



**Crime and Corruption
Commission**

QUEENSLAND

CRIME AND CORRUPTION COMMISSION

MAKING ALLEGATIONS OF CORRUPT CONDUCT PUBLIC: IS IT IN THE PUBLIC'S 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:

Dr Joseph M Fernandez (remotely via SKYPE)

- Mr MacSporran QC All right. Doctor, you can – you can see the panel, can you?
- Dr Fernandez I can. I can, yes.
- Mr MacSporran QC Thank you. Thank you very much. Thank you for your submission.
- Dr Fernandez I can see the panel, and – sorry, I missed that – thank you. Thank you for having me, Chair, and the panel.
- Mr MacSporran QC Now, Doctor, just for the record, could you state your full name and where you are based?
- Dr Fernandez My name is Joseph Martin FERNANDEZ, and I'm based in Perth, Western Australia at Curtin University.
- Mr MacSporran QC Thank you. We are just having a little difficulty with the audio, so we might just take a moment or two to see if we can improve the quality of that.
- Mr MacSporran QC Okay. Thank you, Doctor. I think we can go ahead with you now if that's satisfactory.
- Dr Fernandez That's fine with me, Mr Chair, thank you.
- Mr MacSporran QC Thank you. Now, look, I wonder whether – we've read your submission, obviously, as have the people in the room here, but would you like to take the opportunity to make a five or ten minute opening statement to summarise your views on these issues?
- Dr Fernandez Thank you very much. I will take up the invitation. What I've done is I've prepared some thoughts in response to the email advice I received from your research officer, Ms Vivien CHAN, who provided some suggestions on questions that I could prepare my thoughts around, and I'm not sure if you're familiar with the questions that I'm referring to. The first one goes: "In your view is making allegations of corrupt conduct public in the public interest?" And there are six or seven other questions. Are you aware of those questions that were sent to participants, Mr Chair?
- Mr MacSporran QC Yes, thank you, Doctor. Yes.
- Dr Fernandez Yes. If it's convenient for you and the Panel, I propose to speak in response to those pointers, and I'll commence now.

Mr MacSporran QC

Thank you.

Dr Fernandez

In answer to your question, “In your view is making allegations of corrupt conduct public in the public interest?” my first response is yes, and I say so quite plainly in my submission at item 4.1.1. At the outset I thought I should declare a couple of points, and one is that I see myself as an advocate for freedom of expression and the imperatives of openness, transparency and accountability in our public institutions and in our public offices. That said, I recognise that freedom of expression is one among many interests that deserve protection.

I recognise that other interests may collide with the public interest in freedom of expression, and the Commission’s discussion paper has identified some of these public interests and they include, under the heading “Important Considerations” - the public interest in accused persons getting a fair trial; the public interest in the privacy of individuals facing corruption allegations; the public interest in protecting such individuals from undue reputational damage; the public interest in ensuring that corruption watchdogs, such as the Queensland CCC are able to perform their functions efficaciously.

I’m fully supportive of the role of corruption watchdogs such as the Queensland CCC and accept that they play an important role in fighting corruption. However, I believe that the public and the media have a deep interest in guarding against concentrated power and in bringing to the public’s attention matters of legitimate public concern.

As to the second question that was suggested: “What factors did you consider in arriving at your position?” The factors that I just listed out heavily influenced the way I approached my response to the invitation for a submission. As to what are the positive outcomes associated with my position, I would suggest that my position would ensure that the complementary role played by the media in the fight against corruption is not curtailed further without proper consideration of the merits of the measures that may hinder the public’s and the media’s ability to make allegations of corruption public. In my view, our legal system provides ample tools to deal with the various considerations at play in

this inquiry, including those of the Commission, the people being investigated, and the public at large. My position is that the existing tools must be shown to be inadequate before any change is made, especially any change that will restrict making allegations of corruption public.

The fourth question suggested that I could address is, “What are the negative outcomes associated with your position and how can these be eliminated, minimised or managed?” My answer is I cannot say with certainty that there are negative outcomes associated with my position. I can only speculate as to what the negative outcomes might be. The discussion paper was unclear on this point. In fact, the paper showed that this question has in fact exercised the minds of the various committees that considered the competing interests. These committees did not resolve the question; they were, over the years, divided. The 1992 Committee did not support the CJC’s desire for amendments to outlaw the disclosure of the existence of a complaint. The PCMC in 2006, 2009 and 2012 said no legislative amendment was required. The 2013 consideration, however, recommended making disclosure an offence.

The fifth question suggested to me that I could address was “What changes to laws, policies, practices or systems are required to support my position?” My position is that before we consider what changes are needed to laws or policies, first consideration should be given to why the present question has arisen all over again despite the findings in the majority of prior considerations that showed no legislative amendment was required to make disclosure an offence. It is curious to me that the very first sentence of the discussion paper under the heading “Background” is grounded in speculation. It says, “Publicising allegations of corrupt conduct may adversely affect the CCC’s ability to perform its functions,” and so on.

A further way to look at the present question is to say that right up until 2012 there was no support for legislative change. If any change is required, I would suggest the following, which is explained in more detail in my submission under Heading 3.15 and that is, that attention be given to whether all existing avenues for addressing any perceived problems have been exhausted. It seems to me they have not been exhausted, for example, see the 2013 consideration by The Honourable CALLINAN and

Professor ARONEY where they note that “it is clear to us that there has been an unjustified and unsatisfactorily explained reluctance to engage provisions of the Crime and Misconduct Act.” The reference there is to Sections 216 to 218. These sections deal with the vexatious and reckless complaints, and they noted that these provisions could, but have not been applied to seek to achieve their purposes. On this point please see my submission, Item 3.15.

And my further point is that any resort to confidentiality powers should only occur as a very last resort. Confidentiality is a double-edged sword. It can be used to good effect in protecting society from harm, but it is also the prime source of many of the ills that society faces. One does not need to look too hard to find illustrations of this proposition. Just look at all the work produced by investigative journalists and the revelations made at the various Royal Commissions, and Parliamentary inquiries. They consistently reveal information that came too late to have minimised harm.

The sixth question put to me in the list provided was: “What are the possible barriers to the successful implementation and operation of these reforms and how can these be eliminated, minimised or managed?” To properly answer this question, I would need to know what precisely the present problem is that these reforms are aimed at. What I propose is a clear definition of the present problem. I do not understand what the problem is other than vague references, for example, to what happened in the 2012 State Election and the considerable public interest in the allegations referred to the CMC relating to candidates. There is not enough of a factual foundation upon which the alleged existence of a problem is based. In my view it is important to define the alleged problem if we are going to make any progress. On the other hand, instituting any reform that is not properly targeted at the problem runs the risk of causing collateral damage and become counter-productive. There is a risk that any rule that unduly curtails the media’s present ability to report on allegations of corrupt conduct will impact adversely on the media and the public.

And this is the final question: “What are the possible unintended consequences of these reforms and how can these be eliminated, minimised or managed?” As with my response to the previous question, I’m unclear about what precisely the problem is that the Commission is

trying to address. The discussion paper in its title asks whether it is in the public interest to make allegations of corrupt conduct public, and it makes me ask, is the CCC considering whether to introduce rules to prevent the reporting of allegations of corruption by making the existence of such complaints confidential? Why is this question being raised given all the prior considerations of the question, and in most of the prior considerations the answer to this question was “no”, we don't need new rules to stop allegations being made public?

And if I'm permitted, I've got some final points to wrap up my presentation. At the risk of being pedantic, it seems to me there is a slippage in the use of the terms in the discussion paper, first, “making allegations of the corrupt conduct public”, which appears in the title and elsewhere, and, second, “publicising allegations of corrupt conduct”. I suggest that a distinction can be made between the two forms of expression. The first form of expression refers to the mere disclosure of allegations of corrupt conduct, whereas I suggest the second one refers to repeated disclosure or disclosure of a harassing kind or of a kind that could give rise to stronger claims of mala fides. In any event, as the discussion paper itself notes, contemporary mass communication methods mean the horses always bolt faster than we can shut the gates. With countless holding yards where the horses are kept, far too many gates need controlling. The reality is that many of these gates cannot be controlled and those who would end up paying a much heavier price would be those in the mainstream media and those engaged in serious journalistic work.

In my view, as my closing statement, a more efficient way to address the mischief, the vexatiousness, the recklessness and mala fides in the raising of allegations of corrupt conduct would be to address the sources of these allegations and not the media messengers and journalists. And that is the end of my presentation.

Mr MacSporran QC

Thank you, Doctor. That was very helpful. Can I just take you back to some of the things you've said?

Dr Fernandez

Thank you.

Mr MacSporran QC

One of the things you said that the – there was no evidence that the existing tools for dealing with this so-called problem were not adequate. Do I take it that you mean in part at least that the laws of defamation are a

sufficient safeguard against false allegations being made and not being redressed?

Dr Fernandez That would be my default position and that if it is argued that the laws of defamation are not adequate, I would like to see the argument to that effect before I can decide whether I agree with the rebuttal or not.

Mr MacSporran QC I suppose one of the views we've had expressed here earlier today about the defamation laws is that they are, firstly, very complex, secondly, very slow, and thirdly, and perhaps most importantly, very expensive and not available to everyone.

Dr Fernandez Oh, okay. My response to that would be maybe we should have a fresh look at the way defamation law operates to see whether it is doing its job. The last major review we had was more than a decade ago and since then nothing has been done even though some of the jurisdictions have made some changes to the way the law operates. It may be the view of those in the shoes of a potential plaintiff that defamation laws are not working well for them, but I'm inclined to the view that defamation laws are not working very well for the media either.

Mr MacSporran QC In terms of the review, do you refer to the 2005 Uniform Defamation Laws Review?

Dr Fernandez Yes, that's the one, Mr Chair.

Mr MacSporran QC Do you agree that there is at least a risk, if not a proven eventuality, that some people will be the subject of malicious and false complaints?

Dr Fernandez Yes. And this is something that I took on board in making my submission, and my question then is why are not those provisions designed to deal with the making of reckless, vexatious or malicious complaints not being more effectively applied? The first inquiry should be are those provisions there, are they effective and are they being applied? I would need to know more about the answers to those questions.

Mr MacSporran QC I think, Doctor, one of the responses to that, is that the present offence creating provision is very complex and difficult to prove, requires proof of intent to – and an understanding that the complaint being made is, in fact, false and it's done for malicious purposes. That, absent

an admission, which is very infrequently given, is very difficult to prove, so that the laws in that respect might be said to be inadequate to deal with the situation.

Dr Fernandez

I take your point, Mr Chair. In response, I would say is imposing a confidentiality rule that completely stops the making of such allegations public the best way forward or should we now look at why those provisions that we just talked about are inadequate and what can be done to fix them?

Mr MacSporran QC

One option might be to make it a strict liability offence to publish allegations in a given period, for instance, in the case of elections, during the election campaign period. That's just one option that might be a – it's a blanket prohibition but for a limited specific purpose.

Dr Fernandez

In other words am I correct in understanding, Mr Chair, that this blanket prohibition, if it applies during the election period, would prevent the making of allegations of corrupt conduct during that period, that defined period?

Mr MacSporran QC

It would prevent the making of those allegations public. It wouldn't prevent, and in fact it would encourage them to be made confidentially to the appropriate authority, whether it be us or another appropriate authority for investigation.

Dr Fernandez

I'm wondering whether – and I – well, I'm very uncomfortable with that alternative, simply because I think elections are an opportune time to thoroughly examine a person's fitness for office, and that is a time when people take a greater interest in the fitness of office of people who are seeking election, and I think it would be a disproportionate response to impose a blanket ban on such publication during that period.

Mr MacSporran QC

Doctor, do you see any difficulty in the making of the allegation public but no opportunity, effectively before Election Day, to resolve one way or the other whether the complaint has merit?

Dr Fernandez

Yes, I think there is a disadvantage that candidates would face. As a former news editor I'm very alert to that problem, because, like no time before in the calendar, that's a very intense time when all sorts of allegations land on my table, and that is something that newspaper editors and other gatekeepers continually grapple with,

and this is where, I think, if we keep our attention closely focussed on the intent behind the making of these allegations if there is substance to it I cannot see why those allegations cannot be made during the election period. I think our concern should be on the making of reckless, vexatious, malicious and mischievous complaints, and it's something that the law can address by providing very stiff penalties for those found to be engaging in that sort of activity.

Mr MacSporran QC Providing stiff penalties for those engaging in the activity will punish those people, but won't cure the disadvantage suffered by the candidate who is the victim of it.

Dr Fernandez Well, I think we've got to try it out to see whether those penalties are sufficient to send the message to those who have similar intentions as to whether they wish to engage in that sort of conduct, that sort of mischievous publication. If the penalties work I would think that people would think twice before they sought to exploit the election period for personal gain.

Mr MacSporran QC So it would act as a significant deterrent, a penalty.

Dr Fernandez Yes, that's exactly – thank you for that word; that's the word I'm looking for.

Mr MacSporran QC Yes.

Dr Fernandez You know, if the penalties are adequately of a deterrent that should, I hope, cure the problem, and if it doesn't we need to fresh – investigate afresh why that's not working.

Mr Bingham Doctor, I have one reflection on the comments that you've made, and thank you very much for them; I found them very helpful. Given that the issues around this question are ones which have been debated backwards and forwards a few times, I'm wondering what your position is on what other options there might be. You mentioned that, firstly, the discussion paper doesn't adequately define the problem. If we say that the problem is the fact of unexpected and unwarranted damage to reputations for some people, if that's the problem, what ways do you think there might be that should be explored short of the sorts of proposals that have been made about restricting publication? It's proposed sometimes, for example, that ways of dealing more effectively with vexatious complaints involve making it harder to

complain or requiring additional steps to be gone through before a complaint can be lodged.

From your perspective, what other options should be explored to prevent the harm which you would see flowing from the restrictions on publication?

Dr Fernandez

I think that's a useful start. You've mentioned quite a few alternatives at our disposal. The gatekeeping, the point at which a complaint becomes recognised as a complaint that has been lodged with the CCC, if it's put through very strict hoops before someone can consider that they have indeed lodged a complaint, is an excellent way to go about it. So that's tackling it at the source. On the other hand there could be other alternatives, and if a questionable complaint does get through that hoop, then if it is discovered that the person who lodged the complaint still managed to get through with a questionable complaint or a malicious complaint then penalties in the nature of a deterrent could apply to those individuals. Once again, we need to be clear that we're not throwing the baby out with the bath water and that people are not discouraged from coming forward with complaints.

Another point I would mention is that it is not just allegations of corrupt conduct that harm people's reputations. The harm to reputations comes from many directions. I'm not convinced that those particularly involving corruption deserve special treatment, although I do agree that allegations of corruption can be very harmful to personal reputations.

Mr Bingham

Thank you.

Dr Fernandez

Thank you.

Dr Denning

Dr FERNANDEZ, you keep coming back to this idea about the deterrent effect, the general deterrent effect of the frivolous and the vexatious mechanisms in the Act. I suppose I just wanted to tease that out a little bit more and to ask you how you think – whether you really think that that's a realistic prospect in terms of deterring this kind of behaviour, particularly given that the nature of frivolous and vexatious complaints are often made when the stakes are pretty high and the benefit of getting away with it is often very, very significant, sometimes, as we've talked about today, in the terms of being elected to an official position, a public office, sometimes we're

talking about significant land developments and millions and millions of dollars. So that power balance, I think, is something that warrants a little bit of attention.

Dr Fernandez

Sure. Sure. I'm also informed by the consideration of 2013 where The Honourable CALLINAN and Professor ARONEY made the observation that there has been an unjustified and unsatisfactorily explained reluctance to engage the provisions of the Act. Now, I would like to see what the answer is to that claim made by those two officers. They've noted that these provisions could, but have not, been applied to seek to achieve their purposes. So in my view there are some unexplored avenues, some unexhausted avenues that, in my view, should first be considered. Why did that happen, and if that is still available then that should be our first recourse.

As I confessed at the very start, I am inclined towards protection of freedom of expression and that anything that undermines freedom of expression, which is a very delicate feature of our legal landscape, needs to be very, very carefully thought out and it's on those grounds – it's on that basis that I'm suggesting that the unexplored avenues be totally exhausted before we move in a particular direction.

Mr Irwin

Professor, would you accept that, notwithstanding that CALLINAN and ARONEY emphasised the fact that the offence provisions had not been utilised, that nonetheless they made a recommendation that there be enacted an offence of disclosure of the fact that a complaint had been made to the CCC. So the question that I ask arising out of that is isn't it appropriate for the offence provisions dealing with frivolous, vexatious, careless, reckless, malicious complaints to work side by side as part of a package of deterrent measures with an offence of disclosure of a complaint to the CCC of the sort that had been recommended by CALLINAN and ARONEY in their report?

Dr Fernandez

I take your point. Thank you very much for teasing that aspect out. I'm still not satisfied that CALLINAN and ARONEY's position is the one that I support, especially given the prior instances when this matter was investigated, and those inquiry panels did not recommend a legislative amendment. So my question then would be what has changed since that period? What has changed so dramatically that makes it necessary for us to seriously consider this prohibition on disclosure. It

must be something that has happened after – since those prior considerations were done, and I'm – I must confess I'm not clear as to what exactly has happened in the last, say, four years or three years that requires us to give very serious consideration to introducing this confidentiality barrier?

Mr Irwin

Well, what would you say if the circumstances were these: that, despite strenuous efforts by the Crime and Corruption Commission, particularly in the context of election campaigns and recent local Government election campaigns, to convince the candidates not to publicly disclose the fact that they have made allegations to the CCC, that those complaints have continued to be publicised?

Dr Fernandez

My – if I can answer that question with a question, do we have any empirical evidence as to how many of those allegations subsequently turned out to be frivolous and vexatious, and if so did those parties who made those complaints face any consequences for that?

Mr Irwin

Well, I don't think that we have any empirical evidence of that nature at the present time, but we do, of course, have the anecdotal evidence that historically in Queensland before election campaigns that these allegations are made public to the detriment of the reputation of at least some individuals, and, despite efforts by the CCC and, for example, a local Government association before each of the election campaigns over a number of election cycles, this conduct continues.

Dr Fernandez

In response to the point you've just made, my response would be I would want to focus my attention more heavily on this aspect to see whether the avenues that have been – that are available to us have been fully exploited and to do so in a more measured way, in a more empirical way, and to be satisfied that the research shows that it's not working, and only then would I be comfortable with contemplating the confidentiality device.

Mr Irwin

I take it from what you say, Professor that you don't agree, at least at this stage, with the implementation of legislation along the lines that CALLINAN and ARONEY recommended?

Dr Fernandez

That would be absolutely correct, thank you.

