

27 March 2024

Our ref: KB:MC

The Hon Catherine Holmes AC SC
Reviewer
Independent CCC Publication Review

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

Dear Reviewer

Independent review into the Crime and Corruption Commission's reporting on the performance of its corruption functions

Thank you for the opportunity to provide a submission to the Independent Review into the Crime and Corruption Commission's reporting on the performance of its corruption functions.

The Queensland Law Society ("the QLS") is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. The QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

The QLS has considered the public submission of the Crime and Corruption Commission ("the CCC") to the Community Safety & Legal Affairs Committee considering the *Crime and Corruption Amendment Bill 2023* ("the CCC's submission"). The QLS does not support proposed amendments to the current provisions in the *Crime and Corruption Act 2001* (Qld) ("the Act"). In the event legislative reform is recommended, the QLS submits that the provisions should be directory insofar as when and how the Commission should prepare and publicly disseminate a report, and how procedural fairness is to be ensured to any affected person(s).

The CCC's submission contends that amending legislation with a retrospective effect is imperative to facilitate its statutory purpose to, "*continuously improve the integrity of, and to reduce the incidence of corruption in, the public sector*".¹ In particular, the CCC contends that its capacity to fulfil its statutory corruption objects will be 'significantly diminished' if its

¹ *Crime and Corruption Act 2001*, s4(1)(b)

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reporting powers remain limited to those identified by the High Court in *Crime and Corruption Commission v Carne*². The CCC states:-

"In the absence of public reporting powers, the CCC is limited in its ability to report on:-

- *The detail of an investigation which identified systemic corruption risks for which recommendations may be made; and*
- *Where an investigation has concluded that there was not corrupt conduct and there is a public interest in explaining the basis of the CCC's conclusion about this."*³

The CCC also refers to 'the public interest' in disseminating reports to the Legislative Assembly, for publication at large, *"...for the education of the public sector and the public generally, or by dispelling an allegation of corrupt conduct where it is not established on the evidence."*⁴

Reference is made to provisions in the Act that are said to promote the protection of privacy and guard against reputational risk, whilst still giving proper weight to the CCC's need to be accountable and transparent to Parliament and the public in respect of the exercise of its (extraordinary) powers. These provisions include the right to seek judicial review of the CCC's activities concerning corruption (s332), the requirement that the CCC provide procedural fairness to persons the subject of adverse comment in a proposed report by giving them an opportunity to make submissions prior to publication (s71A), the presumption against public hearings in corruption investigations (s177(1)) and the Commission's overriding statutory obligation to act independently, impartially and fairly having regard to the purposes of the Act and the importance of protecting the public interest (s57 of the Act).

Finally, the CCC directs attention to the enabling legislation of each of its Commonwealth and interstate counterparts, including the National Anti-Corruption Commission ("NACC"), the New South Wales Independent Commission against Corruption ("ICAC") and the Independent Broad-Base Anti-Corruption Commission in Victoria ("IBAC"), which confer power to report publicly on corruption investigations.

Against this, the Commission (correctly) recognises that:-

*"...striking the right balance between properly informing the public and particular stakeholders so that they maintain confidence in the CCC's work, and providing fairness to those investigated, is a difficult exercise."*⁵

² [2023] HCA28.

³ Crime and Corruption Commission Public Submission to Community, Safety and Legal Affairs Committee dated 29 February 2024, p.2.

⁴ Ibid.

⁵ Ibid, p.3.

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There is no doubt that Queensland needs a strong and effective anti-corruption body such as the CCC. The CCC must have appropriate powers adapted to achieve its statutory functions. However, there must at the same time be an enduring recognition of the extraordinary nature of the powers, and the ever-present risk of an abuse of power and/or oppression occasioned by their exercise.

For the reasons that follow, the QLS is unpersuaded that the matters referred to by the CCC, either individually or in combination, warrant the legislative reform sought.

First, a power to generally report on corruption investigations is not justified so as to dispel an allegation/complaint of corrupt conduct in circumstances where a CCC investigation has found none to exist. As the CCC identifies, there is a statutory presumption against the holding of public hearings in corruption investigations: s177(1). Accordingly, it would seem that the occasions on which there will be a public interest in the dissemination of a report to elucidate a finding of no corruption are likely to be rare.

More relevant is the circumstance in which a corruption investigation results in a conclusion of no criminal conduct nor malfeasance in public office but a finding of a 'systemic corruption risks'⁶ grounded in some lesser wrong (e.g., conduct that may amount to contravention of the Code of Conduct of the Queensland Public Service, the Public Service's Ethical Principles or an employment/industrial law obligation).

In this regard, the Society notes that s 5(3)(a) of the Act provides that the CCC's statutory purposes are to be achieved by investigating, in particular, "*more serious cases of corrupt conduct*". A corruption investigation resulting in adverse findings not amounting to criminal conduct nor public sector misconduct would therefore seem to constitute a secondary corruption function of the CCC.

The CCC has extraordinary, compulsive powers not ordinarily available to other investigative agencies. Evidence assembled by the CCC in the course of a corruption investigation is often a product of the exercise of such powers. It is a legal truism that the reliability of evidence obtained by involuntary means should always be approached with circumspection.

Against this backdrop, it is relevant that the CCC has no obligation of evidentiary disclosure. An individual the subject of a CCC corruption investigation has no right to a copy of all relevant or potentially relevant evidence in the case. Nor do they have an entitlement to test the evidence in any meaningful way. In particular, there is no right to cross-examine a witness giving evidence adverse to them. Similarly, there is no right to pray in aid of adjudication by an independent tribunal of fact, pursuant to a prescribed standard of proof.

The net effect is that adverse factual findings against an individual contained within a CCC corruption report may be based upon evidence neither disclosed to, nor tested by, the subject.

⁶ Ibid, p.2.

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And, interstate experience shows that findings in corruption reports are readily trumpeted by the mass media in a manner equivalent to the findings of a Court.

Such a process is apt to occasion a potent degree of prejudice. It is also apt to abuse, in particular for political purpose.

At pp.3-4 of the CCC's submission, four criteria are stated as touchstones of its' pre-existing decision-making process regarding, "*when and how to report on the outcome of a CCC investigation*". None of the criteria expressly refer to the subject's right to privacy and protection from reputational damage. The Society considers that the risk of an unjustified contravention of privacy and reputational damage is not adequately met by an individual's capacity to make a submission to the CCC (s71A) and/or apply for a statutory order of review of the CCC's activities (s332).

Regarding the state of the law in other jurisdictions, the Society urges the Review to closely consider the substantial criticisms previously levelled at the NACC, the ICAC and the IBAC regarding their dissemination of public reports on corruption investigations. The QLS understands that these criticisms are extensive, and were a factor in the formulation the statutory presumption that corruption investigations of the NACC be heard in private (i.e. so as to offset the risk of the undue infringement of the privacy and reputational damage).

In the event the Review concludes that there is an objective necessity for statutory reform designed to enlarge the CCC's current reporting power, the QLS suggests consideration be given to insertion of a legislative dictate that any corruption report with adverse findings falling short of criminal offending and/or misconduct de-identify the subject individual(s). This was not the case in *Crime & Corruption Commission v Carne*, where the High Court said:-

*"[The published report]...differed from the earlier draft in that, relevantly, it included a forward by the Chairperson of the Commission which spoke at some length about the standards of conduct on the part of public officials who held positions of trust. Given that the respondent was identified in the report as the public official whose conduct was the subject of the allegations and investigation, the forward would be understood to be directed to him and to be highly critical of him, although the body of the report contained no findings of corrupt conduct against him. The conclusion of the forward contained a statement urging ministers, senior public sector employees and members of the public to read the report."*⁷

Finally, the QLS opposes in principle the retrospective application of legislation, criminal or civil, particularly when the amendment is capable of having an adverse effect on individual rights and obligations. As French CJ, Crennan and Kiefel JJ noted, rule of law principles underpin the common law presumption against retrospective operation of the statute:-

⁷ *Crime and Corruption Commission v Carne* [2023] HCA 28 at 13.

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"In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by Parliament in enacting of statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercise their rights and incurred liabilities and obligations. That assumption can be viewed as an aspect of the principle of legality...."⁸

Yours faithfully

A handwritten signature in black ink, appearing to be 'Rebecca Fogerty', written in a cursive style.

Rebecca Fogerty
President

⁸ Australian Education Union v General Manager of Fair Work Australia (2012) 246 CLR 117, [30]