



**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

Conducted at CCC Brisbane, 6 and 7 October 2016

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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 Michael Cope

President
Queensland Council for Civil Liberties

Mr MacSporran QC So with that brief summary, I think we should move to the forum itself, and I think the first person to come forward is Mr Michael COPE, the general counsel of the Queensland Council for Civil Liberties. Welcome, Mr COPE.

Mr Cope Thank you very much.

Mr MacSporran QC Just for the record state your full name, please, and where you're from.

Mr Cope Yes. I'm Michael COPE. I'm the President of the Queensland Council for Civil Liberties.

Mr MacSporran QC Thank you. And thank you for your submission, which we've all, no doubt, read with interest. As you heard in my opening remarks we're happy for you to make a, roughly, five minute opening statement if you so desire.

Mr Cope Yes. I'll try to make a few points. Although, you know, you've identified already some of the issues that I was going to raise. From our point of view this is one of those stark situations where you have to – where clear rights come into conflict. That's the right to freedom of speech, the right to a fair trial, and the right for a person's reputation to be protected. One of the things we know from the American evidence is one of the critical sources of impairment to the right to a fair trial is when inadmissible material is made public. And, of course, in a complaints process which is open, the risk of that is quite significant. It's also, of course, one of the risks with things like Royal Commissions, which we also have long-standing concerns about.

Our approach to the issue basically takes the point of view that until an allegation is substantiated it should not be disclosed. This is basically the practice, as is applied in ordinary criminal procedures. People are not identified until the police have sufficient evidence to charge them. It is also important to emphasise that police do have rights. They have a right to a fair hearing. They have a right to their reputation. And it must be acknowledged that police are in a situation where they are open to malicious and vexatious complaints.

Of course the public has a right to know. But that right, as I've already said and has been said, has to be balanced against these other rights. Right is often the best disinfectant, but it has to be – but it is not the appropriate

remedy in all circumstances. So dealing with, then, that is the essential issue. How do we balance those rights? And it seems to me that the first thing to be said is that the proposal in the Callinan Review, which is the proposal that we supported in our submission, is in fact quite a narrow one, as they themselves said.

The only publication which they propose prohibit, is publication of information which tends to identify a person specifically associated with a complaint submitted to or an investigation being conducted by the Commissioner. It's not a proposal to prevent the public discussion of maladministration or misconduct or corruption itself, or to prevent the identification of persons who have been alleged to have perpetrated such conduct. That's the first point.

The second point is that we have processes in place to review these things, and we have the Parliamentary Crime and Corruption Committee. We would also say, as we've submitted on other occasions, that the Parliamentary Crime and Corruption Commissioner should be given a greater independent discretion to overview the conduct of the CCC.

The other means of addressing these concerns, and this is not dealt with in any detail in our submissions, is to look at the question of what exemptions might be made. And having looked at some of the submissions on the website seems to me there are a number of possibilities in that area. The first one is that the parties, the person who's making the complaint, the complainant, and the person about whom the complaint is made, could consent to it being disclosed. The CCC could be given a power to release details of the complaint when they consider it to be in the public interest, with a right of review in a court by both the complainant and the person affected.

It also seems to me that the concept of reasonable excuse, as set out in Professor Brown's paper has some merit. That is a situation, where, for example, the CCC is not processing the complaint at a proper speed. A person should be entitled to release that or would have an excuse.

And finally, a person who is being accused of conduct and who is found not to have been guilty of any conduct, should have the right of their own to release the findings. And finally, once again, from reading the submissions,

the other approach which has been advocated by a number of submitters, rather than making it a criminal offence would be to effectively remove the defences in defamation law. It's an approach which I haven't thought through, but it interests me. It has at least the advantage of not involving criminal proceedings in this process. And if you look at American jurisprudence on the First Amendment, it's basically removal of a prior restraint and a probably should be damned approach, which, as I say, I haven't thought through completely, but it does have the advantage of not criminalising the conduct. Those are my opening remarks.

Mr MacSporran QC

Thank you, Mr COPE, thank you for that. Just taking up your point about a fair trial, we've had examples, of course, where, as we all know, Royal Commissions which are conducted almost always largely in public, have a huge impact on individuals who are alleged to be corrupt or have committed crimes and so forth. And one of the celebrated cases arising out of the Fitzgerald Inquiry was the case of the Police Commissioner who was charged and ultimately convicted of corruption. And of course, he was a witness and his evidence was publicly aired over a long period of time, when all of the allegations of corruption were put to him and he variously denied them and claimed he couldn't remember the details, and so forth.

One of his grounds of appeal was he couldn't get a fair trial, or hadn't had a fair trial because of the adverse impact of the pre-trial publicity, and there have been, as you know, other celebrated cases going as far as the High Court in Australia, that have consistently said that justice is not perfect, that you can have a trial that's as fair as the system enables it to be had, and routinely have rejected any suggestion that a trial can't be conducted after publicity such as the Fitzgerald Inquiry publicity. What do you say about that approach that that seems to acknowledge that judges' warnings to jurors can compensate for any adverse impact that pre-trial publicity may have?

Mr Cope

Well I suppose the first thing is, as I said in my remarks, I mean, our position has been that we oppose the regular trotting out of Royal Commissions for exactly these reasons. And probably in recent years the Fitzgerald Inquiry is probably about the only one in which we would have said was a good idea because we are not as sanguine as the courts are about the possibility of curing adverse

publicity that comes from a Royal Commission by Judges' directions. And as I say, the American evidence would tend to suggest that, you know, inadmissible material being aired is a significant factor in impacting on juries and their decision making process. And that's what happens in Royal Commissions all the time.

So our answer to that is, you know, we think there are far too many Royal Commissions anyway and we don't accept the sanguine approach which our courts tend to take to the question of whether people can get a fair trial after that sort of publicity.

Mr MacSporran QC

Thank you. What about the practice of other law enforcement and regulatory agencies such as ASIC, the ACCC, Fair Trading Department, the Police Service itself? We're reminded in one of the submissions from one of the journalist submitters that those bodies regularly publicise the fact that they are investigating allegations against individuals and companies and so forth. Do you see a difference in that approach?

Mr Cope

Yeah. Well, I mean it might be that if we sat down and looked at some of those things we would mount the same argument about them. I mean, that's why I always say we need to make a submission about everything unless somebody comes along later on and says you didn't complain about it at the time. And no doubt we haven't been through the sort of – for many years we stuck to our mission of dealing with what happens in this State. So it might be that we would say the same thing if we looked at some of those propositions. But, I mean, also it has to be said that some of the things that ASIC and the ACC are investigating are not of this sort of nature anyway, their powers range over a whole range of things which don't necessarily affect anybody's individual reputation.

Mr MacSporran QC

I suppose one distinction might be that just taking ASIC, for instance, where they might publish an allegation that someone is conducting under the guise of a managed investment scheme, a Ponzi scheme, which is totally illegal and a great threat to investors and their money, there might be justification for publicising those allegations in the sense of warning the public not to be involved with these schemes.

Mr Cope

Yes. And that's a good point. And that's part of the reason why you – our submission was that there should be a discretion in the public interest in the CCC to deal

with those sort of things. And you're exactly right, I mean, that's part of the thing with people like the ACC or the ASIC, that they have that obligation to warn people about particular things that they may be buying in the market.

Mr MacSporran QC

I suppose similarly it might be said about the QPS publicising violent crime and naming a suspect with the belief that the public needs to be warned and the suspect needs to be apprehended as a matter of public concern and safety.

Mr Cope

Yes, I mean, this is an issue in which we have made comment in the past. We do feel at times the QPS publishes the photographs and names of people when it's not justified because their allegations against them are minor things like shoplifting. But in those more serious crimes we have accepted that there is a justifiably public interest in locating those people and having them arrested. Yes.

Mr MacSporran QC

And you'd agree, no doubt, as a lawyer, that defamation law is complex?

Mr Cope

Oh, yes, it's extremely complex and extremely expensive. I think it's probably about the most expensive litigation you can get involved in. And it's not a very good mechanism for protecting your reputation, because as you said, you get at the end of a long and expensive process and it takes a long time to get there and you have to spend a lot of money. So it's preferable from that point of view that it's stopped upfront, as Callinan and Aroney said.

Mr MacSporran QC

Yes. And the point you correctly make is that the proposal by the review conducted by Callinan and Aroney suggested merely that there be a prohibition not on general discussion about allegations of corrupt conduct, but just the fact that they come to the agency.

Mr Cope

Yes. So it's a very narrow prohibition that they're proposing. It's quite wrong to give the impression that it's going to shut down debate about corruption and misconduct in this State. It's a very narrow proposal. And, as I say, if you combine that with some of the exemptions that we've talked about, it becomes even narrower. And the CCC can address these issues if there is a public interest which requires the disclosure of this particular complaint. And for those who have concerns

about, you know, the conduct of a particular investigation, well there is, as I say, consideration should be given to that reasonable excuse concept as well to address those issues.

Mr Irwin

Can I go on with that?

Mr MacSporran QC

Yes.

Mr Irwin

Just in relation to your support for the Callinan/Aroney proposal, I just wanted to be a little clearer on what aspect of the recommendations made in that report you refer to. I ask that because in your submission you support a section along the lines of section 56 of the South Australian legislation. There's also the recommendation number 8 that Callinan and Aroney made as to what might be a possible non-disclosure offence. And there does seem to be a difference between the way section 56 is drafted and the way that Callinan and Aroney put their recommendation. And I just wanted to be clear on whether you're still advancing as the best model the section 56 proposal from the South Australian Independent Commission against Corruption Act or whether you're advancing for our consideration the actual recommendation that was made by Callinan and Aroney in their report.

Mr Cope

I must say that I didn't appreciate that there was a significant difference between the two.

Mr Irwin

But in any event, as I understand it, the essence of what you're saying that you'd be suggesting that there'd be some legislative amendment that would make it an offence to disclose the fact that a complaint has been made to the CCC?

Mr Cope

Yes, yes.

Mr Irwin

And to identify people associated with the complaint and the subject matter of the complaint in whatever form that should take?

Mr Cope

Yes, yes. I mean, as I say, the submission supports the – well, as I read the report, that Callinan and Aroney were supporting a model basically along the lines of the South Australian model. And so we support the development of a model along those lines. Yes.

Mr Irwin

Subject to some exceptions?

Mr Cope Yes. And subject to the exceptions I've discussed this morning. Yes.

Mr Irwin All right. Thank you.

Mr MacSporran QC Yes. Mr COPE, one of the clear examples of where this debate is necessary is, as I said in my opening remarks, during the course of election campaigns there's been a tendency to make allegations and often, as you know, to make an allegation that something has come to us for investigation, with perhaps a motive to damage an opponent or candidate. Do you see any merit in a position where there'd be a prohibition upon publication of that sort of allegation or statement in a period which might be defined as the period of the campaign, or when the election is announced until polling day, for instance? Is there any merit in that sort of suggestion?

Mr Cope Well, I suppose our preference would be to have the issue dealt with in a more general sense rather than having a specific thing about elections. I mean, if you're going to deal with this I think you'd be better off dealing with it in a general way rather than a specific thing that just deals with elections. That's my immediate reaction to that question.

Mr MacSporran QC I suppose just in relation to that proposal some might say that the public, the voting public, not knowing of the allegation, would perhaps elect a candidate without the full information about the candidate's background activities.

Mr Cope Well that's right. And that's the sort of thing that we would see as being dealt with by the public interest power and the CCC to make, or announce this information when it's clearly in the public interest. Yes.

Mr MacSporran QC One other option that has been flagged is something akin to what now is in place under the Public Interest Disclosure Act, the PID Act, and it's under section 20 and it's in this form. That:

- “(1) This section applies if –
 - (a) a person has made a public interest disclosure under this chapter, and
 - (b) The entity to which the disclosure was made or, if disclosure was referred under

section 31 or 34, the entity to which disclosure was referred –

- (i) decided not to investigate or deal with the disclosure; or
- (ii) investigated the disclosure but did not recommend the taking of any action in relation to the disclosure; or
- (iii) did not notify the person, within 6 months after the date the disclosure was made, whether or not the disclosure was to be investigated or dealt with.

(2) The person may make a disclosure of substantially the same information that was the subject of the public interest disclosure mentioned in subsection (1) (a) to a journalist.”

So the nub of that, I suppose, is to require the person to have made a disclosure to an appropriate authority, whether it be the CCC, Police Service or otherwise. But if they're not notified within a period of six months of those various factors the person then has a right to go to a journalist and make public the allegation they've made.

Mr Cope

Well that's the sort of reasonable excuse provision, if that's the section that's referred to in Professor Brown's-

Mr MacSporran QC

Yes.

Mr Cope

And as I said, we would certainly be open to a development of an excuse along those lines as part of the legislation. Yes.

Mr MacSporran QC

I mean, if we are concerned about the public's right to know in the context of transparency and accountability, is it too harsh to require a delay in the public's right to know that is proposed by this section?

Mr Cope

Well, as I understand the purpose of it, it's really one of those situations where somebody is saying I've made a complaint and it's not being dealt with properly. And I certainly saw it in the context of addressing that concern that some people have, or might have, that, you know, the CCC isn't doing its job and we need to tell people about that. And in that context, though, I think it's reasonable to say that the organisation should be given an opportunity to do its job and so the time factor seemed to me to be a relevant consideration in that, you know, a

reasonable time for conducting an investigation should pass before somebody is allowed to say you're not doing your job, get on with it and complain about it.

Mr MacSporran QC

If the motive is to expose corruption and have it dealt with properly, what could be the harm in delaying that process for, as in this case, six months?

Mr Cope

Well, I mean this whole process involves the risk of some level of harm, in that, you know, you have the prospect that somebody is engaged in corrupt conduct. But in all of this, we go back to the starting point, how do we balance the right to free speech, the right of the public interest to know and the right of those people who might be the subject of complaints which turn out to be entirely without substance, and they have their name destroyed in the public arena. So we need to balance that and we have the processes like the CCC and the PCCC and the Commissioner, to some extent, which overlook those processes and seek to ensure that the Commission is doing its job properly and these things are investigated in a timely fashion and results are achieved, and it balances against the restriction on the right to free speech and the need to protect people's reputation. So this is the mix that we're trying to get that balances those considerations and gets the right result, so the public have confidence without these things being dumped in the media, that a result – the correct processes are going on and these people will be dealt with and will be charged or whatever needs to be done with them.

Mr MacSporran QC

And I suppose you'd agree that fundamental to the proposal to prevent publication for a short period while an agency investigates or assesses can only work if the public have confidence in the agency concerned?

Mr Cope

Yes. That's right. And that's why I make the point that, you know, the CCC doesn't operate in a vacuum, it is supervised by the Committee and, as I said, we would take the view that the Commissioner should be given a wider ambit in that regard. I mean, people express to me the concern that politicians on the Committee, whatever, can't be trusted to do this. I mean, I don't have quite the cynical view of politicians as some people do, but if that's a concern then the Commissioner should be given an expanded remit in terms of having an independent issue broader than they have at the moment to supervise the conduct of the Commission. But these are the sort of issues that we do need to address to make sure that people

have confidence in the Commission so that when these things are conducted in private they feel confident it's going to be dealt with properly. And that's the point of having that reasonable excuse provision that it does enable somebody to say, well, you know, you've had enough time, there is some reason to be concerned about what's going on here and the public should know about it.

- Mr MacSporran QC Thank you. No.
- Mr Bingham No, that's good. Thanks.
- Mr MacSporran QC Marshall?
- Mr Irwin Nothing further, thanks, Alan.
- Mr MacSporran QC Okay. That's probably all the queries we have, but do you have anything you'd like to add before you leave us today?
- Mr Cope No. I might think about the question you asked, because I must say I didn't think there was much difference between what they were saying and what the South Australian legislation is.
- Mr MacSporran QC Yes.
- Mr Cope And I think if there's an opportunity I could write something else. I might write something about that.
- Mr MacSporran QC It might ultimately be a matter of drafting – ultimately I think you've made the point as to the, you know, the proposition you're advancing as to the sort of legislative change that could be made.
- Mr Cope Yes.
- Mr Irwin But if you did feel the need to address that further by all means you'd be entitled to make another submission or supplementary submission to us on that point.
- Mr Cope Okay.
- Mr Irwin Thank you.
- Mr Cope Thank you.

Mr MacSporran QC

Yes. Thank you, Mr COPE. You can stand down. And Mr McMAHON, I think is next.

END OF SPEAKER