should be brought to book. Where the remedies for vindication, exoneration or other remedies are inadequate, it is proper for any such inadequacy to be given direct attention rather than through a blanket approach that curtails the public discussion matters of legitimate public concern.

4. CONCLUSION

4.1 The primary question posed in the Discussion Paper is whether on balance, it is in the public interest to publicise allegations of corrupt conduct and, if it is not, what legislative or other options are available to prevent this. The answers submitted are:

4.1.1 Yes, it is in the public interest to publicise allegations of corrupt conduct.

4.1.2 Any argument that it is not in the public interest to publicise allegations of corrupt conduct needs to be subject to strict limitations and should only contemplate responses that are proportionate to the malaise sought to be addressed. Even so, this should only happen after it is clearly established that currently available mitigation mechanisms are inadequate or that there is no room to overcome these inadequacies. As an example, where the malaise to be addressed is a ‘privacy concern’, it should be left to the law of privacy to address. While freedom of speech does not necessarily trump all other rights, any abridgement of the free speech right, must be done only after alternative courses of action are exhausted.

4.1.3 As the OECD stated above (3.7.4), for the media to perform its function of enhancing accountability and curbing corruption, ‘a number of elements should be in place such as freedom of information laws and procedures, effective competition between a plurality of media firms, and sufficient protection of journalists who expose corruption or investigate the interests of powerful private and public sector leaders’. While Australia has made some progress over the years such as through the introduction of Freedom of Information law, shield laws, public interest disclosure (whistleblower) laws and the like, these laws leave a lot to be desired.

As veteran journalist Laurie Oakes has observed a number of pieces of legislation, primarily security-related, that clearly have the potential to inhibit public interest reporting, have been introduced, some a direct threat to journalists and some a threat to

⁴⁰ Beattie, P. (2015, 31 October). Who watches the anti-corruption watchdogs? *The Australian*: <http://www.theaustralian.com.au/news/inquirer/who-watches-the-anticorruption-watchdogs/news-story/81c79d8c0452ea0ced7be3b13e13f74>

⁴¹ Elks, S. (2015, 9 November). Queensland’s Crime and Corruption slammed. *The Australian*, quoting Professor Timothy Prenzler of the University of Sunshine Coast: <http://www.theaustralian.com.au/national-affairs/state-politics/queenslands-crime-and-corruption-commission-slammed/news-story/8f491f54f36a02bcb9874124342760b4?sv=d3ebfff633e4339fc6abe1e2d384b41d>


⁴² See also Joint Media Organisations. (2016, 8 July). Submission to Queensland Crime and Corruption Commission – *Making Allegations of Corrupt Conduct Public: Is it in the Public Interest?*, 6

journalists' sources.⁴³ A fuller examination of this issue must be left for another occasion. Suffice to say for the present that many new laws have been introduced, some in the name of national security and defence, that through a side wind undermine the media's ability to prosecute its task of ensuring openness, accountability and transparency in governance. This challenge confronts the media in Queensland as it does anywhere else.

4.2 As the author of the book entitled *The War on Journalism* noted: 'Australia is a tough place to work as a journalist. Journalists tend to end up as collateral damage in the war on whistleblowers.'⁴⁴ The argument has not been satisfactorily made that the work of Australian journalists needs to be further restrained in respect of the publicising of allegations of corrupt conduct. Indeed, a good number of the QCCC's own past inquiries did not recommend restraints.

4.3 The reference in the Discussion Paper to 'publicising' connotes a degree of sensationalism or salaciousness. While the media can be said to 'publicise' things there is much more to what the media does – they provide coverage of news and current affairs observing professional dictates governing the industry and the profession. The media is subject to a vast array of rules, regulations, codes and legislation. The limitations the media faces from these rules, regulations, codes and legislation is increasingly restrictive. Where the 'publicising' of allegations of corrupt conduct crosses the line from the defensible to being untrue, unwarranted, prurient or a serious source of harm, the prevailing legal framework and the usual forces of self-regulation are sufficient as checks.

4.4 In the aftermath of the *September 11* attacks in the United States, there has been a surge in the number of Australian laws that impose restraints on speech and access to information. This surge has far outweighed progress in the other direction. For example, modest progress has been made through the introduction of *shield laws* to protect journalists' confidential sources.⁴⁵ Much more, however, needs to be done to protect freedom of expression. Ordinary citizens should be given a free rein to decide what matters they are entitled to think about. Reducing the media's capacity to make allegations of corrupt conduct public runs the real risk of denying ordinary citizens information they should be entitled to access. It would be fallacious to assume that any attempt at further restricting discussion on allegations of corrupt conduct would fully resolve any claimed difficulties. The current era presents unprecedented opportunities for citizens to publish and the news media is undergoing upheaval. Any further restrictions on the media's ability to report on matters of public interest will impact more heavily on the mainstream media. They will have to carry the main burden of such restrictions by having to forego their legitimate right to participate in discussions that will, in all likelihood, not be quelled in alternative media spaces.



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⁴³ Oakes, L. (2016). Media got complacent. In Dobbie, M (ed). *Criminalising the Truth, Suppressing the Right to Know: The Report into the State of Press Freedom in Australia in 2016* (Press Freedom Report 2016): Redfern, NSW: MEAA Press, 4–10, 4. Retrieved from <https://www.mcaa.org/resource-package/press-freedom-report-2016/>

⁴⁴ Fowler, A. (2015). *The War on Journalism*. Sydney: William Heinemann, 323.

⁴⁵ For a recent insight, see generally Dobbie, M (ed). *Criminalising the Truth, Suppressing the Right to Know: The Report into the State of Press Freedom in Australia in 2016* (Press Freedom Report 2016): Redfern, NSW: MEAA Press. Retrieved from <https://www.mcaa.org/resource-package/press-freedom-report-2016/>

