



**Crime and Corruption
Commission**

QUEENSLAND

CRIME AND CORRUPTION COMMISSION

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

TRANSCRIPT OF PUBLIC FORUM

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Panel members:

Mr Alan MacSporran QC
Mr Marshall Irwin
Mr Richard Bingham
Dr Rebecca Denning

CCC Chairperson and Panel Chair
CCC Ordinary Commissioner
Queensland Integrity Commissioner
CCC Director, Policy and Research

Speaker:

Mr Greg McMahon

President
Queensland Whistleblowers Action Group

- Mr MacSporran QC Thank you. Mr McMAHON can you just for the record announce who you are?
- Mr McMahan Yes. Greg McMAHON. I'm the President of Whistleblowers Action Group Queensland Incorporated.
- Mr MacSporran QC Thank you. Can I just thank you for your submission, Mr McMAHON, and you would have noticed that it has been published on our website, subject to some brief redactions in parts of it. You'd understand, I hope, why that's been done and I just ask you to be mindful of that when you give your evidence today.
- Mr McMahan Well I'm agreeing to the no names.
- Mr MacSporran QC Thank you.
- Mr McMahan But I need to do my best to give a generic description of the types of situations alive with my members.
- Mr MacSporran QC Absolutely. We understand that and we encourage you to raise all of those issues in that manner at your convenience. Would you like to make an opening statement?
- Mr McMahan Yes. Thank you. The position as we see it, Queensland Whistleblowers Action Group states that publicising allegations of corruption is in the public interest. As stated to the Parliamentary Committee on Legal and Constitutional Affairs two years ago, Whistleblowers proposed that the current position is that of a crime and corruption watchdog that is subject to a credible and accumulating body of allegations, that the CMC, CJC, QCC, CCC, which we refer to as the four Commissions, may have engaged in actions and omissions to act at various times that did knowingly advantage another by not applying the law in an honest, consistent and accurate manner, and that this may have occurred particularly with respect to sections of the Criminal Code dealing with the disposal, destruction and manufacture of evidence, and with sections of the Whistleblower Protection legislation dealing with criminal detriments to whistleblowers, including punitive transfers and termination by public sector agencies and the Ministry.
- The problem, we see it, is that the four Commissions are the problem, in our view. Our response to the problem is to propose that the 20 years of allegedly tolerated and defended corruption within the Ministry and the agencies

has undermined our institutions, reduced the capability of our public service to levels that threaten the welfare of the community, and generated waste beyond the ability of a State to fund. It will be from this malady of Ministry that a lot of the future allegations of corruption will emerge.

Our proposals were that this deteriorating situation be addressed by independent investigations of the existing allegations against the four Commissions, the Legal Services Commission and other watchdog arms of the executive. Secondly, by doing away with the CCC and by establishment of a Whistleblower Protection Authority. The possibility, however, that we have before us today is that we give more power to the CCC to suppress public knowledge of its performance in its investigatory role, and trust the CCC to use such powers properly.

From our perspective its trust and regulatory capture are the issues, and the operation of law and justice within public administration is what is at risk. With respect to trust, the CCC is already the subject of allegations by whistleblowers of dishonesty, tricks and breaches of natural justice regarding actions when investigations have been undertaken on a confidential basis or secret basis. Thus a whistleblower agreed to keep an investigation into members of the judiciary confidential where the four Commissions undertook in writing to use a lawyer from another State to do the inquiry. Without telling the whistleblower, however, the four Commissions then employed a member of the Queensland judiciary to do the inquiry. Thus the four Commissions allegedly received allegations against a police detective and completed inquiry into those allegations without the need to tell the detective of the allegations, nor to interview the detective. The four Commissions allegedly then tricked the Parliament by reporting to the Parliament that natural justice had been afforded to the police detective.

Regulatory Capture: Further, the four Commissions has been the subject of allegations and criticisms of having been captured by the agencies under the four Commissions purview, agencies who would, in effect, become the recipients of these new powers. Thus most allegations of misconduct against agencies or their officers are referred by the CCC back to the agencies to investigate. So the umbrella of the suppression orders

will be delivered to the agencies, agencies like Police, like Health, like Racing. When agencies allegedly reprise the whistleblower, which is of crime or in corruption, who seeks to redress through the agency grievance procedures, the four Commissions allegedly regard the alleged crime no longer as an alleged crime but as a workplace grievance, and leave it to the agency to determine.

Public administration being subject to law: Finally, the proposal will be a further displacement of the justice system from public administration, in our view, since the advent of the four Commissions. Already the four Commissions are subject to allegations that it has displaced High Court precedence on the destruction of documents, with the four Commission's own rogue legal opinion, and displaced protections given to persons under Queensland law with what the four Commissions allegedly are sanctioned rights given to agencies to non-enforcement of the same laws.

Now it is proposed to displace open investigations where the accused is given the presumption of innocence by suppression orders where agencies are presumed to have good intentions. Open investigations encourage potential witnesses to participate and attract community concern where similar fact allegations are unaddressed and are accumulating. Open investigations discourage the tricks and process that the four Commissions allegedly used to defeat whistleblowers in their disclosures and the calls of the community for proper investigations.

Mr MacSporran QC

Thank you. Do I take it that your main concern and the reason you see as it being necessary to publicise allegations of corrupt conduct, that you have no faith in the agencies, including this agency, to properly investigate and get to the bottom of such allegations?

Mr McMahan

It's a lack of confidence and a lack of trust. And without saying our – our attitude is to describe allegations as things that may be true but that we want properly investigated.

Mr MacSporran QC

Yes.

Mr McMahan

And you are what we call a 'sword' organisation and investigatory. And the accumulation of experiences are that you, as the sword, are not achieving what we would

expect you would achieve. And that happens not in the output but in the process.

Mr MacSporran QC Yes. I understand. And you're proposing a separate regulatory body called the Whistleblowers Protection Authority?

Mr McMahon Yes. We believe that the secret to dealing with corruption is that the whistleblower survives.

Mr MacSporran QC Yes.

Mr McMahon As long as the whistleblower survives the disclosure survives.

Mr MacSporran QC Yes.

Mr McMahon But what happens now is the whistleblower within – you were talking about the six months, within those six months the whistleblower's lost their job, lost their career, lost their reputation. They're probably financially strapped and may have lost their marriage.

Mr MacSporran QC But is your proposal that the allegations of corrupt conduct should go confidentially to the Whistleblower Protection Authority for investigation?

Mr McMahon We would allow whistleblowers to take their allegations, their disclosures, to the Whistleblower Protection body and if they chose to, to do it on an anonymous basis. We would leave that – that's up to them. But remember the whistleblower protection body is not involved in the sword – it's the shield. It's the one that goes in and gets the record of the person's performance now with the disclosure when it's made so that we can't generate – or agencies can't generate documentation demonstrating that the whistleblower is poorly performed. Or where there is a rule that establishes the status quo, what some agencies do is move the person, then declare the act of public interest disclosure and says you can't move from there under the status quo. They turn the rule into a disadvantage on the whistleblower rather than an advantage. Now a whistleblower protection body would be able to fight that.

Mr Irwin Mr McMAHON, can you clarify for me where the investigative power would lie under your proposal?

Mr McMahon It still stays with the CCC.

- Mr Irwin All right.
- Mr McMahan Because while the whistleblower survives, the pressure is on the CCC to do its job.
- Mr Irwin All right.
- Mr McMahan But as the whistleblower disappears the pressures go away and other things sweep in. And we find the culture of the sword organisations is mainly investigatory. Police don't look after witnesses after they've given their evidence. That's the end of the story.
- Mr Irwin And on your submission, would that require some significant amendment to the public interest disclosure legislation?
- Mr McMahan There needs to be the establishment of a shield organisation. Our policy is the sword and the shield. They both supplement each other.
- Mr Irwin All right.
- Mr McMahan And the shield organisation is a force to keep the sword organisation honest.
- Mr Irwin All right. Well under that proposal, do you accept that there is the need for some confidentiality in the investigative process without the fact that the allegations are being made, litigated or generated into the public arena?
- Mr McMahan In your discussion about reputations, I haven't heard you talk at all about the whistleblower. Okay. So are you talking about the six month idea that's in-?
- Mr Irwin -No. I'm talking about in general to start off with, because you didn't seem to be entirely receptive to the six month idea.
- Mr McMahan I'm sure there would be special – there's special circumstances now with respect to children and cases like that, national security.
- Mr Irwin Yes.
- Mr McMahan But other than that our experience is no, because the investigations, we find out probably fail in the beginning.

talking about is not in my field, that's a special situation which I don't think you can – it's not really to do with corruption, it's to do with politics. I'm talking about the heart of corruption fighting, which is the whistleblower. The person who comes forward from the agency and discloses wrongdoing. Now most of them, and there's been studies of it, do it responsibly and respectfully. In fact, if there's a criticism of them they are naïve about what is going to happen to them. They don't know. So I think the heartland of dealing with corruption is going to be best served, the public interest in dealing with corruption is going to be best served by the ability for the whistleblower, as one, to go and publicise matters where they are being badly dealt with. And that starts the day after they make their disclosure.

Mr MacSporran QC Do you conceive of any situation where a whistleblower might be motivated by malice or the wrong motives?

Mr McMahan Again there's been studies of that. We're strong critics of the study that the CCC and the other watchdogs did. But one of the positives that came out – I mean, you did survey people – one of the positives that came out is that that doesn't seem to be an issue with whistleblowers. It might be with politicians. Or some politicians.

Mr MacSporran QC Just dealing with politicians and coming to the election campaign scenario, do you see any unfairness in the publicising of allegations generally, or the fact they've come to this agency for investigation or assessment before election day without the ability to assess the complaint before people vote?

Mr McMahan My impressions are that the public are educated about what's going on.

Mr MacSporran QC You mean the voting public would be expected to ignore those sorts of allegations in that timeframe?

Mr McMahan Yes, I do. I mean, there might be exceptions. But there was a recent election where a leading politician was subject to an enormous tirade of accusations and won in a landslide.

Mr MacSporran QC Yes.

Mr McMahan People are educated about what's going on. And besides, I think you're underestimating the force and the support in the community for the presumption of innocence until

proven guilty. And there's a recent example where people are probably upset about some of the outcomes from court cases. A doctor and a – I can't name names, but in fact they probably got dealt with less than what people's expectation was. But there is that – we've been educated in it, that there's a presumption of innocence. But we aren't educated to a trust in watchdogs.

Mr MacSporran QC

But do you have any concern that in circumstances like that, whether the politician gets re-elected or not, that the mud sticks and follows that person for the rest of their life?

Mr McMahon

No. They seem to be – the successful ones seem to be Teflon coated. I don't see that at all. I think the politicians who get affected are the ones who make the disclosure or support the whistleblower. And if you mention the Fitzgerald Inquiry, who were the two politicians who were dealt with there for acts that I think Sir Max BINGHAM said there was too much blood on the floor, didn't he, and didn't pursue the others. The only ones who suffered were the ones who made the disclosure and crossed in support of a fairer system than the one that was.

Mr Irwin

Yes. I have nothing further.

Mr Bingham

Yes. Mr McMAHON, thanks very much for your submission. I for one agree with you about the important elements that whistleblowers provide in any integrity systems and I think there's room for debate and I understand that the Ombudsman's got a process under way at the present time in relation to what the most robust whistleblower protection system would look like. But I wanted to make sure that I properly understood what you'd previously been putting to us. Mr COPE, for example, started with a presumption that, as Callinan and Aroney did, that there should be some protection around the fact that a complaint has been made to the CCC, but that there should be some situations in which publicity could be given to that complaint, notwithstanding that presumption. From what you've said in your submission I understand that you would turn that presumption on its head, if you like, and say that the initial presumption should be that everything is open but there are some circumstances in which matters can properly be withdrawn from public debate. Have I understood that correctly from your submission from what you've said today?

- Mr McMahon Yeah. Bar exception.
- Mr Bingham Yeah.
- Mr McMahon I mean, one of the examples I gave you regarding the allegations against the judiciary, the whistleblower agreed to what was put to him by the four Commissions to keep the matter confidential.
- Mr Bingham Yep.
- Mr McMahon With the explanation as to why that was the case. It was about members of the Queensland judiciary. But that confidentiality, allegedly, was abused. So try to think of whistleblowers, not politicians, who have done the wrong thing. Most of their crime to themselves is their naivety. They trust the system.
- Mr Bingham Sure.
- Mr McMahon Or they're told to trust the system. It's only by experience that they find out, in Queensland at least, what can happen to them.
- Mr Bingham I don't think the experience is confined to Queensland in my experience, certainly. I know that there are whistleblowers in other places who would take a similar view to the one that you've put to us. But just to come back to the central issue before this panel, if we were looking at what the extent of the exemptions to the presumption of openness that you would propose, as compared to the presumption of closeness, if I could call it that, that Mr COPE put, have you turned your mind to the exact scope of those exemptions, the circumstances in which it might be justifiable for the CCC to say, no, in this particular case we don't think it's an appropriate circumstance for these matters to be in the public domain?
- Mr McMahon No. We're in a different balance, consideration of balance. We're expecting that whistleblowers act responsibly, and we've been arguing for exceptions to the rule of disclosing to appropriate authorities, as per the legislation.
- Mr Bingham Yes.

Mr McMahon So we've been arguing for those exceptions where we can go straight to the media. And the ones that are already in the legislation, or were, dealt with matters of safety and environmental concern. Other than that we get to go to the press after six months, I think you referred to.

Mr Bingham Yes.

Mr McMahon So that's where we're thinking. And because, you see, I think this notion of experience with politicians is soiling your consideration of the heartland of dealing with corruption, which is whistleblowers and witnesses. They're not like that. They're responsible people and I think they're probably educated enough now to know what's likely to happen to them. And so they're trying to show themselves to be law abiding.

Mr Bingham Of course. And I certainly take your point that this is not just about what goes on in the run-up to an election or anything like that, and there does need to be a whole of panoply of elements that are reflected in an integrity system of which the protection of whistleblowers is an important part. We're only dealing with one very small part of that panoply at the present time and so if I can state again, that my understanding is if you're saying to us that the sorts of exceptions that exist under the Whistleblowers Protection legislation, the circumstances in which public disclosure is justified under the Whistleblowers Protection legislation those sorts of circumstances could be replicated in the CCC framework as well, if you like, so that-

Mr McMahon -Well, we're looking at ability to go to the press and maintain protections.

Mr Bingham Yes.

Mr McMahon But there are circumstances now where we may need to go to the press and lose those protections.

Mr Bingham Yes.

Mr McMahon In fact, in another jurisdiction, the Federal one, whistleblowers can't seek protection because as soon as they seek protection that authorises the sword to stop investigation.

Mr Bingham Yes.

- Mr McMahon So it gets confusing. But the summary is we need to be able to go to the press. Now, the penalty we suffer if we go outside of the PID Act is that we lose protections. What this proposal puts forward is that we can be subject to a new form of penalty and prosecution. And so I remind you of circumstances such as an inappropriate appointment setting terms of reference that don't address the disclosure that was made but address a substitute disclosure or set of charges.
- Mr Bingham Sure.
- Mr McMahon Another thing, tricks, there's a list of tricks in our submission.
- Mr Bingham Yes.
- Mr McMahon Those tricks about investigations and undermining investigations occur at the beginning. And if that happens we would like to be able to make it public, because that's where we might be able to – there are some jurisdictions where you only get, like the military, where you only get justice if you go public.
- Mr Bingham Sure. Okay. Thanks very much.
- Dr Denning Mr McMAHON, I'm thinking about the – you talk about the sword and the shield and I appreciate that distinction that you're making. I'm interested in your views on some of the broader functions that the CCC has here around prevention, identification, as opposed to just its investigative arm, how do you see engaging with the media? Or not so much the media, but taking something public affects those other roles. In addition, sort of just teasing out the sword element, we have prevention functions and, you know, other functions that go beyond investigations, can you just speak to that for a moment?
- Mr McMahon You become conflicted as an organisation, or you can become conflicted as an organisation with those roles. So, for example, the – it's a pity Mr McMILLAN's not here – because in his role as the Commonwealth Ombudsman that office also carried the role of Defence Force Ombudsman. They decided to take a long term view with respect to improving the treatment of whistleblowers within the Defence Force. And that long term view, allegedly, involved ignoring some principle issues that whistleblowers were bringing forward to the

Ombudsman. So what seems to be occurring there, we can't be certain it's just alleged, that this aim of prevention so as these issues of wrongdoing didn't occur in the future, was being undertaken at the expense of wrongdoing, alleged wrongdoing that had already occurred? So it's a conflict for the sword that we can advise against. But if there's a whistleblower protection body we will help you to better navigate that conflict.

Mr Irwin

I have nothing further. No.

Mr MacSporran QC

Thank you, Mr McMAHON. That's all we have. Do you have anything else you'd like to say before you stand down?

Mr McMahan

I'd like to thank you very much for inviting Mr Kevin LINDEBERG to your last session.

Mr MacSporran QC

Thank you. All right.

END OF SPEAKER