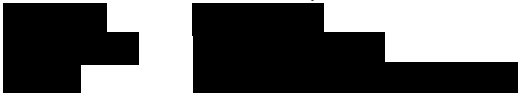




Office of the Director

Your Ref: 602456/1, 6119001

Our Ref: ADM2022/79



The Hon. Tony Fitzgerald AC QC
The Hon. Alan Wilson QC
Commissioners
Commission of Inquiry relating to the Crime and Corruption Commission
GPO Box 149
BRISBANE QLD 4001

By email only: submissions@cccinqury.qld.gov.au



Dear Commissioners

SPECIFIC MATTERS REQUESTED BY THE COMMISSION OF INQUIRY

I refer to your request for information from my Office (**ODPP**) about some specific matters of relevance to the Commission of Inquiry, received by email on 2 March 2022.

The paragraphs below respond to those specific matters, which concern the relationship between Western Australia's Corruption and Crime Commission (**WA CCC**) and the ODPP.

I have no further submissions to make to the Inquiry on the Terms of Reference as they relate to the Queensland Crime and Corruption Commission.

1. Decisions to commence prosecutions arising out of WA CCC investigations

Background

The powers and functions of the WA CCC are governed by the *Corruption, Crime and Misconduct Act 2003* (WA) (**CCM Act**).

Prosecutions can arise from WA CCC investigations in several ways. In the performance of its serious misconduct function, the WA CCC may refer allegations for further action by an independent agency or an appropriate authority,¹ or it may assemble and furnish evidence it has obtained in the

¹ CCM Act, s 18(2)(c).

course of its own investigation to those entities,² or to a suitable authority in another jurisdiction.³ A decision to prosecute might also be taken following the tabling in Parliament of a report by the WA CCC which includes a recommendation that consideration be given to prosecuting particular persons.⁴

Prior to the Court of Appeal's decision in **A v Maughan** [2016] WASCA 128 (**Maughan**), delivered on 15 July 2016, there was some uncertainty as to whether the WA CCC had itself the power to commence and conduct prosecutions. The history of this uncertainty is usefully documented in the enclosed report of a previous Joint Standing Committee of the Western Australian Parliament on the WA CCC.⁵

In *Maughan*, the Court of Appeal held that the WA CCC's functions do not extend to the prosecution of offences it has investigated but which otherwise have no connection with the CCC or the administration of its Act.⁶ The Court of Appeal left open the issue of whether the WA CCC is empowered to prosecute matters which concern the administration and enforcement of the CCM Act.

Following *Maughan*, the WA CCC made arrangements, where it considers an investigation it has undertaken discloses the commission of an offence, to refer the matter to the State Solicitor's Office (**SSO**). It remains open to the WA CCC to refer allegations to the WA Police for investigation and charge, and a prosecution might thereafter be taken over by the ODPP from WA Police in the same manner as other criminal prosecutions.

Current practice

Upon a matter being referred from the WA CCC as a result of its investigation, the SSO independently analyses the evidence and determines the charges arising from the brief and whether a prosecution should be commenced. The process the SSO undertakes to review the brief was described in the enclosed report by the WA Department of Justice following its *Review into Prosecutions arising from Corruption and Crime Commission Investigations* (**Review**).⁷

If the SSO believes there is a prima facie case against the accused, and it is in the public interest to prosecute, the SSO will commence proceedings.

Where the alleged offence is a simple offence, the prosecution will be conducted by the SSO. Where the alleged offence is an indictable offence, the SSO will, after commencing the prosecution, liaise with the ODPP to reach agreement on which office conducts the proceedings. If it is agreed

² CCM Act, s 18(2)(h)(i).

³ CCM Act, s 18(2)(h)(ii).

⁴ CCM Act, ss 43 and 84.

⁵ 39th Joint Standing Committee on the WA CCC, Parliament of Western Australia, *The ability of the Corruption and Crime Commission (CCC) to charge and prosecute* (Report No. 33, November 2016).

⁶ *Maughan*, [2].

⁷ Department of Justice, *Review into Prosecutions arising from Corruption and Crime Commission Investigations*, (Report, May 2020); 16-17.

that the prosecution will proceed on indictment, the prosecution is taken over by the ODPP at the committal stage.

The powers and functions of the Director of Public Prosecutions are governed by the *Director of Public Prosecutions Act 1991* (WA). It is a function of the Director to commence and conduct prosecutions of any offence; and, at any stage of criminal proceedings, to take over a prosecution commenced by another person of an offence.⁸

As an independent prosecution agency, the ODPP has the sole decision-making authority to continue any prosecution it is conducting, whether to amend or discontinue charges, and as to how any prosecution is conducted. Those decisions are made in accordance with the enclosed *DPP Statement of Prosecution Policy and Guidelines 2018 (DPP Guidelines)*.⁹ Paragraphs [16] to [33] set out the guidelines applicable to the ODPP's assessment of whether a *prima facie* case has been established by the evidence, and its evaluation of the public interest in prosecuting the matter.

As it would in any prosecution, if the alteration or discontinuation of charges were contemplated, the ODPP would consult the investigators (the WA CCC) and the original prosecutors (the SSO).

Once the ODPP has conduct of a prosecution arising out of a WA CCC investigation, it is managed in the same manner as any other prosecution. The matter is prepared depending on whether it is a committal for trial or sentence. For committals for trial, the sufficiency of the evidence is evaluated, any additional evidence necessary is requested, and (in appropriate cases) an indictment is filed alleging appropriate charges.

All prosecution processes are governed by the *Criminal Procedure Act 2004* (WA).

2. Referral of matters from the WA CCC

The WA CCC's serious misconduct functions include assembling and furnishing evidence it has obtained in the course of its own investigations to an 'independent agency', such as the ODPP,¹⁰ or to another 'appropriate authority',¹¹ such as the SSO or the WA Police Force.¹²

As described above, the current arrangement is for the WA CCC to refer matters to the SSO prior to a prosecution being taken over by the ODPP.

There is currently no formal policy or set of procedures governing the referral of matters by the WA CCC to the SSO. However, in response to the Review's

⁸ *Director of Public Prosecutions Act 1991* (WA), s 11(1).

⁹ The statement of guidelines is issued pursuant to s 24(1) of the *Director of Public Prosecutions Act 1991* (WA).

¹⁰ CCM Act, s 3 (definition of 'independent agency' para (b)). Other independent agencies are the WA Ombudsman (the Parliamentary Commissioner), the Auditor General, the Inspector of Custodial Services and the Public Sector Commissioner.

¹¹ CCM Act, s 3 (definition of 'appropriate authority').

¹² CCM Act, s 18(h)(i).

recommendation,¹³ the ODPP, the WA CCC, and the SSO are working toward a Memorandum of Understanding concerning the referral of prosecutions.

The Memorandum of Understanding will set out agreed:

- Procedures for the referral of matters by the WA CCC to the SSO.
- Standards for briefs of evidence.
- Timeframes.
- Arrangements for ongoing liaison and monitoring of the process.

Types of matters

The matters that are referred to the SSO by the WA CCC and subsequently prosecuted by the ODPP on indictment might typically involve such offences under *The Criminal Code* (WA) as:

- Disclosing official secrets: s 81(2).
- The offences in Chapter XIII (Corruption and abuse of office) including bribery (s 82), corruption (s 83), and falsification of record (s 85) offences.
- Offences in Chapter XVI (Offences relating to the administration of justice) including fabricating evidence (s 129), destroying evidence (s 132), and pervert the course of justice offences (ss 135 and 143).
- Stealing as a public servant or servant: ss 378(6) and (7).
- Frauds: s 409(1).
- Unlawful use of a restricted-access computer system: s 440A(3).
- Property laundering: s 563A(1).

The ODPP would not expect to conduct proceedings for offences under the CCM Act such as disclosing a restricted matter (s 167), destroying evidence (s 171), or giving false testimony (s 168), unless such an offence was prosecuted on an indictment with other offences.

As noted in answer to Question 1, the SSO conducts summary prosecutions following a referral from WA CCC. Although the Director has a function to commence, conduct and take over the prosecution of summary matters, in accordance with paragraph [74] of the DPP Guidelines, the ODPP will not perform this function unless it is overwhelmingly in the public interest.

A charge under s 25(5) of the CCM Act – maliciously or recklessly making a false or misleading report of serious misconduct – can only be brought by the Director of Public Prosecutions; however, to my knowledge that offence has never been prosecuted.

Form of referrals

The WA CCC provides full disclosure of evidentiary materials in its referral to the SSO, including relevant transcripts of compulsory examinations,

¹³ Op cit (n 7), 19.

exhibits, and any other relevant primary source documents. The materials are provided to the SSO in electronic form.

Timing

I am not in a position to comment on when matters are referred and why they are not referred at an earlier stage. The ODPP, having conduct of only those prosecutions that have already been commenced by the SSO, does not handle the referrals.

If your Inquiry requires greater detail on the timing of referrals, or the form in which they are made, that information is best sought from the WA CCC and the SSO.

3. Resourcing prosecutions

Although the ODPP conducts few prosecutions of matters arising out of WA CCC investigations,¹⁴ the resource impact must be met by the ODPP. There is no separate funding arrangement for prosecution costs or services.

The ODPP is currently under-resourced having, over recent years, absorbed additional demand in the number and type of prosecutions it conducts. Prosecutors are increasingly burdened by the volume and complexity generated by proliferating forms of electronic evidence.

Material gathered by the WA CCC in its investigations may or may not be admissible in a criminal proceeding. Much of the material has been gathered electronically and is not able to be easily viewed by people external to the WA CCC, or put into a format which enables its disclosure to an accused. At times, ascertaining that disclosure obligations have been fully complied with can be a very onerous exercise. Further, the WA CCC has analytical software which enables it to assess a significant amount of data in a way that the ODPP cannot.

Considerable resources also need to be expended on sorting the evidence which has been gathered by the WA CCC into that which is admissible in a criminal proceeding and that which is not, due to the nature of the WA CCC's compulsory procedures.

The current referral arrangements involve the SSO carrying out these essential tasks before a prosecution is commenced. The primary reason for this arrangement is to enable the prosecution to proceed expeditiously, but it is also advantageous in its reduction of the burden on the ODPP's resources.

4. Specialist expertise

Complex fraud and property laundering matters can require a specialised prosecution approach and be particularly time- and resource-intensive. The evidence in these matters may be voluminous and necessitate the synthesis of vast and detailed financial information.

¹⁴ Table 1 of the Review presents prosecution data for the period July 2016 (after *Maughan*) to March 2020.

The ODPP has a small number of prosecutors who have become experienced in prosecuting financial crimes and who are familiar with methods, concepts and issues relevant to investigating and presenting evidence of this crime type. However, there is no identified team within the ODPP which handles prosecutions arising from WA CCC investigations, and prosecutors with expertise are not always available.

5. Interactions between ODPP and WA CCC

Advice on prosecutions

In some cases, the opinion of the Director on the availability of a charge, or the appropriate charge, will be sought at an early stage by the WA CCC or the SSO. In such cases, formal correspondence will be raised and the SSO will be entitled to act on the Director's recommendation in commencing (or not commencing) a prosecution.

Practices concerning compulsorily acquired evidence

The ODPP requires the provision of all relevant material by WA CCC for a prosecution, which may include evidence obtained by its use of coercive powers such as examination transcripts and compulsorily acquired documents.

The restrictions on the use in criminal proceedings in this State of evidence obtained by the exercise of the WA CCC's coercive powers have, since *Maughan*, been well understood, although they have not been tested in any controversial aspect. In *Maughan*, the Court of Appeal considered the significance of the X7 line of authorities to the provision by the WA CCC of examination transcripts to a prosecutor under the CCM Act.

Relevantly, the CCM Act:

- Expressly authorises the conduct of compulsory examinations for the purposes of investigating criminal conduct¹⁵ and expressly abrogates the privilege against self-incrimination which would otherwise be available to persons examined.¹⁶
- Does not oblige the WA CCC to make directions about the use which might be made of the evidence given by persons examined so as to ensure their fair trial.
- Defines a 'restricted matter' in terms that include any evidence given before the WA CCC, and the contents of any compulsorily acquired documents, and prohibits the disclosure of a restricted matter otherwise than in accordance with ss 151 or 152.¹⁷
- Expressly authorises the provision of information gathered by the WA CCC in the course of its investigations to prosecuting agencies.¹⁸

¹⁵ CCM Act, s 137(1).

¹⁶ CCM Act, s 160(2).

¹⁷ CCM Act, s 151.

¹⁸ CCM Act, ss 18(2)(h) and 152(4)(b).

- Provides a qualified 'direct use immunity' such that evidence given under compulsion during an examination cannot be admitted as evidence in any subsequent criminal proceedings against the person examined.¹⁹
- Expressly preserves the operation of s 21 of the *Evidence Act 1906* (WA), which permits a witness to be cross-examined in relation to statements they made during compulsory examination if those statements are inconsistent with the evidence given in the criminal proceedings.²⁰
- Makes admissible the transcript of an examination as evidence of the witness's statements to the WA CCC.²¹

In *Maughan*, the Court of Appeal followed ***R v Independent Broad-based Anti-corruption Commissioner*** [2016] HCA 8; (2016) 90 ALJR 433 in concluding that access by the prosecution to the transcript of an accused's examination before the WA CCC did not involve any alteration to any fundamental principle of the common law or the criminal trial process, nor did it abrogate any fundamental freedom, right or immunity.²² The Court considered that s 145 of the CCM Act must be taken to authorise access by a prosecutor to the transcript of the evidence given by a person examined before the WA CCC, either by the express words of s 145(2) or by necessary intendment.

The Court of Appeal summarised the proper construction of the CCM Act thus:

[T]he general provisions of the Act which reveal the object or purpose of the Act relevant to these proceedings; the scheme by which that object or purpose is to be achieved; the particular provisions of the Act with respect to the use which may be made of evidence given at an examination; and the specific provisions which both authorise and in one case require the Commission to provide information to a prosecutor, all clearly and unequivocally compel the conclusion that it is necessary to attribute to the legislature an intention that the prosecutor have access to the transcript of evidence given by an person examined before the Commission and subsequently charged with offences.²³

Notwithstanding the Court of Appeal's clear position on the proper construction of the CCM Act in *Maughan*, in my view it is appropriate for the prosecution to consider whether evidence that was compulsorily obtained by the WA CCC should be managed in any exceptional way, and to be cautious in the use made of it. The consideration and the caution that is necessary will depend on the nature of the evidence and the allegations.

¹⁹ CCM Act, s 145. The use immunity is qualified by exceptions in each subsection of s 145 which are exceptions for types of proceedings (subsections (1) and (1A)) and exceptions for particular uses of the evidence (subsections (2) and (3)).

²⁰ CCM Act, s 145(2).

²¹ CCM Act, s 145(3).

²² *Maughan*, [65].

²³ *Maughan*, [101].

I am aware of the Queensland Court of Appeal's disapproval in ***R v Leach*** [2019] 1 Qd R 459; [2018] QCA 131 of the provision to a prosecutor of material obtained under compulsion that discloses an accused's defence. Although the applicable provisions of the CCM Act and the *Evidence Act 1906* (WA) render the statutory context in which evidence compulsorily obtained by the WA CCC is used in this State quite different to that in the *Leach* cases, the Queensland Court of Appeal's conclusions, along with the different conclusions of the New South Wales Court of Criminal Appeal in ***R v Kinghorn*** [2021] NSWCCA 313, are to be borne in mind.

Please contact my Legal Projects Officer, [REDACTED] if you have any questions in relation to this submission, or if I can be of further assistance.

Yours sincerely



Amanda Forrester SC
DIRECTOR OF PUBLIC PROSECUTIONS

14 April 2022

Enclosed

1. Parliament of Western Australia, 39th Joint Standing Committee on the Corruption and Crime Commission, *The ability of the Corruption and Crime Commission to charge and prosecute* (Report 33, November 2016).
2. Department of Justice, *Review into Prosecutions Arising from Corruption and Crime Commission Investigations* (Report, May 2020).
3. Director of Public Prosecutions for WA *Statement of Prosecution Policy and Guidelines 2018*.