



13 April 2022

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Commission of Inquiry relating to the Crime and Corruption Commission
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Dear Commissioners,

Submission to the Commission of Inquiry relating to the Crime and Corruption Commission

Thank you for your letter of 25 March 2022 inviting me to provide a submission to the Commission of Inquiry. I make the following brief comments in response.

Decisions to commence prosecutions

Many of your queries are directed to matters relating to decisions to commence prosecutions arising from investigations. The NSW Crime Commission ('NSWCC') does not make decisions to charge persons or otherwise commence prosecutions.

Rather we primarily work in partnership with other law enforcement agencies. Police officers are regularly appointed officers of the Commission for the duration of such investigations. Notwithstanding that, the decision as to whether obtain advice from the ODPP or to prefer criminal charges persons rests with those partner agencies such as the NSW Police Force or the Australian Federal Police. It is the training and policies of those agencies that regulate those decisions.

I understand that in Queensland, prior to 2018, at the completion of a CCC investigation, a brief would be sent to the ODPP to obtain the views of that office as to whether criminal charges were warranted. In my view, this was a sound practice as it recognised that it can be difficult for investigators to view the results of their endeavours objectively.

Conversely, police officers routinely prefer even the most serious charges without any input from the ODPP and not infrequently the Crown elects not to proceed to trial or the trial court dismisses the charges. Such outcomes are usually accepted without controversy. It would be undesirable if the CCC were expected to adhere to higher standards merely because the individuals impacted by their decisions to charge are officials with influence rather than "common or garden criminals".

Nonetheless, the cases the CCC investigates are frequently more complex than those investigated by the QPS and the status of defendants in CCC cases will inevitably ensure their protestations will have greater impact if charges are withdrawn. The harm done in that eventuality is not just to the defendant – the CCC suffers, and the justice system is brought into disrepute. Accordingly, I respectfully recommend that consideration be given to the



reinstitution of the requirement that the CCC refer a brief to the OPDD for advice before criminal charges are preferred.

Management of coercive evidence in relation to charged persons

The NSWCC is bound by s 35A of the *Crime Commission Act 2012* (NSW) to seek the leave of the Supreme Court of NSW in order to be able to coercively examine a person who is the subject of a current charge for an offence about the subject matter of the charged offence. To receive a grant of leave, the Court must be satisfied that any prejudicial effect to that person's trial that is likely to result from the person's examination is outweighed by the public interest in using the Commission's powers to ensure that a matter is fully investigated.

When such a coercive examination occurs, the Commission is further bound by s 45A of the *Crime Commission Act 2012* (NSW) to ensure that any of the evidence taken is not disclosed to a member of an investigative agency or a prosecutor if the member of the investigative agency or the prosecutor is involved in the prosecution of the examinee for the offence they were examined about.

Further, coercive evidence obtained from a charged person after leave is granted is not admissible against the charged person in any civil, criminal, or disciplinary proceeding. However, this evidence can be admissible as evidence against another person, subject to that evidence being disclosed as a result of a court determining that the interests of justice require the release of that evidence in those criminal proceedings – see s 45(4) and (5) of the *Crime Commission Act 2012* (NSW).

Oversight bodies

The NSWCC has a number of bodies which oversight its activities. I regard all of these bodies as effective in their oversight.

The bodies are:

- The NSW Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission
- The Law Enforcement Conduct Commission
- The NSW Ombudsman
- The Office of the Inspector of the Law Enforcement Conduct Commission (with reference to the NSWCC's use of powers under the *Surveillance Devices Act 2007* (NSW)) and
- The Commonwealth Ombudsman (with reference to the NSWCC's use of powers under the *Telecommunications (Interception and Access) Act 1979* (Cth)).

I hope that this information is of assistance to the Inquiry. If the NSWCC can be of any further assistance, please do not hesitate to contact me.

Yours faithfully,

[Redacted signature]

Michael Barnes,
Commissioner
New South Wales Crime Commission

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