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1 April 2022

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

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

Dear Commissioners

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

Thank you for your invitation to make a submission to the Commission of Inquiry. I will address the specific points raised in your invitation.

Any use of seconded police officers in investigations conducted by the Independent Commission Against Corruption, South Australia, and in the processes connected with decisions to commence prosecutions arising from those investigations.

In 2013, the Independent Commissioner Against Corruption commenced in South Australia. In the second half of 2021, the South Australian Parliament passed a number of legislative amendments. One of the changes brought about by the amendments was the creation of the Independent Commission Against Corruption, a body corporate with me as its principal officer. In this correspondence, "the Commission" will be used to refer to the Commissioner prior to the amendments, and the Commission subsequent to the amendments.

Since 2013, the Commission has employed seconded police officers from South Australia Police (SAPOL). Section 13(2) of the *Independent Commission Against Corruption Act 2012* (SA) (the Act) permits the Commission to make use of members of SAPOL under an arrangement established by the Commissioner of Police. Under section 14(4) of the Act, a police officer seconded¹ to assist the Commission is an investigator under the Act and, unless otherwise agreed, may, during the secondment, continue to exercise police powers and authorities in the exercise of functions or powers under the Act (see section 14(4a)). A Memorandum of Administrative Arrangement has been established between the Commission and SAPOL in relation to police secondments. Under the arrangement, SAPOL may second up to eight (8) police officers to the Commission at any given time.

¹ Note also the definition of "seconded" in section 4 of the Act.

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While the Commission has employed up to eight (8) SAPOL police officers from time to time, numbers have varied depending on recruitment and requirements. Seconded police officers generally go through the same recruitment process as civilian investigators and selections are based on merit. However, there have been occasions where police officers have been seconded to the Commission for short-term contracts outside of usual recruiting practices due to an urgent need for resourcing. Seconded police officers take leave without pay from SAPOL and are employed on fixed-term contracts like all other Commission staff.

Seconded police officers working within the Commission from time to time exercise their police powers. These powers include but are not limited to the powers of arrest; stop, search, and detain; and general search warrants powers under section 67 of the *Summary Offences Act 1953* (SA). Commission policy prevents the use of a general search warrant by Commission officers without the consent of the Commissioner. Commission policy also requires the authority of the Commissioner to arrest other than for an offence of obstruction under section 33 of the Act (in relation to which all investigators, whether civilian or seconded police, have the authority to arrest).

Seconded police officers working within the Commission are issued with firearms and other operational safety equipment. These police officers are required to carry that equipment when undertaking Commission activities such as the execution of warrants on high risk premises, and other high risk activities. Seconded police officers undertake all compulsory training required by SAPOL to be an operational police officer. That training is delivered by SAPOL and includes regular firearms qualifications. Seconded police officers also undertake any training provided by the Commission.

From time to time, the Commission will use SAPOL police officers not seconded to the Commission to assist with certain investigation activities due to additional resourcing requirements. This is done under an operational Memorandum of Administrative Arrangement between the Commission and SAPOL.

As indicated below, the Commission has never had the power to commence a prosecution and police officers seconded to the Commission have never charged alleged offenders in relation to Commission investigations.

I would make the observation that this has not adverted criticism of the laying of charges. In many instances, criticism has been levelled at the Commission by both commentators and politicians, notwithstanding the exercise of the independent discretion by the Director of Public Prosecutions to charge.

Issues arising from any use of seconded police officers and how those issues are managed by the Commission.

Conflicts of interest occasionally occur within certain investigations, in particular investigations involving allegations against police officers. Those conflicts are managed by ensuring the officer with the conflict is not involved in the investigation, and does not have access to records relating to the investigation. Also, investigations involving allegations against police officers are allocated to civilian investigators.

Decisions relating to charging have always been separated from the Commission, as referred to above.

The expertise, qualifications and training required by the Commission for persons involved in the Commission's investigations and decisions to commence prosecutions arising out of those investigations (including the required expertise, qualifications and training in areas of law other than criminal law that may affect investigations and decisions to prosecute, such as administrative law, public law, employment law and public sector corporate governance).

An essential requirement for the position of Investigator at the Commission is to have successfully completed a Detective Training Course or Investigations Training Course. To date, every investigator recruited has either been in the past, or at the time of selection, a Designated Detective within a law enforcement agency.

Investigators are assisted throughout investigations by legal officers within the Commission and, where necessary, external legal advice is sought. Legal expertise within the Commission includes lawyers with prior prosecution experience and those lawyers are involved prior to any brief of evidence being referred to the Office of the Director of Public Prosecutions (previously) or a law enforcement agency for potential prosecution.

Importantly, under section 27 of the Act (both before and after the legislative amendments), investigations conducted by the Commission into potential issues of corruption in public administration must be overseen by the Commissioner. My predecessor and I have always been closely involved in the commencement, progress and finalisation of corruption investigations undertaken by the Commission.

Any relevant law, policies, procedures and practices affecting decisions to commence prosecutions arising out of Commission investigations.

Prior to the recent legislative amendments, section 7(a) of the Act provided that the Commission's functions included:

to identify corruption in public administration and to –

- (i) Investigate and refer it for prosecution; or*
- (ii) refer it to a law enforcement agency for investigation and prosecution*

Since the legislative amendments, the provision now reads (the added words have been emboldened):

to identify corruption in public administration and to –

- (i) Investigate and refer it **to a law enforcement agency for any further investigation and prosecution**; or*
- (ii) refer it to a law enforcement agency for investigation and prosecution*

Prior to the amendments, matters where the Commission considered prosecution was warranted could be referred to the Director of Public Prosecutions, who would commence a prosecution if he thought a prosecution was warranted, or SAPOL, who would commence a prosecution if they thought a prosecution was warranted. Police officers seconded to the Commission did not charge alleged offenders (and the Commission has never had the power to lay charges). Subsequent to the amendments, this position will continue. A significant difference, however, is that the Commission is no longer able to refer matters directly to the Director of Public Prosecutions.

It is anticipated that law enforcement agencies will review the brief and then retain the matter or refer it to the Director of Public Prosecutions for prosecution, if they determine that it is appropriate to do so.

For completeness, I indicate that, both before and after the amendments, the definition of "law enforcement agency" in the Act extended beyond SAPOL to bodies such as the Australian Federal Police and police forces of other States and Territories. I also, for completeness, draw your attention to sections 36(1) and (1a) of the Act.

A further issue is worthy of note. The involvement of Commission officers in a matter once a prosecution has been commenced (amongst other issues) has been the subject of recent litigation, including a successful special leave application in the High Court (special leave was subsequently revoked.) The matter is *Bell v. The Queen* [2022] HCATrans 030. The transcript of the hearing before the High Court can be found at:

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2022/30.html>

and the citation for the Supreme Court of South Australia – Full Court decision is [2020] SASCFC 116. An undertaking was given by the Director of Public Prosecutions at the conclusion of the hearing without any prior discussion with me. In essence it was not to make any further requests of the Commission for assistance in the prosecution of any matter arising from an investigation commenced before 25 August 2021.

Any relevant law, policies, procedures and practices affecting any referral of matters by the Commission to the Office of the Director of Public Prosecutions (SA), including details about the types of matters that are referred; the form of the referrals; when matters are referred and why referrals are not made at an earlier stage (if known).

These issues are, for the most part, dealt with above. The matters are referred by the Commission by way of the provision of briefs of evidence.

Practices regarding interaction between the Commission and the Office of the Director of Public Prosecutions (SA), including:

- **practices in respect of advice given (either formally or informally) by the Office of the Director of Public Prosecutions (SA) before and after the commencement of criminal prosecutions; and**
- **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) 248 CLR 92, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, and *Lee v The Queen* (2014) 253 CLR 455); and**

Prior to the legislative changes, the Commission would refer briefs of evidence to the Director of Public Prosecutions for his consideration as to the laying of charges. Where the Director of Public Prosecutions decided not to prosecute, the matter would either be closed or further considered as to the viability of a disciplinary investigation. In instances where a person was arrested as a result of a Commission investigation, the Director of Public Prosecutions would consider the brief of evidence and similarly determine whether or not charges would be brought.

Following the legislative changes, the Commission may seek advice from the Director of Public Prosecutions in relation to a matter, but ultimately any referral for potential prosecution must be to a law enforcement agency.

In relation to the reference to “evidence obtained by use of coercive powers”, I will confine my submission to evidence obtained from examinations conducted under Schedule 2 of the Act. The Commission has never conducted an examination of an accused person in relation to matters in which the accused has been charged, and the Commission has never conducted an examination of a person who is a suspect in relation to matters in which that person is a suspect. It is not my intention ever to do so. However, if, hypothetically, that were to occur, the Commission would ensure that evidence given in an examination by a person who may be charged as a result of a Commission investigation into another matter was not included in the brief of evidence relating to that matter forwarded to a law enforcement agency (and was also not provided to the Director of Public Prosecutions).

Any steps that the Commission can take, and any steps that it has taken, in the course of investigations or hearings to minimise inappropriate impacts on affected parties (for example, steps taken to mitigate adverse mental health outcomes suffered by witnesses by reason of their involvement in such investigations or hearings).

Schedule 2 of the Act sets out how examinations must be conducted and various obligations on the part of the examiner and the witness. Importantly, all examinations must be conducted in private, which minimises the impact of the examination on the witness. Schedule 2 further provides protections for the witness with regard to their identity as a person examined; their ability to obtain legal advice; and their ability to disclose the existence of the summons and information about the matter relating to the summons for the purpose of obtaining medical or psychological assistance, or to a close family member. These protections allow the witness to obtain welfare support.

A Commission Investigations Manual provides instruction to Investigators with regard to managing witness welfare during the various investigation processes (including examinations). A Welfare Services Contact Card listing a number of support agencies and contact details is provided to people with whom investigators interact during Commission investigations. A common sense approach is taken with this when dealing with professional witnesses. A contact person is listed on the Welfare Services Contact Card. The contact person is generally an investigator who is not involved in the investigation. The purpose of the contact person is to answer procedural questions which might alleviate undue stress on a witness. An investigator connected to the investigation will provide the witness with their own business card, should the witness have any investigation-related enquiries.

The Investigations Manual provides instruction to investigators to pay attention to the welfare of all people they have contact with during an investigation. The onus is placed on the investigator to take appropriate action based on their apprehensions. Guidance is provided to investigators with respect to options they should consider where a welfare issue is identified. Those options include liaising with the witness' manager, supervisor or HR official, suggesting seeking access to an Employee Assistance Program or medical advice, and consideration as to whether the welfare of the witness outweighs the importance of their interview or examination, such that an interview or examination with the witness is not pursued. Where a risk to safety is identified, SAPOL is contacted to deal with the matter.

Witnesses summoned to appear at examinations are provided with a Welfare Services Contact Card with the summons, and investigators serving the summons are instructed to give consideration to the welfare of the witness. Where concerns are identified, it is the responsibility of the investigator to take appropriate action. That might involve having further conversations with the witness or contacting a family member or SAPOL.

The Commission has an Examination Checklist which is required to be completed for each examination. The checklist includes the name of the person responsible for witness welfare and a series of requirements to be checked. Those requirements are:

- Confirm Witness Welfare Card provided to witness.
- Allocate a witness contact person.
- Has contact been made?
- Are there concerns for witness welfare?
- If yes, have they been addressed?

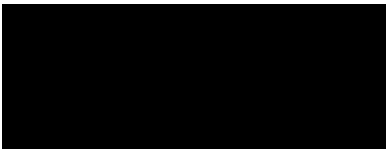
Witness welfare is a matter that is front of mind for all investigators, in particular welfare relating to witnesses who are persons of interest or the subject of a Commission investigation. As indicated above, the Commission has never examined a witness about matters in which that witness is a suspect.

Any body or bodies established by law that provide independent oversight of the activities of the Commission (such as bodies equivalent to the Parliamentary Crime and Corruption Committee, the Parliamentary Crime and Corruption Commissioner and the Public Interest Monitor established by the *Crime and Corruption Act 2001*), and the effectiveness of any such body or bodies.

The activities of the Commission might shortly be overseen by an Inspector. Schedule 4 of the *Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Act 2021* (SA) sets out the role and powers of the Inspector. It has not yet been proclaimed. The Inspector is to replace the current Reviewer, referred to in Schedule 4 of the Act.

The Commission is also overseen by a standing Committee of the Parliament entitled the Crime and Public Integrity Policy Committee. The Commission's compliance with the *Telecommunications (Interception and Access) Act 1979 (Cth)* is overseen by the Commonwealth Ombudsman. The supervision by the current Reviewer, and the Committee and the Commonwealth Ombudsman is considered by me to be comprehensive and effective.

I trust this submission is of assistance. Please contact me, should you require any further information.



COMMISSIONER