



**PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA**

15 September 2016

The Hon Nick Goiran MLC
Chairman
Joint Standing Committee of the
Corruption and Crime Commission

Dear Chairman

**RE: INVITATION TO PROVIDE A SUBMISSION TO THE JOINT STANDING
COMMITTEE'S INQUIRY**

Thank you for your invitation dated 18 August 2016 to make a submission to the Committee's Inquiry into the Corruption and Crime Commission being able to prosecute its own charges.

To avoid an unnecessary duplication of information which will be submitted to the Committee by other jurisdictions, or will be gathered by the Committee during its inquiry, my submission will principally focus on terms of inquiry a) and c).

My opinion is that the Commission should not be granted the function or power to commence criminal charges, or to prosecute those charges.

A v Maughan [2016] WASCA 128 confirms that the Commission has never had the function or power to prosecute criminal charges under the *Criminal Code*, or any other written law.¹ The Court said that this is so because Parliament never intended the Commission to have such a function or power.² Parliament, instead, confirmed that the scope of the Commission's misconduct function has always been:

... limited to investigation and reporting upon allegations of such misconduct and, if appropriate, making recommendations with respect to prosecution to an independent agency or appropriate authority.³

Fundamentally important considerations underpin the Court's judgment concerning Parliament's intention in this respect which was first expressed in the *Corruption and*

¹ An uncertainty left by the Court on this point is whether officers of the Commission have authority to commence proceedings for offences related to the administration and enforcement of the legislation establishing the Commission. The Court elected not to determine this question, deciding that its determination should be made when a case raises that issue; *Maughan* 5, n 3.

² *Ibid* [119].

³ *Ibid* [124].

Crime Commission Act 2003 (WA), and reaffirmed in 2015 in the amendments made to what became the *Corruption, Crime and Misconduct Act 2003 (WA)*. The judgments of the Court make it clear that the decision is concerned, not with a mere technicality, but with a substantive limitation upon the purposes and functions or powers of the Commission.

These considerations effect the important balance achieved by the legislation between, on the one hand, manifesting Parliament's intention to establish an integrity agency in this State, and on the other hand to leave in the hands of the Director of Public Prosecutions, or a law enforcement agency such as the Police, the decision whether a Commission misconduct investigation has found sufficient admissible evidence to justify the commencement of criminal proceedings against an individual.

The decision-making contribution made by those more specialised and traditional prosecutorial and investigative bodies to the proper operation of the statutory misconduct framework in this regard:

1. maintains the existence of an objective assessment of the admissible evidence produced by a Commission investigation by organisations that are bound by legislation and guidelines for commencing or continuing prosecutions for criminal offences;⁴
2. increases the likelihood that a person is not prosecuted for a criminal offence without justification, and
3. Provides no impediment to the charging and prosecution of a person where the evidence justifies it.⁵ All relevant evidentiary material is to be passed on to the appropriate prosecuting agency.

I have observed no compelling reason during my term as Parliamentary Inspector, either in the conduct of the Commission or in the conduct of the public service investigated by the Commission, which suggests that these vital protections should be discarded in favour of another statutory model which authorises the Commission to commence or prosecute criminal charges.

The nature of the Commission's serious misconduct function, and the peculiar nature of the type of conduct upon which a criminal prosecution is likely to be based, must also be borne in mind when considering the importance of the protections inherent in the current statutory misconduct framework.

⁴ *The Director of Public Prosecutions Act 1991 (WA)* and the Director of Public Prosecutions' *Statement of Prosecutorial Policy and Guidelines* to which the Police also adhere in determining whether to investigate a complaint of criminality or to commence or proceed with a prosecution of a criminal offence.

⁵ I do not accept the view that these important safeguards should be discarded on the basis that the progression of any particular brief of evidence produced by the Commission through the criminal justice system should not be delayed. No Act of Parliament suggests that the Commission should expect to enjoy such an advantage.

Corruption and dishonesty in public office are types of criminal offences, as the Commission's own statistics show, difficult to successfully identify or prosecute. They are often based on intercepted information gained by warrants obtained under the *Telecommunications (Interception and Access) Act 1979 (Com)*⁶ or under the *Surveillance Devices Act 1998 (WA)*, and can rely on the evidence of Commission surveillance officers.

Although I do not suggest that in W A the Commission has been guilty of misconduct of the kind recently encountered in other jurisdictions, such as New South Wales, integrity agencies investigating such discrete and difficult crimes may, in some instances, pursue their targets vigorously and publicly destroy reputations, withhold evidence from a prosecuting authority,⁷ or indeed purposely exceed their misconduct functions and powers.⁸

The nature, functions and powers of integrity agencies throughout Australia, and their respective governing legislation, do not readily invite real-time oversight of their operational activities. This is so in this State. For instance, I am prohibited from exercising any of my functions or powers in a way that might interfere with, obstruct, hinder or delay any lawful Commission operation.⁹ Therefore, my oversight effectiveness, in the case of operational matters, rather than generally, is not such as to be likely to prevent an injustice of the kind just described, should the Commission have the power to commence and prosecute criminal proceedings.

In my opinion, not only are there good arguments why the Act should not be amended to provide a general prosecution power to the Commission following the decision in *Maughan*, but the decision in reality simply confirms what has in effect always been the situation under the Act, at least following the amendment of the Act soon after it came into effect, by the amending Act 78 of 2003, which commenced on 1 January 2004.

That Act added ss 7A and 7B. Section 7A provides:

The main purposes of this Act are –

- (a) to combat and reduce the incidence of organised crime; and*
- (b) to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector.*

Originally, s 7B(3) provided that purpose (b) was to be performed by helping public authorities by increasing their capacity to deal effectively with misconduct '*while retaining power to itself investigate cases of misconduct, particularly serious misconduct.*' That sub-section was repealed by the amending Act 35 of 2014 and replaced, *inter alia*, to the same effect, by s 7B(4), which provides:

⁶ Affidavits used by the Commission to obtain warrants under this legislation are not permitted by the legislation to be assessed or audited for their accuracy by my Office, unless I am investigating suspected misconduct on the part of the Commission or by its officers.

⁷ The New South Wales Independent Commission Against Corruption's prosecution of SES Commissioner Murray Kear in 2016 was severely criticised by the presiding Magistrate for withholding exculpatory evidence from the Director of Public Prosecutions.

⁸ *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.

⁹ Section 198 of the Act.

The Commission is to be able to investigate cases of serious misconduct.

In parting with this question, however, I should note that in her Review of the Act published in February 2008 Ms Gail Archer SC, in Chapter 23.1, after referring to views expressed by the then Commissioner, the Hon Leonard Roberts-Smith QC, and the Parliamentary Inspector, Mr Malcolm McCusker AC CVO QC, recommended that the Act should be amended to make it clear that the Commission ‘has, and has always had, the power to commence and conduct prosecutions in the Magistrates Court.’ It will be evident that I respectfully disagree.

I wish finally to mention briefly a matter which, in my view, arises out of the term of reference (c). In my view, given the division of misconduct investigative functions between the Commission and the Public Sector Commission (PSC) enacted by the 2014 Amendment Act, to which I have referred above, it is important that the combined misconduct functions of the two agencies cover the field of public integrity investigation.

By various sections and the definitions in s 3(1) and s 4(a), (b) and (c) the Commission has the function of dealing with ‘serious misconduct’, which includes ‘police misconduct’, misconduct of any degree of seriousness by a member of the Police Force and persons employed in and attached to the Police Department. The Commission has the power to deal with serious misconduct by its own officers, subject to the oversight of the Parliamentary Inspector under s 196 of the Act, which guards against any difficulty which may arise out of the Commission investigating the conduct of its own officers.

The function of dealing with ‘minor misconduct’, by various sections and the definitions in s 3(1) and s 4(d), is vested in the PSC, subject to certain exclusions, including ‘police misconduct’. However, by s 45G(b) the PSC may not receive or initiate an allegation of misconduct concerning a Commission officer. If the allegation is, wholly or in part of serious misconduct, as we have seen, it may be dealt with by the Commission, but the Commission has no power to deal with allegations of minor misconduct by its officers.

It is arguable that I may have an investigative function in that regard under s 195(1)(b) of the Act, but the argument is weak because my powers to deal with a matter are essentially powers of referral to another appropriate agency and of recommendation – powers of oversight. In truth this appears to be an accidental omission which occurred when the Act 35 of 2014 was enacted to confer misconduct functions upon the PSC. It should be remedied by amendment to restore to the Commission the power to investigate and deal with minor misconduct by its own officers, subject to the oversight of the Parliamentary Inspector.

Yours sincerely,


HON MICHAEL MURRAY AM QC
PARLIAMENTARY INSPECTOR