

PRIVATE AND CONFIDENTIAL

16 April 2024

The Hon. Catherine Holmes AC SC
Reviewer
Independent CCC Publication Review

By email: CCCReportingReview@justice.qld.gov.au

Dear Reviewer

Public reporting on corruption matters

The Association appreciates the opportunity to make submissions in respect of the terms of reference of the independent review into the Crime and Corruption Commission's reporting on the performance of its corruption functions, and apologises for the delay in providing this response. The terms of reference have been considered, and this submission prepared, by the Association's Criminal Law Committee.

As requested in your letter, the Association has particularly focused this submission on paragraph 6(d) of the terms of reference, and appreciates that paragraph 6(d) of those terms raises broad issues which go to the heart of the review. In addition to this submission, if it would assist your review, members of the Association's Criminal Law Committee would be happy to attend a meeting to discuss these issues or any potential recommendations for legislative amendment in further detail.

From the outset, the Association supports the CCC having the ability to publish reports of its corruption investigations. There is legitimate public interest in the kind of conduct in question and a corresponding interest in the findings of an investigation by the CCC being made available to the public in some form.

The Association notes that procedural fairness is an inherent aspect of the proper discharge of statutory powers and functions exercised by the CCC generally.¹ The specific requirements of procedural fairness in any given case will depend upon the nature of the power or function being exercised.²

Noting the Government's intention to legislate new reporting powers for the CCC it is opportune for those specific powers to contain appropriate safeguards to ensure procedural fairness is afforded in the corruption investigation and at any reporting



BAR ASSOCIATION
OF QUEENSLAND
ABN 78 009 717 739

Ground Floor
Inns of Court
107 North Quay
Brisbane Qld 4000

Tel: 07 3238 5100
Fax: 07 3236 1180

chiefexec@qldbar.asn.au

Constituent Member of the
Australian Bar Association

¹ See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

² See *Kiao v West* (1985) 159 CLR 550 at [585]; *Duncan v Independent Commission against Corruption* [2016] NSWCA 143 at [688] – [693]; *Glynn v Independent Commission Against Corruption* (1990) 20 ALD 214 at [215].

stage itself.³ That is to say that provisions within the *Crime and Corruption Act* itself should provide for specific requirements to afford procedural fairness to the subject of an investigation or to any person who may be the subject of adverse commentary or opinion in a publication made by the CCC.

While there are likely many scenarios where the CCC could report on its investigations without revealing the identity of a person involved, it is likely inevitable that situations analogous to those in *Carne*⁴ will arise and a person under investigation be clearly identifiable by the content of a report.

Therefore, consideration could also be given to ensuring there is scope for the subject of an investigation to make submissions specifically with respect to the issue of publication of a report, or any part of it, and to ensuring that the CCC take those submissions into account in deciding whether to publish the report, or any part of it.

Additional safeguards may include the allowance of adequate timeframes for the subject of an investigation to respond to allegations and make submissions, and allowing for extensions to be sought and granted where necessary because of, for example, health issues.

Consideration should also be given to the potential impact of a public report by the CCC, and likely subsequent reporting in the media arising from such a report, on any related criminal prosecutions or other legal action which may arise from the same facts.

Where a referral for prosecution is made, or criminal proceedings are instituted as a result of a CCC corruption investigation, it would be preferable for no substantive public report to be made by the CCC (albeit, perhaps, the fact that such an investigation has occurred and such a referral made or prosecution commenced). The public interest in the matter being ventilated is, in that situation, achieved through the subsequent criminal process such that there is no need for a pre-trial report from the CCC. A substantive pre-trial report on the CCC's investigation being made public at that point is problematic and may give rise to, for example, applications for non-publication orders, no jury orders, or in an extreme case, a stay of the criminal proceedings. Those would be matters for the Court hearing the criminal proceedings to determine.

The same issues could arise, although to a lesser extent given the absence of juries, in non-criminal proceedings arising from the same facts, for example, disciplinary proceedings.

The Association notes the position in Victoria under the *Independent Broad-based Anti-corruption Commission Act 2011 (Vic)*, where s 162 restricts the publishing of any information which would prejudice a known criminal investigation, criminal proceeding or other legal proceeding. The Association supports the inclusion of a

³ As is the case in, for example, Victoria, per s 162(3) of the *Independent Broad-based Anti-corruption Commission Act 2011 (Vic)*. See *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* [2024] HCA 10.

⁴ *Crime and Corruption Commission v Carne* [2023] HCA 28.

comparable safeguard in respect of any specific statutory reporting powers to be recommended by this independent review.

The Association appreciates the opportunity to make submissions in response to the terms of reference of the independent review, and would be glad to make any further submissions, or answer any questions you may have. If you would like to hold a meeting with members of the Criminal Law Committee to discuss these issues in further detail, its members will make themselves available to the Review.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Damien O'Brien', written in a cursive style.

Damien O'Brien KC
President