

29 April 2022

The Honourable Tony Fitzgerald AC QC
Chairperson and Commissioner
Commission of Inquiry relating to the Crime and Corruption Commission

Care of [REDACTED]
Executive [REDACTED]
Via email [REDACTED]

Dear Chairperson,

Submission to the Commission of Inquiry into specific matters relating to the Crime and Corruption Commission

Thank you for inviting this Office to provide information to the Commission of Inquiry into specific matters relating to the Crime and Corruption Commission in Queensland. The responses to the questions posed in your letters are drawn from the experience of this Office and the continuing development of our working relationship with the NSW Independent Commission Against Corruption (the NSW ICAC).

Because the answers provided detail the working relationship between the NSW Office of the Director of Public Prosecutions (the NSW ODPP) and the NSW ICAC, [REDACTED]

1. Any relevant law, policies, procedures and practices affecting decisions to commence prosecutions arising out of NSW Independent Commission Against Corruption Investigations.

The decision to commence prosecutions is governed by the NSW ODPP Prosecution Guidelines. Chapter 1 of the Prosecution Guidelines outlines the test for deciding whether to prosecute, including a non-exhaustive list of public interest factors taken into consideration.

As set out in Chapter 1, the decision whether to prosecute involves two questions:

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1. Can it be said that there is no reasonable prospect of conviction on the admissible evidence?
2. Is the prosecution in the public interest?

This test applies to all offences, including prosecutions arising out of NSW ICAC Investigations. If the NSW ODPP determines that there is sufficient admissible evidence and that a prosecution is in the public interest, the NSW ICAC is advised and commences the prosecution. If a brief of evidence is considered insufficient, the NSW ODPP may request the NSW ICAC to provide further evidence or information. If the NSW ODPP determines that there is no reasonable prospect of conviction in a matter or that otherwise a prosecution is not in the public interest, the NSW ICAC is advised and may request a review of the decision.

A copy of the NSW ODPP Prosecution Guidelines is available online: [Prosecution Guidelines \(March 2021\) \(nsw.gov.au\)](https://www.nsw.gov.au/prosecution-guidelines).

2. **Any relevant law, policies, procedures and practices affecting the referral of matters by the NSW ICAC to your Office, including details about the types of matters referred; the form of the referrals; when matters are referred and why referrals are not made at an earlier stage (if known).**

The *Independent Commission Against Corruption Act 1988 (NSW)* (the NSW ICAC Act) provides the legislative basis for the referral of matters by the NSW ICAC to the NSW ODPP.

The NSW ICAC may form opinions as to whether the advice of the NSW Director of Public Prosecutions should be sought in relation to the commencement of proceedings against persons for criminal offences against laws of the State: s13(3) and s13(5)(b)(i) *NSW ICAC Act*.

The ICAC may, before or after investigating a matter (whether the investigation is completed and whether the ICAC has made any findings), refer a matter for investigation or other action to a 'relevant authority': s53 *NSW ICAC Act*.

The ICAC may gather and assemble evidence that may be admissible in the prosecution of a person for a criminal offence and furnish that evidence to the Director of Public Prosecutions: s14(1)(a) and s52A *NSW ICAC Act*.

A Memorandum of Understanding (MOU) exists between the NSW ICAC and the NSW ODPP and outlines the practices and procedures for the referral of matters. The MOU also stipulates the format and information to be included in the referral of a matter from the NSW ICAC to NSW ODPP. [REDACTED] I can also advise that an updated MOU is in the process of being drafted and will incorporate ongoing and positive developments in the practices and procedures between the NSW ICAC and this Office.

The most common types of matters referred to the NSW ODPP from the NSW ICAC are fraud offences (ss192B – 192H *Crimes Act 1900* (NSW)) and related proceeds of crime offences (ss193A-193FA *Crimes Act 1900* (NSW)), giving false and misleading evidence to the ICAC (s87 *NSW ICAC Act*), and the common law offence of 'misconduct in public office'.



3. The impact on the resources of your office by reason of performing its functions in respect of matters arising out of the NSW ICAC investigations and how that impact is managed by your office.

Prosecutions arising out of NSW ICAC investigations are routinely complex and lengthy and impose significant demands on the resources of the NSW ODPP.

To manage these demands, referrals from the NSW ICAC are directed to two specialised prosecution groups that deal specifically with prosecutions involving NSW ICAC referrals, serving NSW Police, referrals from the Law Enforcement Conduct Commission, and other high-profile, complex prosecutions, as discussed in response to question 4 below.

4. Any specialist expertise required by members of your Office to carry out prosecutions arising out of the NSW ICAC investigations.

In July 2019, the NSW ODPP established the Public Sector Prosecutions Unit (**the PSPU**). The primary functions of the PSPU are to:

- Provide advice on, and prosecute persons arising from, NSW ICAC inquiries and subsequent referrals;
- Provide specialist advice across the NSW ODPP, and to conduct more complex or significant proceedings, under the *Confiscation of Proceeds of Crimes Act 1989* (NSW); and
- Provide advice and conduct prosecutions in complex, high profile matters involving police, politicians and others, including referred persons from Law Enforcement Conduct Commission and other agencies.

The PSPU, together with the Specialised Prosecution Group (**the SPG**) provides specialist prosecution services to the Office in corruption and related offences. The PSPU and SPG are separate to the general operational groups within the NSW ODPP, which both addresses any potential issues of conflict and aids in developing the capacity and experience of specialist lawyers in the prosecution of these types of offences.

The Specialist Legal Support Unit services both the PSPU and the SPG. It maintains a detailed register of all ICAC prosecutions from the last five years and referrals for advice.

5. Practices regarding interaction between your Office and the NSW ICAC, including:
a. practices in respect of advice given (either formally or informally) by your Office before and after the commencement of criminal prosecutions; and

As outlined in Chapter 12.2 of the Prosecution Guidelines, advice will not be provided by this Office on an informal basis. The NSW ODPP primarily provides advice to the NSW ICAC before the commencement of a criminal prosecution in response to a specific referral on the question of the sufficiency of evidence to prosecute, although the Office can on request provide general advice and advice prior to the formal referral of a matter.

Once advice as to the sufficiency of evidence has been provided and a prosecution has been commenced by the laying of charges by NSW ICAC officers, the NSW ODPP assumes full



responsibility for the prosecutorial decisions made with respect to a matter, but will consult with the NSW ICAC concerning any determinations it makes. It is therefore not the case that advice will typically be provided after the commencement of a criminal prosecution.

Practices in respect of advice given by the ODPP to the ICAC are outlined in the MOU. The MOU sets out agreed timetables for the provision of advice, the furnishing of evidence and the format of materials to be provided to the ODPP in the referral for advice.

- b. practices concerning how evidence obtained by use of coercive powers is managed given the legal principles regulating the use of that evidence (such as those identified in *X7 v Australian Crime Commission* (2013) 251 CLR 196, and *Lee v The Queen* (2014) 253 CLR 455).**

Direct use of an accused's compulsory evidence (public or private) is permitted when prosecuting an accused for an offence under the *NSW ICAC Act*: s37(4) *NSW ICAC Act*. Conversely, direct use of an accused's compulsory evidence (public or private) is not permitted when prosecuting an accused for any other offence: s37(3) *NSW ICAC Act*. There are otherwise a number of NSW appellate decisions concerning the indirect use of compelled testimony that this Office frequently will have regard to in its consideration and conduct of prosecutions arising from NSW ICAC inquiries, including *McDonald v R*; *Maitland v R* [2016] NSWCCA 306 and *R v OC* [2015] NSWCCA. 306.

The current practice is that the NSW ICAC will not provide transcripts of evidence given under objection pursuant to s38 of the *NSW ICAC Act* in a referral to the NSW ODPP, unless advice is requested for the sufficiency of evidence for giving false and misleading evidence to the NSW ICAC.

Internal practices in the specialist units at the ODPP ensure access to this evidence is restricted to specific prosecution teams. This involves having separate prosecutors with carriage of the advice and prosecution of substantive corruption offences from the prosecutors who have carriage of the advice and prosecution of offences under the *NSW ICAC Act*.

To ensure that the transcript of evidence of witnesses and exhibits given under objection is not viewed by prosecutors with carriage of the substantive offending, such material will only be requested from the NSW ICAC after approval has been given by a Managing Solicitor from either the PSPU or the SPG.

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