



ATTORNEY GENERAL; MINISTER FOR COMMERCE

Our Ref: 44-23507

Hon. Nick Goiran MLC
Chairman
Joint Standing Committee on the Corruption and Crime Commission
Parliament of Western Australia
Parliament House
PERTH WA 6000

Dear Chairman

INVITATION TO MAKE SUBMISSION TO INQUIRY: CORRUPTION AND CRIME COMMISSION'S POWER TO PROSECUTE

I refer to your letter dated 18 August 2016.

Thank you for inviting me to make a submission to the Joint Standing Committee on the Corruption and Crime Commission (**JSC**) which, you inform me, has recommenced its inquiry into the Corruption and Crime Commission (**CCC**) being able to "prosecute its own charges".

You have invited me to make submissions regarding three matters:

1. The operation of the State's prosecution system in relation to Corruption and Crime Commission matters subsequent to the Court of Appeal decision in the case of *A v Maughan* [2016] WASCA 128;
2. Arrangements for the prosecution of offences associated with corrupt conduct and misconduct in other jurisdictions; and
3. Any amendment required to the *Corruption, Crime and Misconduct Act 2003* (WA) (**CC&M Act**) following the Court of Appeal decision in the case of *A v Maughan* [2016] WASCA 128.

With respect to these, I make the following observations:

1. **The operation of the State's prosecution system in relation to Corruption and Crime Commission matters subsequent to the Court of Appeal decision in the case of *A v Maughan* [2016] WASCA 128**

The issue of whether the CCC has authority to prosecute for offences only arose after the commencement of the *Criminal Procedure Act 2004* (WA). Before then, there were no constraints upon the capacity of any person to institute criminal proceedings.

In anticipation of the decision in *A v Maughan* (which was delivered on 15 July 2016), the Corruption and Crime Commissioner made arrangements with the Director of Public Prosecutions and the State Solicitor to deal with prosecutions arising from CCC investigations. Unless the CC&M Act is amended to allow the CCC to charge and prosecute individuals for offences uncovered in the course of its investigations, the following arrangements will apply:

- (a) prosecutions for indictable offences commenced by the CCC (or its officers) prior to 15 July 2016 have been referred to the Director of Public Prosecutions. Where the Director considers there is a *prima facie* case against the accused, he will continue with the prosecution;
- (b) if a prosecution for a simple offence was commenced before 15 July 2016 and the limitation period within which proceedings for the relevant offence can be commenced has not expired, the prosecution has been referred to the State Solicitor. The State Solicitor will consider the case and where, in the exercise of his independent discretion, he considers it appropriate to do so, he will commence fresh proceedings in relation to the alleged offending;
- (c) if in the course of new investigations the CCC forms the view that an offence has been committed, the CCC will refer a prosecution brief to the State Solicitor for his consideration. If the State Solicitor forms the view that there is a *prima facie* case against the accused and that it is in the public interest to proceed, he will commence proceedings against the alleged offender. Where the alleged offence is a simple offence the prosecution will be conducted by the State Solicitor. Where the offence is an indictable offence, the proceedings may be taken over by the Director of Public Prosecutions at the committal stage; and
- (d) it remains open to the CCC to refer matters to the police for investigation and charge in the usual way.

2. **Arrangements for the prosecution of offences associated with corrupt conduct and misconduct in other jurisdictions**

At paragraph [133] of his judgment in *A v Maughan*, the Chief Justice sets out the position with respect to bodies in other Australian jurisdictions with functions analogous to those of the CCC. He notes that the legislation governing the following integrity agencies empower the relevant agency to refer matters investigated and information gathered in the course of the investigations to other agencies, including prosecution agencies:

- (a) Australian Crime Commission;
- (b) Australian Commission for Law Enforcement Integrity;
- (c) New South Wales Crime Commission;
- (d) Independent Commission Against Corruption (NSW);
- (e) Police Integrity Commission (NSW);
- (f) Crime and Corruption Commission (Qld);
- (g) Integrity Commission (Tas); and

(h) Independent Commissioner Against Corruption (SA).

He observes that none of those Acts establishing those bodies confer upon them the power to prosecute matters arising from their investigations.

In the same paragraph His Honour notes that the legislation establishing both the Independent Commission Against Corruption (NSW) (**ICAC**) and the Police Integrity Commission (NSW) expressly provides that officers of those agencies do not have the authority to prosecute offences against the law of NSW, with the exception that an officer of the ICAC may commence a prosecution if the Director of Public Prosecutions (NSW) consents in writing.

The Chief Justice also notes that by section 190 of the *Independent Broad-based Anti-Corruption Act 2011* (Vic), the Independent Broad-based Anti-corruption Commission (**IBAC**) has been given the express power to prosecute matters arising from its investigations and that it seems to be the only body in Australia with functions analogous to those of the CCC which has expressly been given the power to prosecute matters arising from its investigations.

You have asked what arrangements are in place in other Australian jurisdictions for the prosecution of offences identified in the course of an investigation by an integrity body.

I understand that you are travelling to New Zealand and to other Australian States in part to discuss the arrangements for the prosecution of offences associated with corrupt and misconduct in other jurisdictions. I have nevertheless made inquiries about this issue from other Australian jurisdictions and am able to provide the following, conveyed by officers from the relevant jurisdictions:

(a) NSW

The ICAC established under the *Independent Commission Against Corruption Act 1988* (NSW) publishes a report to Parliament following an inquiry or an investigation. Such a report may include a recommendation that the advice of the Office of the Director of Public Prosecutions (**ODPP**) be sought as to prosecutions: section 74A *Independent Commission Against Corruption Act 1988* (NSW).

A Memorandum of Understanding (**MOU**) between the ICAC and the ODPP was signed on December 2007. The MOU deals with the referral of matters from ICAC to the ODPP. Pursuant to the MOU, ICAC will provide a brief of evidence on potential charges arising out of an ICAC investigation to a particular prosecution team at the ODPP. The ODPP then provides ICAC with advice regarding what, if any, charges are appropriate to be laid, the sufficiency of evidence, and the prospects of success.

ICAC has the authority to commence proceedings for statutory offences (but possibly not common law offences) as a result of the application of sections 14, 48 and 173 of the *Criminal Procedure Act 1986* (NSW), the definition of "public officer" in section 3(1) of the *Criminal Procedure Act* (NSW), and clause 101 of the *Criminal Procedure Regulations 2010* (NSW).

The Director of Public Prosecutions has the authority to institute and conduct proceedings in relation to indictable offences in NSW.

As a matter of practice, however, ICAC only prosecutes offences arising under the *Independent Commission Against Corruption Act 1988*.

(b) Northern Territory

The Northern Territory does not have an integrity agency akin to an ICAC or a CCC. The establishment of such an organisation is a policy of the new Territory Government. The Martin Report, which considered the structure of such an integrity body, has recommended that the body not have the power to prosecute (see [452]-[455] of the report published at <https://acimcinquiry.nt.gov.au/>).

(c) South Australia

The South Australian Independent Commissioner Against Corruption (**SA ICAC**) does not have a function or power to prosecute offences arising under either the *Independent Commissioner Against Corruption Act 2012* (SA) (**ICAC Act**) itself or other legislation. Section 7 of the ICAC Act empowers the SA ICAC to refer matters for prosecution. While this can include referral to police, in practice all matters for prosecution are referred to the Director of Public Prosecutions, and the decision to prosecute is entirely one for the Director of Public Prosecutions. As a rule, the Director lays the charge and conducts the resulting prosecution. There may be occasions where a person is charged following an arrest and the prosecution is then referred to the Director of Public Prosecutions.

(d) Tasmania

The Tasmanian Integrity Commission was established by the *Integrity Commission Act 2009* (Tas). The Commission does not have the power to prosecute in its own right but may refer matters to the Commissioner of Police, the Director of Public Prosecutions, or to any other person that the Integrity Commission considers appropriate.

(e) Australian Capital Territory

The Australian Capital Territory does not have an integrity body established by statute law. The establishment of such a body is a policy which the Liberal Opposition are taking to the ACT election on 15 October 2016.

(f) Victoria

In Victoria, the IBAC has the authority to bring criminal proceedings in relation to any matter: section 190 *Independent Commission Against Corruption Act 1988* (Vic).

That notwithstanding, there is in place a MOU between the IBAC and the Office of Public Prosecutions (**OPP**) as to how prosecutions arising from investigations conducted by IBAC are to be dealt with. It provides that in the case of indictable matters, the IBAC will provide the OPP with a brief of evidence and the informant and the OPP will take carriage of the prosecution from the committal stage. By contrast, in the case of summary offences the MOU provides that the matters will be dealt with by the IBAC, which is able to seek assistance from the OPP if it be thought necessary. The OPP can refuse to provide such assistance.

(g) Queensland

There is nothing in the *Crime and Corruption Act 2001* (Qld) (**CC Act**) which contemplates the Crime and Corruption Commission (**Qld CCC**) prosecuting criminal offences in its own right. The scheme of the Act is that anything that emerges from a Qld CCC investigation is prosecuted as either:

- (i) an offence against the general criminal law in the ordinary way under its *Justices Act 1886* and *Criminal Code*; or
- (ii) a disciplinary matter under the relevant statutory scheme for the agency involved.

Chapter 2, Part 3, Division 5 of the CC Act deals with action following Qld CCC investigations in that way. However, only section 49(2)(a) deals directly with criminal prosecutions: it provides that the Qld CCC may report on an investigation to the Director of Public Prosecutions or other prosecuting authority for any prosecution proceedings the Director or other authority considers warranted. Otherwise, the Act is silent on the subject. (Despite the heading, section 50 is concerned only with the Qld CCC 'prosecuting' disciplinary proceedings for corruption in the Queensland Civil and Administrative Tribunal.)

Against that statutory background, the practice is that where the Qld CCC considers that a prosecution should be considered, the matter is referred to the Director of Public Prosecutions or police prosecutors as section 49(2)(a) contemplates. In some cases, the offender will be charged by a police officer seconded to the CCC, but that is only in the exercise of the officer's ordinary functions and powers under the *Police Powers and Responsibilities Act 2000*, not by virtue of any statutory function or power of the CCC.

The charge would ordinarily be laid by a police officer, whether on ordinary duties or on secondment to the Qld CCC. (In an exceptional case, the Director of Public Prosecutions or the Attorney-General may present an *ex officio* indictment, but that is rare.) The proceedings may be commenced in one of the following ways:

- (i) by notice to appear issued by the police officer under the *Police Powers and Responsibilities Act*;
- (ii) by complaint and summons under the *Justices Act* (complaint made by the officer to a Justice of the Peace, and summons issued by the JP to the defendant);
- (iii) arrest and charge under the *Criminal Code*.

While there are exceptions depending on the locality and nature of offence, once the proceeding is commenced the case is then prosecuted as follows:

- (i) in the case of a simple offence, the Police Prosecution Corps (**PPC**) would take the matter to its conclusion in the Magistrates Court;
- (ii) in the case of an indictable offence dealt with summarily, the PPC would take the matter to its conclusion in the Magistrates Court;
- (iii) otherwise, in the case of an indictable offence:

- the PPC would manage the case to committal in the Magistrates Court; and
- the Director of Public Prosecutions would present the indictment in the District or Supreme Court and prosecute the case to verdict and sentence (and appeal where relevant).

3. **Any amendments required to the *Corruption, Crime and Misconduct Act 2003* following the Court of Appeal decision in the case of *A v Maughan* [2016] WASCA 128**

Strictly speaking, no amendments to the CC&M Act are required as a result of the decision of the Court of Appeal in *A v Maughan*. The Court of Appeal made it clear that, contrary to a view until then widely held (by the CCC, its Inspectors, the Courts, and defence counsel involved in previous proceedings), the CCC and its officers did not have the power to prosecute for offences arising outside of the CC&M Act which it had identified in the course of investigations conducted under Act. The manner in which such prosecutions can be commenced and conducted is set out above. That can continue to be the case into the future even if no amendments are made to the CC&M Act.

If it be thought either necessary or desirable to amend the CC&M Act to facilitate the prosecution of such offences by the CCC, that can be done, the primary amendment needed being, in my view, an amendment to the functions of the CCC as set out in section 18 of the CC&M Act.

I would need to be persuaded that it is desirable for the CCC to be given the power to prosecute offences which are not offences arising under the CC&M Act, given that:

- there are already persons who have authority to commence prosecutions in circumstances where an alleged offence has come to light as a result of an investigation by the CCC; and
- it is not the usual practice throughout Australia to allow such integrity bodies to act as investigator and prosecutor.

That said, I do not have a concluded view on the matter and will be assisted in coming to such a view by the Committee's inquiry, report and recommendations.

Yours sincerely



Hon. Michael Mischin MLC
ATTORNEY GENERAL; MINISTER FOR COMMERCE

30 SEP 2016