

Our ref: BNE5411119

17 April 2024

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

Dear Ms Holmes,

Supplementary response on the CCC reporting powers review

Thank you for meeting with us on 28 March to discuss human rights issues raised by the Terms of Reference for your review into the powers of the Crime and Corruption Commission (**CCC**) to make public statements and reports as part of its corruption functions (**the Review**).

This letter provides our further response in relation to a number of issues discussed in that meeting. It should be read with our previous submission dated 4 April 2024 (**the initial submission**).

Human rights issues raised by retrospective application of publication regime

The first issue is whether particular human rights concerns are raised if reforms empowering the CCC to publish reports or statements extend to reporting on corruption investigations that have already been completed, rather than being restricted to future investigations.¹

At common law, a statute is presumed not to have retrospective application, although this can be rebutted by clear words.² The common law has particular concern with retrospective application of criminal laws, which is mirrored in human rights that specifically prohibit retrospective operation of criminal laws.³ However, there are also concerns with retrospective application of civil laws, which ‘may create uncertainty for individuals and may disappoint legitimate expectations’.⁴

In human rights terms, the question of reporting on past investigations does not engage specific human rights concerning retrospective application of criminal laws. However, in relation to the right to privacy protected under s 25 of the *Human Rights Act 2019* (Qld) (**HRA**), a key issue is whether the interference with an individual’s privacy in such circumstances is ‘arbitrary’. As discussed in the initial submission, an arbitrary interference has been held to be ‘an interference which is capricious, or has resulted from conduct which is unpredictable, unjust or unreasonable in the sense of not being proportionate to the

¹ Terms of Reference for the Review, para. 4(c).

² *Maxwell v Murphy* (1957) 96 CLR 261, 637-8.

³ *Human Rights Act 2019* (Qld) s 35.

⁴ Australian Law Reform Commission (2015) *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Final Report, ALRC Report 129) 360.

legitimate aim sought'.⁵ It entails a broad assessment of whether the interference extends beyond what is reasonably necessary to achieve the purpose being pursued. Retrospective granting of powers of public reporting in relation to past investigations is likely to fall within this category.

The types of legitimate purposes that public reporting of corruption investigations might be argued to serve include encouraging witnesses to come forward in an ongoing investigation, enhancing accountability of and public confidence in public administration by transparency about investigations into alleged corrupt conduct, and preventing corruption in the future by demonstrating how problems have arisen, and have been addressed, in particular agencies.⁶ However, with the passage of time following completion of the investigation, the extent to which public reporting by the CCC can achieve these purposes will be nullified or diluted.

More significantly, changing the law with retrospective effect demonstrates unpredictability associated with the notion of arbitrariness, and the extent to which interference with privacy will be considered proportionate to the aim sought will also decrease over time. Where an individual has a legitimate expectation about the extent of the CCC's reporting powers concerning an investigation in which they were involved, it will be difficult to show that it is not disproportionate to any aim sought to expand those powers some time, and perhaps many years, after the investigation has concluded. This conclusion is strengthened because publication would likely only be contemplated in the absence of criminal proceedings flowing from the investigation's findings (proceedings which would have been both open to the public and involving the protection of fair trial rights).

Similar considerations apply to whether limitations of the right to privacy and other rights such as the right to property and the right to participate in public life caused by retrospectively empowering the CCC to report on past investigations are reasonable and demonstrably justifiable as required by s 13 of the HRA.

Relevance of the use of coercive powers and absence of certain procedural safeguards

The CCC has coercive powers in corruption investigations including the power to require witnesses to attend hearings and to give evidence without the right to silence or privilege against self-incrimination.⁷ The CCC states on its website that:

These powers are exceptional in a Queensland law enforcement context. Such powers enable the CCC to secure otherwise unobtainable evidence.... Hearings are conducted in secret and there are strong protections placed on access to information gained through these powers.⁸

The CCC also has powers in corruption investigations to conduct searches, seize and remove documents, and require the disclosure of evidence.⁹

⁵ *Thompson v Minogue* (2021) 67 VR 301 at [49], [55]-[56], adopted in *Johnston v Carroll* [2024] QSC 2 [367] (Martin SJA).

⁶ See, eg, Explanatory Memorandum, National Anti-Corruption Commission Bill 2022 (Cth) 7–43 (Statement of Compatibility with Human Rights) ('**NACC Statement of Compatibility**'), [218].

⁷ See, eg, *Crime and Corruption Act 2001* (Qld), s 192.

⁸ Crime and Corruption Commission, 'Our Powers' (accessed 17 April 2024), <<https://www.ccc.qld.gov.au/about-us/our-powers>>.

⁹ See, eg, *Crime and Corruption Act 2001* (Qld), ss 73, 75, 75B.

The exercise of these various powers in itself interferes with the right to privacy.¹⁰ However, it has been argued that such interference with privacy by anti-corruption agencies is justified, and not arbitrary, because it is necessary for the detection and investigation of corrupt conduct and referral to prosecution or disciplinary action where appropriate, and proportionate to that end where there are safeguards as to their use and limits on the extent to which such information can be used.¹¹ For example, the Statement of Compatibility for the National Anti-Corruption Commission Bill 2022 (Cth) emphasised that less obtrusive powers were available for public inquiries (as opposed to hearings held in private) when considering the proportionality of interference with the right to privacy.¹²

In the context of the Review, this latter consideration is of particular importance. Where there are fewer limits on the extent to which the information can be reproduced in or used to inform public reporting, the case for proportionality of the initial interference in the right to privacy by coercive powers is weakened. This is particularly so because public reporting of the outcome of an investigation is not necessary to achieve the primary aim necessitating the coercive measures (detection and investigation of corrupt conduct and referral to prosecution or disciplinary action where appropriate).

From the opposite end, the fact that individuals involved in corruption investigations are subject to coercive powers and hearings without full fair trial protections impacts the assessment of whether interference in the right to privacy caused by the publication of a report is itself arbitrary. This makes sense where, as submitted by the Attorney-General as intervenor in *SQH v Scott*, 'the values underlying the right to privacy largely overlap with the values underlying the right to a fair hearing and the right not to incriminate oneself'.¹³

In this respect, as the United Nations Human Rights Committee observed in its views in *Kazal v Australia*:

The Committee further notes statements made by the Attorney-General as referred to by the author, in which the Attorney-General stated that the author and his co-accused had been 'unable to test the corrupt finding made against [them] in a court of law. The consequence is that each has been stigmatised and ashamed by a finding that has not been made, and cannot be tested in an environment that has rules of evidence and procedures established over centuries to ensure a fair and impartial hearing to them and to their opponents.' In the present case the Committee finds that the decision by the ICAC to hold a public hearing and make public findings in which the ICAC concluded that the author had sought to improperly influence the impartial exercise of the official functions of a public officer, but where said findings could not be challenged by the author before any domestic authority and for which the ICAC provided no reasoning as to its decision to make the proceedings and findings public, amounted to an arbitrary interference in the author's right to privacy. The Committee finds that the decision to make the proceedings public, without providing the author with adequate procedural safeguards, cannot be found to be proportionate and necessary to the objective pursued in the particular circumstances of the case, especially taking into account the author's claim that the publication of the findings damaged his reputation and his ability to conduct his family business. ...

¹⁰ See, eg, in relation to inspection of seized documents by the Victorian IBAC, *HJ (a pseudonym) v IBAC* (2021) 64 VR 270, [172]-[193].

¹¹ See, eg, NACC Statement of Compatibility, [160]-[169]. As to the relevance of restrictions on the use of information gathered by the use of coercive powers to the justifiability of limitations on fair trial rights see *R v IBAC* (2016) 256 CLR 459 [72] (Gageler J).

¹² NACC Statement of Compatibility, [169].

¹³ *SQH v Scott* [2022] 10 QR 215 [291].

The Committee therefore concludes that the inquiry conducted by the ICAC, and its adverse public findings made against the author which he could not challenge, amounted to a violation of the author's rights under article 17 of the Covenant.

This suggests that the Committee sees the provision of procedural safeguards within the investigation and hearing, and in relation to any decision to make information public, as important to the consideration of whether interference in the right to privacy caused by publicity about the investigation or its findings is arbitrary (in the sense of being unjust or unreasonable by not being proportionate to the legitimate aim sought).

In addition, the High Court has also recently considered the relevance of the use of coercive powers by the Victorian Independent Broad-Based Anti-Corruption Commission (**IBAC**) to the interpretation of statutory provisions creating procedural fairness rights ahead of public reporting. The Court emphasised that:

The nature of a decision-maker's powers and their capacity to affect a person's rights and interests not only bears upon the existence and informs the content of any duty of procedural fairness, but also informs the proper construction of statutory provisions that create *analogous* rights and obligations in that 'all statutes are construed ... against a background of common law notions of justice and fairness'.¹⁴

In this consideration, the Court noted the following relevant factors:

IBAC is given broad and intrusive powers to gather evidentiary material during an investigation. It marshals that material in formulating the proposed adverse findings, comments or opinions intended to be included in a special report. The potentially grave consequences for an affected public body, public officer or other person from the inclusion of such findings, comments or opinions in a special report have already been described.¹⁵

Based on this, the Court concluded that for an opportunity provided by statute to respond to a draft report to be effective, 'the person affected must be given the opportunity to respond to the material collected by IBAC which it contends justifies the adverse findings, comments or opinions in the special report', and not just the adverse findings, comments or opinions themselves.¹⁶

Tabling of CCC Reports

Under the *Crime and Corruption Act 2001* (Qld) (**CC Act**) reports on public hearings are made public by the CCC providing them to the Speaker, and the Speaker tabling the report in Parliament.¹⁷ Prior to the decision in *CCC v Carne*, reports of other corruption investigations were as a matter of practice also made public by being tabled by the Speaker. This would occur following a direction by the Parliamentary Crime and Corruption

¹⁴ *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* [2024] HCA 10 [26] (internal citations omitted, emphasis in original).

¹⁵ *Ibid.*

¹⁶ *Ibid* [27].

¹⁷ *Crime and Corruption Act 2001* (Qld), s 69(1)(a), (3), (4).

Committee (**PCC**) (made at the request of the CCC) that the report be given to the Speaker, purportedly pursuant to s 69(1)(b).¹⁸

If reforms are introduced to allow the making public of reports into corruption investigations that do not involve a public hearing the Review might consider (i) whether reports should be tabled in Parliament or made public in another manner, and (ii) whether, if tabled in Parliament or made public in another way, the PCC should act as a gatekeeper.

In relation to the first question, the QHRC does not have a strong view on whether, if reports are to be made public, this should be done by tabling in Parliament, although this appears to be the common practice in other Australian jurisdictions.¹⁹ We note, however, that one potential difference between tabling in Parliament and publication through other means is the extent of protection from defamation law. Once tabled in Parliament, a report is subject to parliamentary privilege, providing a complete defence to an action for defamation.²⁰ Although the CC Act also provides the CCC with a defence of absolute privilege to any defamation proceedings in respect of its publications, this applies to publications 'made for the purpose of performing the Commission's functions'.²¹ Therefore a defamation action might succeed if it could be shown that a report was not made for the purpose of performing the Commission's functions.

In relation to the second question, again the QHRC does not have a strong view. However, the PCC could potentially serve a useful oversight role of the justifications for publication of particular information in a particular case in line with any specific requirements introduced by reforms. For example, in Victoria, before the IBAC holds a public hearing, it must inform the relevant oversight body that it intends to do so (10 business days before a public examination is held), and provide a written report with its reasons justifying its decision to do so in accordance with its Act.²²

Statements to the media

In relation to statements to the media about ongoing investigations, as opposed to public reports at the conclusion of an investigation, the Commission considers that the same human rights principles apply. Consideration of human rights compatibility of any statement will involve assessment of whether such a statement will genuinely help to achieve a legitimate aim within the CCC's functions (such as encouraging other witnesses to come forward to assist in the detection and investigation of corruption). If the making of a statement interferes with a person's privacy, any such statement must be specifically authorised by law, and not arbitrary, in the sense of being capricious, unpredictable, unjust or unreasonable because it is not proportionate to the legitimate aim sought. Similarly, where the making of a statement may limit other rights, such as the right to a fair trial or the right to property, the limitation must also be proportionate to the legitimate aim sought.

Where statements may identify individuals involved in an investigation before it is completed the proportionality of the potentially significant limitation of their rights is likely to be even more difficult to justify. If such statements are contemplated, each time a statement is made

¹⁸ In *CCC v Carne* (2023) 97 ALJR 737 the High Court held that that CCC did not have the power to publicly report on individual corruption matters through s 69(1)(b) or any other provision of the CC Act.

¹⁹ See, eg, *Integrity Commission Act 2018* (ACT), s 189 (note this excludes confidential investigation reports); *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s 162(10).

²⁰ *Defamation Act 2005* (Qld), s 27.

²¹ *Crime and Corruption Act 2001* (ACT), s 335(6).

²² *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s 117(5).

there must be careful consideration of the measures that can be taken to protect the rights of individuals involved in the investigation, and whether there are any less restrictive and reasonably available ways to achieve the same ends. If statements are to be allowed, legislation should provide that certain information should not be published reflecting these considerations (for example, information that will prejudice a criminal investigation or trial).²³

Yours sincerely



Neroli Holmes
Deputy Commissioner

²³ See, eg, matters not to be made public by the ACT Integrity Commission in its investigation reports: *Integrity Commission Act 2018* (ACT) ss 183-187, and matters not to be included in a special report to Parliament by the Victorian IBAC: *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic), s 162(5)-(8).