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CCC Reporting Review
c/o Department of Justice and Attorney-General, Queensland

Dear Ms Holmes,

Thank you for the opportunity to contribute to your review. In doing so, I am writing in my capacity as a former Chairperson of the then-CMC, not in my capacity as an academic. I do not represent that my views represent those of my employer, Griffith University. Given the perspective I am bringing, I have not given full vent to the scholarly habit of extensive footnoting.

Framing the problem

The problem underlying the present review emerges from the drafting issues identified in *CCC v Carne*[1]. Shortly put, there is a lacuna in the legislation. The *Crime and Corruption Act 2001* (*CCA*) allows under s69 for reports where there is a public hearing (which the Carne investigation was not), or under s49 where there is a decision in an investigation that considers charging or disciplining the subject of an investigation (which in the Carne case there was not). It allows for reporting under s64, but only with respect to broad general matters, as the High Court found in *Carne*.[2] It does not allow for a report where there has been an investigation not amounting to a public hearing where a decision is not made to consider prosecution or discipline of the subject of the investigation.

[1] *CCC v Carne* [2023] HCA 28
[2] n1, [58] – [65]

It is proposed that the *CCA* be amended to fill that gap so that reports in cases like *Carne* can be made and published in one way or another.

In summary my view is that the law should be amended to overturn the effect of the decision in *Carne* so that reports of the sort that arose in that case may be made and publicly distributed. The model for that process should follow the pattern provided in s69 of the *CCA*. Any amendment should be retrospective in operation.

Historical practice

It would seem that historically, no-one seems to have noticed the point that arose in *Carne*. I regret that I have not been in a position to trace the current state of the legislation on the present point to its origin in statutory history so I am unable to identify the precise details of the change that brought about the state of the legislation as it was considered in Carne. Perhaps the drafting style of making a general statement that the CCC can 'report'[3] obscured the complex qualifications to its reporting capacity elsewhere.

It seems to add to the confusion that s71A of the *CCA* implies the existence of such a thing as a report 'to be published to the public', as a separate concept from a report to be tabled in the Legislative Assembly. I have found no general power to simply publish a report to the public. If there were one, the problem in *Carne* would disappear in a practical sense.

If the *Carne* point had been noticed during the historical development of the *CCA*, then the CCC's argument before the High Court would have probably necessarily have been different. The CCC's argument seems to have assumed that the point that prevailed in *Carne* was wrong, rather than that its effect was avoidable.

It is possible to examine the reports published by the CCC at its website through a filter called 'Public Reports – Investigations'. One has the sense in a brief look at those reports that there does not seem to have been specific attention paid in any great detail to the point that arose in *Carne*. I certainly do not recall, in the relatively few cases I had to deal with

[3] *CCA* s64(1)

during my time as Chairperson, of attention being paid to the point. Without detailed analysis of the historical reports, I have looked for examples of *Carne*-like cases where there was public reporting or reporting under s69 of the *CCA*. An example might be the Senior Medical Officers' Report (Sept 2014). There, there was a report released to the public about the conduct of doctors in public hospitals who held a right to private practice, which conduct was in breach of their contracts. No recommendation to consider prosecution or discipline was made. In the jargon of the CCC, the matter did not go beyond an 'assessment' (which is conceived of within the organisation as a preliminary step prior to a full 'investigation'). The section in the report that deals with the CCC's jurisdiction at p3 does not seem to address any concern about a *power* to report and publish emerging from the considerations in *Carne.* At the bottom of p3, it seems to be assumed that s64 of the *CCA* provided a power to create a public report, apparently taking a much wider view of the operation of s64 than the High Court did in *Carne.*

I recall in my time as Chairperson releasing a media statement immediately prior to the State election in early 2012 about the then candidate for Premier against whom allegations had been made by the then Premier. The media statement descended into some detail and so probably qualifies as a 'report' in the absence of any more formal definition that would exclude it. The media statement indicated that upon assessment, consideration of allegations against him did not rise to the level of requiring an investigation.[4] I recall no consideration being given within the Commission of the *Carne* point. Sections 49. 64 and 69 were then relevantly the same as they were when considered in *Carne*. Once again, it seems to be assumed that s64 had a much wider effect than the High Court allowed it to have in *Carne*.

Lastly I recall that there were secrecy provisions of the *CCA* as it stood during my time as Chairperson that allowed me as Chairperson to authorise the release of information that might otherwise have been required to be withheld. I have not been able to find that provision although I vividly recall acting under it from time to time. It may be that the language of such a provision contributed in a general way to thinking within the CCC that it had power to do what was done in *Carne*.

[4] https://www.ccc.qld.gov.au/news/cmc-concludes-no-official-misconduct-newman-assessment-three-bcc-related-matters

Is there a policy basis for the existence of the problem?

If there were policy reasons affirmatively explaining why the *CCA* had the limitation on reporting identified in *Carne,* they are not, on my reading of the *CCA*, apparent. The *CCA* is densely written, with many technical details about a large variety of topics. It may simply be that the drafter's focus on that level of detail meant that something was missed.

I have relatively briefly reviewed the Fitzgerald Report to seek assistance for any indication that the *Carne* problem was a deliberate policy choice (particularly Chapter X). At p308, there is a broad reference to the CJC reporting 'when it decides it is necessary to do so.' Otherwise, I could find no indication that the specific exclusion from reporting of the sort of matter that arose in *Carne* was a policy choice.

At least seven considerations, to my mind, point to the conclusion that it is unlikely that there is sound policy behind the exclusion from reporting of the sort of matter that arose in *Carne*. The discussion that commences below is not intended to represent an exhaustive list.

In the discussion below I refer to s49 of the *CCA*, not because it was particularly prominent in the decision in *Carne*, but because it is part of the collection of sections that together drive the result that a corruption investigation that does not lead to consideration of prosecution or discipline may not be the subject of a public report. I am not suggesting that the text of s49 should be amended.

Let me also make it clear that I am not suggesting that the High Court was in error in *Carne.* It was making its decision based on a textual analysis of the *CCA*. I am addressing here whether, independently of any textual analysis, it is possible to identify a good policy reason underlying the drafting of the legislation considered in *Carne*.

I turn now in detail to the seven considerations I foreshadowed above.

First, corruption is a crime of complicity. Of its nature, and unlike in other sorts of crime (such as assault, rape, robbery etc), there is no person involved in corruption on either side

of the corrupt bargain who has a natural motive to draw its existence to the attention of investigators. There is, indeed, a powerful natural motive *not* to do so. A potentially very cogent way of attacking corruption with that observation in mind is to draw corrupt conduct out from the shadows in which it operates and expose it, on the 'sunshine is the best disinfectant' principle attributed to Brandeis J of the US Supreme Court. In other words, the fight against corruption is advanced by a more expansive approach rather than a less expansive approach to public reporting.

Secondly, the CCC's reporting on a corruption investigation generally serves the value of openness beyond the point made immediately above. It means that the CCC's work itself is not done in the shadows. It means that public perception of the CCC's work is not limited to those relatively few cases that are brought to trial. In reporting on a failed case, reasons can be advanced why reform might be necessary to correct some aspect of the law.

Thirdly, there is very high onus of proof in criminal proceedings which might prevent the pursuit of criminal proceedings against an individual in a corruption case. In a discipline case it may be that the *Briginshaw* principle[5] elevates the balance of probabilities test to requiring a high order of proof as well. There can also be procedural considerations that limit bringing charges such as the joinder rules and the rules restricting similar fact evidence. It may be that a necessary witness whose account is credible and might be expected to be believed withdraws their cooperation with investigators through intimidation. Yet nevertheless it might be capable of being concluded, on perhaps a lesser standard, or from a perspective that is not bound by those procedural issues, that corruption has occurred. It may also be that the operational methods of how some suspected corrupt conduct was undertaken are worthy of being publicised in detail as a matter of public exposure whether or not some individual is the subject of criminal or disciplinary proceedings.

Fourthly, it might be valuable to draw public attention to a particular investigation as an indicator of broader problems in some particular institution despite there being no decision to consider prosecution or discipline. Exposure may be valuable as a stimulus to reform whose reasons might not be apparent without exposure. Such exposure might serve to answer self-serving objections from those opposing reform for dishonest reasons.

[5] *Briginshaw v Briginshaw* [1938] 60 CLR 338

Fifthly, Commissions of Inquiry are not bound by the distinction about what is and is not capable of being reported detected in *Carne*. That is, the publication of a report by an inquiry constituted under the *Commissions of Inquiry Act 1950* does not depend on whether or not the commissioners decided that prosecution or disciplinary proceedings should be brought. Obviously the CCC does not operate under the *Commissions of Inquiry Act 1950* (*COIA*), and arguments by analogy should not be taken too far, but the general justifications for the creation of Commissions of Inquiry are strongly analogous with those for the CCC. The exceptional powers of both such bodies are justified by the proposition that ordinary powers are inadequate in their respective circumstances, and that special powers including powers of coercion are necessary. Part of the mutual justification of both such bodies is to restore public confidence where it might otherwise be lacking, in ordinary processes and institutions, including by making recommendations for reform. Both such bodies can in principle consider whether prosecution or disciplinary action is necessary (depending on the terms of reference of a commission of inquiry). Both such bodies achieve their purposes in large measure by public reporting.

Sixthly, public reports in cases where there are no proceedings against an individual may serve the beneficial purpose of 'clearing the air' about rumours and suspicions circulating in the community. If such rumours prompt an investigation, and that investigation concludes that the rumours are false, then it would seem perplexing that the CCC could not publicise that. My media release about a candidate for Premier (see n4 above) might be an example of that.

Finally, it is difficult to understand why 'consideration'[6] of criminal or disciplinary proceedings should be the deciding criterion for a report's publication. One might think that proceedings actually being commenced (in public) might separately serve the public interest in exposure of the relevant issues, but mere consideration does not do so. Consider a case where criminal proceedings were considered by the CCC, to the point of referral to an agency such as the DPP, but the DPP indicated it would not proceed. Why should mere consideration to refer the matter to the DPP determine whether publication of a report was appropriate? Alternatively, what if disciplinary considerations might have been considered but for the resignation of the subject of the investigation? Such a resignation might make consideration of disciplinary proceedings otiose, and thereby take any report about the investigation

[6] *CCA* s49(1)

outside of s49(1) or ss 64 or 69 of the *CCA*. Should the person being investigated, by judicious resignation, essentially have the unilateral power to determine the publication of an investigative report?/ It is difficult to see a policy reason why that should be so. Such circumstances actually arose in the case of ***An examination of suspected official misconduct at the University of Queensland*** (Sept 2013).

All of the above considerations exist at a level of abstraction that lies above the merely formal distinction between what sort of investigation is involved (public hearing or not) and what sort of decision about disposition of a particular individual is made.

Potential reasons against amending the law after *Carne*

Of course, there are countervailing policy considerations. Revealing the identity of a person who was investigated for an offence but not dealt with might still be very damaging if the person can be identified. On the other hand, public interest considerations might override ithat in a given case. Moreover, If a person is in fact charged in some case, then a report by the CCC should not prejudice that person's trial. And a person's human rights should be considered in the process of decision-making, pursuant to s58(1)(b) of the *Human Rights Act 2019* (*HRA*). The most significant right that might apply in the case of a person who is *not* the subject of proceedings against them would appear to be that in s25 of the *HRA* (right with respect to privacy and reputation). In a general sense, the obligation of procedural fairness to offer a right to be heard and to respond, already included in the general law in this area and in the *CCA* in s71A in respect of powers of reporting that the CCC already has, should be extended to persons who might be captured by any proposed extension of powers of reporting.

Historically, the CCC or its predecessors have demonstrated a record of acute awareness of the need to anonymise the identity of individuals whose identification is not necessary for the purposes of a report or is undesirable for other reasons[7]. In some cases it may be that the circumstances mean that anonymisation is not practically possible, or that the case has achieved such notoriety that attempts at anonymisation would be entirely gestural. It has not proved necessary to date to include in the *CCA* a specific provision that the CCC is to

[7] See for example *Dangerous Liaisons* (July 2009)

consider anonymisation as part of the process of compiling its reports generally, and there would appear to be no very good reason to change that at present.

The Terms of Reference

Para 3 of the Terms of Reference (TOR) invites consideration of amendments. Respectfully, different drafting techniques are available. A minimalist approach to amendment might be that the release of reports of investigations for the purpose of shining a light on a matter emerging from a non-public investigation is best done through the extension of the process identified in s69 of the *CCA*, involving referral to the Parliamentary Crime and Corruption Committee and provision to the Speaker of Parliament. Other methods of dissemination contemplated by the *CCA* for narrow purposes such as referral to the DPP or the Commissioner of Police are not appropriate for general disclosures to the public. A power of unilateral disclosure for the purpose of publicising issues arising from an investigation is more challenging because of the risks of circumventing supervision by the Parliamentary Committee.

Turning to the detail of any amendment, in *Carne*[8], the High Court identified the words 'other report' in s69(1)(b) of the *CCA*. No doubt the CCC sought to attach great significance to that provision in its submissions, but the High Court read down that expression to restrict it to reports under s64 which it said were limited to general reports not reports of specific investigations.

In light of that, perhaps the simplest way to give effect to some amendment to overturn the effect of *Carne* might be to harness the extant legislative architecture and indicate at some appropriate place that 'other report' includes reports of the sort that arose in *Carne.*

There would need to be a provision expressly giving power to the CCC to generate reports based on investigations that were not public hearings (there would need to be an exhaustive reference to all the provisions allowing for investigations in the *CCA*). The best way to do that might be to insert a new s64(1A) after the very general provisions in s64(1) so that there is clearly a power to create reports relating to investigations conducted under a list of the

[8] n 1 supra, [58]

provisions granting powers to undertake those investigations. It might then be necessary to include after s69(1), a new provision (s69(1)(aa)) that specifically picks up reports created using the new provision in s64(1A). There may finally be a need to tidy up the language in the balance of s69 so that the emphasis on the Commissioner of Police and other language that prompted the High Court to read it down does not continue to restrict the focus of the reports under the new s64(1A).

Alternatively, it might be desirable to create a stand-alone set of sections in the *CCA* that covers the release of most *Carne*-like reports, but also covers *ad hoc* releases of information that might come within the scope of a 'report' but in respect of which it is not really necessary for the full Parliamentary Committee route to be followed. An example of that might be my press release of March 2012.

With respect to Para 4 of the TOR, I would focus on whether any amendment should be retrospective. For me, four considerations are of importance in concluding that amendments should be retrospective.

The first is that there is not and probably never was a considered policy position lying behind the specific drafting that led to the decision in *Carne*. Associated with that is that it does not seem historically that it was thought to be of real concern.

Secondly, these matters can be of great public significance. I have no exposure to the number of past reports not (yet) published whose publication might depend on deciding whether an amendment should be retrospective, but I am aware that public media reporting seems to suggest that the case of Ms Trad might be such a matter[9]. It may also be that *Carne* has the consequence of retrospectively criminalising reports that have already historically been released in good faith at the time of release. It might be thought desirable to regularise any such reports from the past that violate the *Carne* principle. I note that of course I have an interest in that regularisation occurring,

[9] I should add that I know Ms Trad professionally from her time serving on the Parliamentary Crime and Misconduct Committee many years ago but not since, and I know of nothing that would impair my capacity to discuss her case or give rise to a conflict of interest.

Thirdly, a general principle of law is that there is no presumption against retrospective changes in the law with respect to procedure, as opposed to changes to the substantive law. While the boundary between procedural and substantive law can be fraught, it seems to me provisionally that this is a procedural change, although I have not re-examined the authorities on the point to test my view. Nevertheless, laws covering the conduct of investigations generally are typically considered to be within the 'procedure' class.

Fourthly, I cannot see any reason why a person the subject of a *Carne*-like historical report is in any worse position now as a result of an amendment overturning the *Carne* decision than if the law had been consistent with a new amendment all along. Such a person has had the benefit of delay in disclosure of a report, but that delay does not of itself generate anything like an estoppel. In the absence of some special circumstance demonstrating specific undue prejudice, it is not apparent why the principles favouring publication of a report should necessarily be defeated by a mere general assertion based on delay. Between the decision in *Carne* and the time of any corrective amendment, such a person has had the advantage of an accident of history in having their case suppressed from publication. The correction of that accident is not something about which legitimate complaint can be made in a general sense. If my drafting suggestions above are accepted, then the matter must pass through the Parliamentary Committee, whose supervisory role might address any specific complaint special to some aggrieved person who was investigated.

In Para 6 of the TOR, particularly 6(c), (d) and (e), there is listed a series of principles that might be important in determining the nature of any post-*Carne* amendment. Generally, it should be apparent from what I have said above that I am of the view that the considerations in Para 6(c) generally support the amendments proposed and making them retrospective. Generally, the considerations in Para 6(d) are important, but they reflect issues at the level of detail that might arise on a case-by-case basis and be dealt with on that basis as opposed to representing high-order principles that would tell against making any amendments at all. I am not persuaded that any particular need for statutory articulation of provisions to address the issues in Para 6(d) is necessary in the absence of such provisions relating to other reports whose publication is not affected by the *Carne* decision. Such considerations can be addressed individually by the Parliamentary Committee process, since their significance will vary from case to case. The rules of procedural fairness that require giving an affected person an opportunity to comment on a draft report might be thought to be sufficient to deal

with issues like the unnecessary revelation of a person's name, for example. It is unfortunate that in the specific case of *Carne*, the obligation of procedural fairness in s71A of the *CCA* was poorly complied with, but a failure of procedural fairness can be a basis to set aside a report by court proceedings in an appropriate case. For that reason, the minutiae of considerations of privacy and so on that might vary wildly from case to case are best dealt with by the rules relating to procedural fairness that already exist.

Yours faithfully,

Ross Martin KC