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Honourable N. Goiran MLC  
Chairman  
Joint Standing Committee on the Corruption and Crime Commission  
Legislative Assembly Committee Office  
WA Parliament  
Level 1, 11 Harvest Terrace  
WEST PERTH WA 6005



Dear Mr Goiran

**SUBMISSION FOR THE INQUIRY INTO THE CORRUPTION AND CRIME COMMISSION BEING ABLE TO PROSECUTE ITS OWN CHARGES**

Please find enclosed a copy of our written submission pertaining to the inquiry into the Corruption and Crime Commission being able to prosecute its own charges. The WA Police Union (WAPU) welcomes the opportunity to make a submission on this very important issue.

If the Joint Standing Committee decides to conduct a hearing as part of the Inquiry, WAPU would appreciate the opportunity to present oral submissions.

If you have any further queries in relation to this matter, please do not hesitate to contact me.

Yours sincerely-

  
**George Tilbury**  
President

# INQUIRY INTO THE CORRUPTION AND CRIME COMMISSION BEING ABLE TO PROSECUTE ITS OWN CHARGES

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**Prepared by the WA Police Union  
September 2016**

# TABLE OF CONTENTS

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<b>INTRODUCTION .....</b>	<b>3</b>
Background to the Court of Appeal decision in A v Maughan.....	3
The Decision in A v Maughan.....	4
Significance of the Decision to the WA Police Union.....	5
<b>TERM OF REFERENCE 1 .....</b>	<b>6</b>
CCC has power to prosecute breaches of its own legislation .....	6
Current operation of the State's prosecution system in relation to all criminal offences.	7
Operation of the State's prosecution system in relation to CCC matters subsequent to the Decision.....	9
Recommendation .....	11
<b>TERM OF REFERENCE 2 .....</b>	<b>12</b>
Other public sector anti-corruption agencies within Australia .....	12
Lack of statutory power to prosecute criminal offences associated with corrupt conduct and misconduct .....	13
Arrangements for prosecutions of criminal offences .....	15
<b>TERM OF REFERENCE 3 .....</b>	<b>16</b>
CCC powers should not extend to criminal prosecutions .....	16
No amendment to retrospectively validate prior CCC unlawful prosecutions .....	17
CCC Act should be amended to include greater protections of fundamental legal rights .....	19
No provision of transcript of compulsorily acquired evidence to prosecutor .....	21
No disclosure of records of voluntary interviews conducted by CCC to prosecutor .....	22
<b>RECOMMENDATIONS .....</b>	<b>24</b>
Attachment 1 Extract from Hansard – Legislative Assembly – 15 May 2003 .....	25
Attachment 2 Extract from Hansard – Legislative Council – 10 Jun 2003 .....	27

## INTRODUCTION

1. The WA Police Union (WAPU) is the leading representative organisation for police officers in Western Australia, with over 6,500 Members.
2. WAPU welcomes the opportunity to make the following submission addressing the terms of reference of the *Inquiry into the Corruption and Crime Commission being able to prosecute its own charges* (Inquiry).
3. If the Joint Standing Committee decides to conduct a hearing as part of the Inquiry, WAPU would appreciate the opportunity to present oral submissions.

### Background to the Court of Appeal decision in *A v Maughan*

4. The Applicant in *A v Maughan* was a police officer who engaged in a use of force during the detention of a person on 29 March 2013 and another person on 19 April 2013 at Broome Police Station.
5. In or about late April or early May 2013, the Corruption and Crime Commission (CCC) commenced an investigation into whether any public officer had engaged in misconduct in relation to the arrest and detention on 29 March 2013 and 19 April 2013 pursuant to section 4 of the *Corruption and Crime Commission Act 2003 (WA)* (CCC Act).
6. Pursuant to section 42 of the CCC Act, the CCC issued a notice to WA Police directing it not to commence, or to discontinue, any investigation of misconduct in relation to either incident, thereby depriving WA Police of the opportunity to conduct an investigation under its own protocols.
7. On 7 May 2013 the Applicant was summonsed to attend an examination before the CCC pursuant to section 96 of the CCC Act.
8. On 10 June 2013 the CCC ordered that examinations as part of the investigation be conducted in public pursuant to section 140 of the CCC Act.
9. On 11 June 2013 the Applicant applied for the examination to be conducted in private pursuant to section 139 of the CCC Act. The CCC rejected this application, concluding

that it was in the public interest to do so and proceeded to compulsorily examine the Applicant in public about the events of 29 March 2013 and 19 April 2013.

10. The Applicant answered all questions under compulsion and the answers were recorded and a transcript of that evidence was published on the CCC's website, where it remained for a considerable period of time.
11. The Applicant was questioned directly about the same subject matter alleged in the criminal charges subsequently laid against the Applicant by the CCC.
12. On 23 December 2013 the CCC tabled in the WA Parliament a copy of its report prepared into the investigation pursuant to section 84(1) of the CCC Act. The report concluded that the Applicant had used excessive force on both occasions.
13. On 17 April 2014 an officer of the CCC commenced a criminal prosecution in the Magistrates Court against the Applicant.
14. On 28 November 2014 Magistrate Maughan dismissed the Applicant's application for a permanent stay of the prosecution due to an abuse of process.
15. The Applicant sought a review of the Magistrate's decision in the Supreme Court. On 20 July 2015, Justice K Martin made a review order and subsequently ordered the review be referred to the Court of Appeal because of its wider public importance.

### The Decision in A v Maughan

16. In the appeal, the Applicant contended that:
  - 16.1. The criminal prosecutions of the Applicant were not lawfully instituted because the CCC had no authority to prosecute offences under the *Criminal Code WA*; and
  - 16.2. The prosecutions were an abuse of process because the CCC (as investigator and prosecutor), had access to the transcript of the Applicant's evidence given during a compulsory examination.

17. On 15 July 2016 the Court of Appeal delivered its decision in *A v Maughan* [2016] WASCA 128 (Decision).
18. The Court of Appeal held that, on the proper construction of the CCC Act:
  - 18.1. The CCC's powers and functions do not extend to the prosecution of persons in respect of matters investigated by the CCC which are otherwise unrelated to the administration and enforcement of the CCC Act; and
  - 18.2. The CCC Act does authorise a prosecutor to have access to the evidence, and the transcript of the evidence, given by a person during the course of the person's compulsory examination before the CCC.

### Significance of the Decision to the WA Police Union

19. WAPU supported the Applicant in bringing the appeal before the Court of Appeal, however the Decision has wider reaching ramifications for WAPU's membership. Over the past 10 years, a considerable number of WAPU Members have been compulsorily examined by the CCC during its investigations. Some of those Members have subsequently been prosecuted by the CCC for criminal offences under the *Criminal Code*.
20. The ramifications for police officers unlawfully prosecuted by the CCC have been significant. They frequently involve public humiliation from both the CCC investigation process (often exceeding 12 months in duration) and later criminal proceedings.
21. The Decision undermines all those prosecutions (regardless of outcome), and amply demonstrates a deep-seated concern about the merits of an oversight body being vested with additional prosecutorial powers outside the ambit of offences under its own Act.



## TERM OF REFERENCE 1

*The operation of the State's prosecution system in relation to CCC matters subsequent to the decision in A v Maughan [2016] WASCA 128.*

22. Although the expression "CCC matters" in this first term of reference has not been defined, WAPU has approached "CCC matters" as logically referring to the prosecution of persons arising out of matters investigated by the CCC which are otherwise unrelated to the administration and enforcement of the CCC Act.
23. In the context of this Inquiry, that is a reference to prosecutions of offences under the criminal statutes and other statutes of Western Australia.
24. The rationale for this approach is consistent with the findings in the Decision at paragraph [2].

### CCC has power to prosecute breaches of its own legislation

25. WAPU acknowledges that the CCC has the power to prosecute its own charges in respect to matters which are related to the administration and enforcement of the CCC Act.
26. Some obvious examples of prosecutions of offences related to the administration and enforcement of the CCC Act include:
  - 26.1. Failing to attend in answer to a summons to attend an examination;
  - 26.2. Failing to answer questions at an examination;
  - 26.3. Giving false evidence to the CCC during an examination; and
  - 26.4. Unlawful disclosure of restricted matter.

## Current operation of the State's prosecution system in relation to all criminal offences

27. Since the abolition of the right of private citizens to commence criminal prosecutions by the introduction of the *Criminal Procedure Act 2004 (WA)* (CPA), by virtue of the operation of s20 of the CPA, the *Police Act 1894 (WA)* and the *Director of Public Prosecutions Act 1991 (WA)*, the power to prosecute offences against the criminal statutes of Western Australia has been legislatively vested in the following agencies and authorities:

27.1. WA Police (simple offences and either way offences only); and

27.2. The Office of the Director of Public Prosecutions WA (DPP) (simple offences, either way offences and indictable offences).

28. The DPP is completely independent of WA Police. Whilst the DPP is a purely prosecutorial authority, WA Police is both an investigating and prosecuting agency.

29. WA Police separates its investigatory and prosecutorial functions by having a separate Police Prosecutions Branch, headed by a consultant Senior State Prosecutor seconded from the DPP. The Police Prosecutions Branch includes both sworn officers and civilian lawyers who have no role in either the investigation of offences or the laying of charges. They do have a role in the continuation and discontinuance of charges.

30. Police officers who investigate offences may lay charges, but thereafter the prosecution is conducted by either:

30.1. The Police Prosecutions Branch while the prosecution remains in the Magistrates Courts of Western Australia;

30.2. The DPP;

30.3. External legal counsel engaged by the Police Prosecutions Branch and/or the DPP;  
and



30.4. Lawyers from the State Solicitors Office.

31. WA Police have a well-established process for the conduct of criminal prosecutions which includes:

31.1. Review of proposed charges to be laid by an officer of a rank senior to the investigating/charging officer;

31.2. A brief management review by a designated brief manager during the collation of the evidence to comprise the prosecution brief;

31.3. Review by lawyers employed by the Police Prosecutions Branch;

31.4. Review by prosecutors within the Police Prosecutions Branch;

31.5. Obtaining legal advice from the DPP when required; and

31.6. Utilising the DPP's Statement of Prosecution Policy and Guidelines.

32. Similarly, the DPP as an independent statutory body, has a well-established procedure for the conduct of criminal prosecutions, including the development of guidelines for the conduct of prosecutions such as the Statement of Prosecution Policy and Guidelines.

33. Prior to the Decision, the CCC either:

33.1. Laid charges itself against individuals under the criminal statutes of Western Australia; or

33.2. Recommended that WA Police and/or the DPP investigate or consider the commencement of prosecutions against individuals for criminal offences.

34. From time to time, where the CCC had laid criminal charges that were indictable only (i.e. only dealt with in the District or Supreme Courts), the CCC subsequently transferred the conduct of the prosecution to the DPP.
35. Where the CCC laid criminal charges for offences that were not indictable, the CCC either referred the charges to WA Police, or most particularly, if the charges were laid against a police officer, it conducted the entirety of the prosecutions itself.
36. An obvious issue was the potential conflict of interest arising from the role of the CCC in investigating allegations of misconduct by police. The CCC often recruits its investigative officers from within the police forces. As such there is a significant potential for conflicts of interest within the CCC in the investigation of police misconduct and in any subsequent prosecution.
37. To deal with this type of potential conflict, NSW created a separate Police Integrity Commission with responsibility for the investigation of police misconduct, whilst leaving the Independent Commission against Corruption with responsibility for investigating other public sector agencies.

#### Operation of the State's prosecution system in relation to CCC matters subsequent to the Decision

38. The effect of the Decision is that CCC matters (being offences otherwise unrelated to the administration and enforcement of the CCC Act) must be dealt with under the State's current prosecution system, as outlined above.
39. WA Police and/or the DPP will continue to deal with CCC matters as they have done in the past whenever the CCC has referred matters to them.
40. By way of example involving serving police officers, in 2010 the CCC conducted an investigation into the use of a Taser by WA Police. This investigation included a public examination of officers involved in the detention of Kevin Spratt in the Perth Watch House on 31 August 2008. In its final report, the CCC recommended the DPP investigate the laying of charges against certain police officers.

41. As a consequence of that recommendation, the DPP provided legal advice to WA Police in relation to the prosecution of two police officers for common assault. Subsequently, WA Police laid charges of common assault against those two serving police officers.
42. Even though charges of common assault are not indictable and are dealt with summarily in the Magistrates Court, after the laying of charges by the WA Police Internal Affairs Unit, the conduct of the prosecution was managed by the DPP from the first court appearance until trial.
43. This example demonstrates that where CCC matters involve serving police officers, WA Police and the DPP are the appropriate agencies and authorities to conduct a prosecution from start to finish.
44. The State's current prosecution system can therefore satisfactorily continue to deal with CCC matters where a prosecution is referred for consideration or recommended by the CCC.
45. Additionally, the current statutory powers of the CCC can significantly enhance the operation of the State's prosecution system, for example by:
  - 45.1. Assembling evidence obtained in the course of the CCC exercising its serious misconduct function and furnishing evidence admissible in criminal prosecutions to an independent prosecuting agency or authority: s18(2)(h) of the CCC Act;
  - 45.2. Monitoring the way in which independent agencies and appropriate authorities take action in relation to matters referred to them by the CCC: s18(2)(d) of the CCC Act; and
  - 45.3. Investigating the handling of a prosecution by WA Police and/or the DPP where necessary, either of its own volition or following complaint: s18(2)(a) and s24 of the CCC Act.

## Recommendation

- 45.4. The operation of the State's prosecution system in relation to the prosecution of criminal offences associated with or arising from an investigation by the CCC into corrupt conduct or misconduct (but unrelated to the administration and enforcement of the CCC Act) should continue to be conducted by WA Police and/or the DPP.**

## TERM OF REFERENCE 2

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

46. This term of reference focuses on how prosecutions for offences associated with corrupt conduct and misconduct investigated by public sector anti-corruption agencies are dealt with in other Australian jurisdictions.
47. This submission proceeds on the assumption that the reference to “*offences associated with corrupt conduct and misconduct*” is a reference to:
  - 47.1. Offences that are suspected or come to light during the course of investigations by public sector anti-corruption agencies; and
  - 47.2. Offences that are unrelated to the administration and enforcement of the relevant anti-corruption legislation, namely criminal offences.
48. The term “corruption” is frequently associated with criminal offences such as bribery and fraud. However, terms like “corruption” and “misconduct” are often also used to denote conduct that includes some impropriety or is lacking in integrity, but which does not amount to criminal conduct. It is this broader concept that is at the centre of the so-called “integrity branch” of government, and a focus for government agencies established to maintain public sector integrity.

### Other public sector anti-corruption agencies within Australia

49. The CCC’s peer public sector anti-corruption or integrity agencies in other Australian jurisdictions are:
  - 49.1. NSW: Independent Commission against Corruption (NSW ICAC);
  - 49.2. NSW: Police Integrity Commission (NSW PIC);
  - 49.3. QLD: Crime and Corruption Commission (QLD CCC);
  - 49.4. VIC: Independent Broad-based Anti-Corruption Commission (IBAC);
  - 49.5. SA: Independent Commissioner Against Corruption (SA ICAC);

49.6. TAS: Tasmanian Integrity Commission (TIC).

50. Currently there is no such agency in either the Northern Territory or the Australian Capital Territory.

Lack of statutory power to prosecute criminal offences associated with corrupt conduct and misconduct

51. With the exception of IBAC in Victoria, none of the above agencies within Australia has an express statutory power to conduct prosecutions of criminal offences or other offences unrelated to the administration and enforcement of their enabling legislation.

### ***New South Wales***

52. The NSW ICAC is established by the *Independent Commission against Corruption Act 1988* (NSW) (NSW ICAC Act).
53. The principal functions of the NSW ICAC include the investigation of corrupt conduct and the power to formulate recommendations for the taking of action that the ICAC considers should be taken in relation to its findings, opinions or the results of its investigations: s13 NSW ICAC Act.
54. NSW ICAC officers do not have the power to commence proceedings for an offence (meaning an offence against the laws of the State) unless the Director of Public Prosecutions has advised ICAC in writing that the proceedings may be commenced by an officer of ICAC: s14A *Criminal Procedure Act 1986* (NSW).
55. The NSW Police Integrity Commission, established by the *Police Integrity Commission Act 1986* (NSW), has the principal function of preventing officer misconduct, and investigating officer misconduct (or managing/overseeing other agencies in investigating officer misconduct): s13.
56. The NSW PIC has no power to prosecute police officers for criminal offences in relation to any matters arising out of an integrity investigation, but can prosecute breaches of its own legislation.

## **Victoria**

- 57. IBAC is created by the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (IBAC Act).
- 58. The principal functions of IBAC are to identify, expose and investigate corrupt conduct, police personnel misconduct, and to prioritise attention on serious corrupt conduct or systemic corrupt conduct: s15 IBAC Act.
- 59. IBAC has an express power to commence criminal proceedings for an offence in relation to any matter arising out of an IBAC investigation, regardless of whether that offence is under the IBAC Act or under the criminal laws of Victoria: s190 of IBAC Act. It can also refer matters to the Office of Public Prosecutions.

## **Queensland**

- 60. The Qld CCC is created by the *Crime and Corruption Act 2001* (Qld) (Qld CCC Act).
- 61. The main purposes of the Qld CCC are to combat and reduce the incidence of major crime, and to continuously improve the integrity of, and reduce the incidence of corruption in the public sector: s4 Qld CCC Act.
- 62. The Qld CCC Act specifically provides that the Qld CCC is to:
  - 62.1. Refer complaints about corrupt conduct of a person holding appoint in a unit of public administration that may involve criminal activity, to the Commissioner of Police to deal with: s46(2)(c); and
  - 62.2. Report to the Director of Public Prosecutions or other appropriate prosecuting authority if it decides that prosecution proceedings should be considered following an investigation into corruption: s49(1) and s(2)(a).
- 63. The QLD CCC has no power to commence criminal prosecutions unrelated to the administration and enforcement of the Qld CCC Act.



### ***South Australia***

- 64. The SA ICAC is constituted by the *Independent Commissioner Against Corruption Act 2012* (SA) (SA ICAC Act). Its principal functions are the identification and investigation of corruption in public administration, and to refer it for prosecution or for investigation by another law enforcement agency: s7 SA ICAC Act.
- 65. The SA ICAC has no power to commence criminal prosecutions unrelated to the administration and enforcement of the SA ICAC Act.

### ***Tasmania***

- 66. The TIC is established by the *Integrity Commission Act 2009* (Tas) (IC Act).
- 67. The functions of the TIC include investigating and monitoring investigations into misconduct, gathering evidence for the prosecution of persons for criminal offences and referring complaints of any potential breaches of the law to the Commissioner of Police or the DPP or any other relevant public authorities: s8 IC Act.
- 68. The TIC has no power to commence criminal prosecutions unrelated to the administration and enforcement of the IC Act.

### **Arrangements for prosecutions of criminal offences**

- 69. In NSW, South Australia, Queensland and Tasmania (as in WA), prosecutions for criminal offences associated with corrupt conduct and misconduct arising in relation to matters investigated by the various anti-corruption agencies are commenced and conducted by the relevant police forces and/or the offices of Public Prosecutions.
- 70. In Victoria, when the IBAC conducts its own criminal prosecutions it utilises both its own internal counsel as well as external counsel to conduct the prosecutions.

### TERM OF REFERENCE 3

*Any amendments required to the Corruption, Crime and Misconduct Act 2003 following the decision in A v Maughan.*

71. The main purposes of the CCC Act are:

71.1. To combat and reduce the incidence of organised crime; and

71.2. To improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector (s7A of the CCC Act).

#### CCC powers should not extend to criminal prosecutions

72. The integrity of the prosecution system in WA is found in its:

72.1. Independence from government and other executive agencies or authorities with statutory functions (such as the CCC);

72.2. Independence derived from the separation between those who investigate criminal offences and those who conduct the prosecutions; and

72.3. Fairness arising from its foundation on the fundamental principles of the criminal justice system, namely the presumption of innocence, the right to silence, and the burden of the prosecution to prove guilt unassisted by the accused.

73. The compulsory powers of the CCC already constitute a significant statutory erosion of the fundamental principles of the criminal justice system. No further erosion is warranted or justified when WA already has an effective prosecution system to handle CCC matters.

74. If the CCC were to be given the power to commence criminal prosecutions under the criminal laws of WA:

- 74.1. The independence of prosecutions would be compromised as the CCC would be the investigator, compulsory examiner and sole arbiter of the decision to prosecute, i.e. judge, jury and executioner;
- 74.2. The independence and objectivity derived from separation of investigatory and prosecutorial functions would be lost; and
- 74.3. Unfairness would be created from the significant incursions in fundamental principles of the criminal justice system in WA, against which the CCC Act currently contains no safeguards.
75. There is nothing arising in the Decision which suggests a further expansion of the CCC's powers to include the ability to conduct criminal prosecutions is required.

No amendment to retrospectively validate prior CCC unlawful prosecutions

76. The courts do not state what the law is from the date of a decision, but declare the law **as it has always been.**
77. Since its inception in 2003, the CCC has never had powers or functions extending to the criminal prosecution of persons in respect of matters investigated by the CCC which are otherwise unrelated to the administration and enforcement of the CCC Act.
78. The absence of any reference in the Explanatory Memorandum to the CCC Act to the CCC having power to commence criminal prosecutions is the clearest indication that Parliament did not intend to give the CCC the functions or powers of a prosecuting authority.
79. In the First Reading Speech (*See Attachment 1*), it was noted that –

*The CCC may not make a finding or form an opinion on whether a person has committed, is committing, or is about to commit a criminal or disciplinary offence. **This is consistent with the position that it is for the prosecuting authorities and the courts to deal with these matters (emphasis added).***

80. In the Second Reading Speech (*See Attachment 2*), it was noted that –

*The CCC may recommend that an **independent** body such as the Director of Public Prosecutions give consideration to prosecution (emphasis added).*

81. These statements are consistent with the express parliamentary intention that the CCC would be a powerful frontline **investigative** authority with additional monitoring and oversight functions to enhance its anti-corruption purposes, not a prosecuting authority.

82. The Decision renders invalid all the previous prosecutions commenced by the CCC for criminal offences. The issue for government is how to deal with the invalid prosecutions.

83. In Australia, legislation is not usually retrospective in effect. There is a presumption against retrospectivity: *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

84. In a range of contexts, legislation with retrospective operation may be enacted to validate decisions that have been made, or powers exercised, by government agencies, the validity of which is in doubt for ‘technical’ reasons. Such legislation may be seen as retrospectively changing legal rights and obligations. These statutes are sometimes known as ‘declaratory statutes’ and the presumption against retrospectivity does not apply: *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 374.

85. It is important to observe that this is not a situation where the validity of the CCC’s powers to prosecute criminal offences under the CCC Act is “in doubt for technical reasons”.

86. In a legal review in 2008, Gail Archer SC concluded that the CCC Act should be amended to make it clear that in her legal opinion the “**CCC has, and always has had, the power to commence and conduct prosecutions in the Magistrate’s Court**” (emphasis added). That legal opinion was clearly incorrect and a contradiction in terms. If it was clear the

CCC always had such a power there could be no basis for recommending amending the CCC Act to make that clear.

87. In 2010, former CCC Commissioner L Roberts-Smith (a former Supreme Court judge) insisted to a parliamentary inquiry that the CCC had the power to prosecute. Again that legal view was clearly incorrect.
88. When the Applicant formally raised, as part of a stay of prosecution application in 2014, the CCC's lack of statutory power to prosecute criminal offences, the CCC engaged a senior barrister to defend the application, arguing that a power to prosecute could be read into the CCC Act by virtue of the CPA.
89. When the Applicant's review came on for hearing in the Supreme Court of Appeal in 2015, the CCC (headed by former Supreme Court judge John McKechnie) engaged senior counsel to vigorously defend the appeal, arguing that the power to prosecute was to be inferred from the CCC Act, or from other legislation such as the CPA.
90. The CCC's persistent view since before 2008 that it had a power to prosecute criminal offences suggests either incompetence or an agency determined to extend the scope of its powers beyond the CCC Act. To reward either with retrospective validation of unlawful prosecutions would be a travesty of justice.
91. The CCC's misinterpretation of its own legislation for the last 13 years is the most important reason why the CCC Act should not be amended to retrospectively validate all prior unlawful prosecutions. That misinterpretation is not a good, or even a rational reason, for parliament to consider declaratory legislation with retrospective effect.

CCC Act should be amended to include greater protections of fundamental legal rights

92. Fundamental legal rights (known as the rule of law) are both necessary to achieve justice, and are an important constraint on the coercive power of the State.
93. The four fundamental legal rights commonly abrogated in legislation creating public sector anti-corruption agencies are:

- 93.1. The presumption of innocence and burden of proof;
- 93.2. The right to silence;
- 93.3. The privilege against self-incrimination; and
- 93.4. Natural justice.
94. In 2015 the Australian Law Reform Commission conducted a Freedoms Inquiry, reviewing federal legislation to identify provisions that unreasonably encroach upon traditional rights, freedoms and privileges. The results confirmed an increasing trend towards parliamentary erosion of fundamental legal rights, in particular with the growth in anti-corruption agencies.<sup>1</sup>
95. Fundamental legal rights arising from the access to the transcript of compulsorily acquired evidence was the other aspect of the appeal in *A v Maughan*.
96. The Applicant relied on recent decisions of the High Court in *X7 v Australian Crime Commission* [2013] HCA 29; (2013) 248 CLR 92 and *Lee v The Queen* [2014] HCA 20; (2014) 253 CLR 455. After the Supreme Court of Appeal reserved its decision on 17 December 2015 and before its judgement on 15 July 2016, the High Court heard and delivered its decision in *R v Independent Broad-based Anti-corruption Commissioner* [2016] HCA 8.
97. In his judgement, Chief Justice Martin, after reviewing the case law concluded that:

*This court is bound to apply the reasons given by the plurality in R v Independent Broad-based Anti-corruption Commissioner to conclude that access by the prosecution to the transcript of the applicant's examination before the Commission does not involve any alteration to any fundamental principle of the*

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<sup>1</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) 17

*common law or the criminal trial process, nor does it abrogate any fundamental freedom, right or immunity [65].*

98. The Chief Justice went on to conclude, based on his review of the various provisions of the CCC Act, that the provision of the transcript of the applicant's examination before the CCC to the prosecution was in any event authorised by the Act: [102]

No provision of transcript of compulsorily acquired evidence to prosecutor

99. This aspect of the CCC Act is but one example of a statutory abrogation of fundamental legal rights, related to:

99.1. The burden of proof on the prosecution to prove its case without assistance from an accused;

99.2. The right to silence; and

99.3. The privilege against self-incrimination.

100. Importantly, the provision of the transcript of compulsorily acquired evidence to a prosecuting agency is not an issue which received any attention in the Explanatory Memorandum or the parliamentary reading speeches of the CCC Act.

101. The complex statutory interpretation exercise carried out by the Chief Justice in the Decision highlights the need to reconsider whether the CCC Act should now be amended to ameliorate the obvious potential prejudice from such express power.

102. Section 113 of the NSW ICAC Act contains a mechanism for a court to decide whether it is desirable in the interests of justice that particular evidence given before ICAC (where a direction restricting disclosure has been made under s112) should be made available to a person charged with an offence before a state court or the prosecutor.

103. This section is limited to a person charged with an offence, but there is no reason why it could not apply to a person suspected by the CCC during a compulsory examination of committing an offence against state laws.



104. WAPU submits that the CCC Act ought to be amended to revoke the power to disclose to prosecuting authorities the transcript of a compulsory examination of a person charged with or suspected of committing a criminal offence.
105. An alternative course of action would be to introduce a court-based mechanism to protect the rights of persons suspected of, or charged with committing a criminal offence in similar terms to section 113 of the NSW ICAC Act.

#### No disclosure of records of voluntary interviews conducted by CCC to prosecutor

106. WAPU has long held concerns about the rights and obligations of police officers who are asked to participate in voluntary interviews by CCC officers.
107. The CCC has power to compel police officers to:
  - 107.1. Produce a statement of information (s94(1));
  - 107.2. Produce a record or thing specified to the CCC (s95(1)); and
  - 107.3. To answer questions and/or produce documents, records or things at an examination (s96).
108. However, police officers are only obliged to comply with the above powers if the CCC serves the officer with a notice or summons requiring them to do so.
109. The CCC frequently begins its investigations by conducting what may best be described as “voluntary” interviews with witnesses, which are almost invariably recorded.
110. There is no power under the CCC Act for the CCC to compel police officers to co-operate with requests for voluntary interviews. Consequently if a notice or summons is **not** issued by the CCC, an officer is not obliged to participate in any voluntary interview.
111. However, police officers are encouraged (both by CCC officers and the Commissioner of Police) to cooperate with the CCC during investigations, and many officers have

reported to WAPU that they have felt compelled to participate in a voluntary interview, even though they were under no legal compulsion to do so.

112. WAPU's concern stems from the lack of protection available to officers who participate in voluntary interviews.
113. The CCC Act abrogates the privilege against self-incrimination (which includes the right to silence) by its power to compel a person summonsed to answer questions under oath during an examination: s96. To ameliorate the loss of the privilege against self-incrimination, the CCC Act contains two main protective measures for persons summonsed to give evidence:
  - 113.1. Examinations are not open to the public unless otherwise ordered: s139(1); and
  - 113.2. A statement made by a witness in answer to a question that the CCC requires the witness to answer is not admissible in evidence against the person in any criminal, civil or penalty proceedings except contempt proceedings, disciplinary action or proceedings for offences against the CCC Act: s145(1).
114. The direct use immunity under section 145(1) of the Act **does not** apply to a police officer who voluntarily participates in an interview with the CCC because such interviews are not conducted using the compulsory powers in sections 94 to 96 of the CCC Act.
115. This means that any statement made by a police officer in a voluntary interview can be used against that officer in any subsequent criminal, civil or disciplinary proceedings.
116. WAPU submits that the immunity in section 145(1) of the CCC Act should be extended to include the records of any voluntary interviews between police officers and officers of the CCC, and such records should not be made available to any prosecuting authority.

## RECOMMENDATIONS

- 116.1. No amendment should be made to the CCC Act to expand the power of the CCC to include a statutory power to prosecute offences under the criminal laws of Western Australia.
- 116.2. No amendment should be made to the CCC Act to retrospectively validate prosecutions of criminal offences commenced and conducted by the CCC, irrespective of the outcome of those prosecutions.
- 116.3. The CCC Act should be amended as follows:
  - 116.3.1. To prohibit disclosure of the transcript of any evidence given by a person compulsorily examined by the CCC to any prosecuting authority or agency in the event that person is subsequently charged with a criminal offence; and
  - 116.3.2. To prohibit disclosure of any record of a voluntary interview conducted between CCC officers and a person suspected of committing a criminal offence to any prosecuting authority or agency for the purposes of a criminal prosecution of the person interviewed or any other person.

## **Attachment 1**

### **Extract from Hansard – Legislative Assembly – 15 May 2003<sup>2</sup>**

The CCC will have three main jurisdictions: investigation of police corruption; investigation of public sector corruption; and a role in relation to the investigation by the police of organised crime

Misconduct Function: A major function of the CCC will be to ensure that allegations and information about misconduct are dealt with in an appropriate way. The CCC will be able to investigate Western Australian judges, ministers, members of Parliament and other public officers and police officers. The commission will be able to receive allegations about misconduct from any person, as well as from the police royal commission, the parliamentary commissioner, the ACC, the Inspector of Custodial Services, the Commissioner of Police, the principal officer of a notifying authority - for example, a department or organisation as defined in the Public Sector Management Act - or an officer who constitutes a notifying authority.

The CCC will perform its misconduct function by -

- receiving and initiating allegations of misconduct;
- considering whether action is needed in relation to allegations and matters related to misconduct;
- investigating or taking other action in relation to allegations and matters related to misconduct if it is appropriate to do so, or referring the allegations or matters to independent agencies or appropriate authorities so that they can take action themselves or in cooperation with the commission;
- monitoring the way in which independent agencies and appropriate authorities take action in relation to allegations and matters that are referred to them by the commission;
- investigating whether misconduct has or may have occurred, is or may be occurring, or whether further misconduct may be about to occur or is likely to occur; or
- furnishing reports and making recommendations on the outcome of investigations, and consulting, cooperating and exchanging information with independent agencies and appropriate authorities.

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<sup>2</sup> 15 May 2003 / p7861-7865 CORRUPTION AND CRIME COMMISSION BILL 2003 [Introduction And First Reading, Second Reading]

The CCC may not make a finding or form an opinion on whether a person has committed, is committing, or is about to commit a criminal or disciplinary offence. This is consistent with the position that it is for the prosecuting authorities and the courts to deal with these matters.

## **Attachment 2**

### **Extract from Hansard – Legislative Council – 10 Jun 2003<sup>3</sup>**

The Government believes that a corruption-fighting body must have all of the powers, resources and modern techniques that are now available for the investigation of corrupt, criminal and improper conduct. The CCC will therefore have all of the powers of the Anti-Corruption Commission, plus the extensive powers currently used by the police royal commission. In addition to the investigation of police and public sector misconduct, the CCC will have a role in the investigation by the police of organised crime.

Additional safeguards have been included to protect the rights of persons the subject of complaints. The CCC may recommend that an independent body such as the Director of Public Prosecutions give consideration to prosecution. The CCC is empowered to furnish reports and make recommendations on the outcome of investigations, and consult, cooperate and exchange information with independent agencies and appropriate authorities. It has the ability to furnish reports for presentation to Parliament on a wide range of matters. The CCC may not make a finding or form an opinion that a person has committed, is committing, or is about to commit a criminal or disciplinary offence.

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<sup>3</sup> 10 Jun 2003 / p8356-8358 CORRUPTION AND CRIME COMMISSION BILL 2003 [Receipt And First Reading, Second Reading]