



Review into Prosecutions arising from Corruption and Crime Commission Investigations

Report

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1 Introduction

The following is a report on the *Review into Prosecutions arising from Corruption and Crime Commission Investigations* (the Review) prepared by the Department of Justice (the Department).

The key elements of the Review are:

- an examination of prosecution arrangements for similar bodies in other jurisdictions;
- consultation with key stakeholders on the prosecution process; and
- an examination of data on matters referred by the Corruption and Crime Commission (CCC) for possible prosecution.

The powers and functions of the CCC are governed by the *Corruption, Crime and Misconduct Act 2003* (WA) (CCM Act) and provide the CCC with the ability to investigate matters of serious misconduct and to provide evidence to another agency which may be used in the prosecution of a person for a criminal offence.

2 The Review

2.1 Background

On 17 November 2016, the Joint Standing Committee on the Corruption and Crime Commission (JSCCCC) released *Report 33: The ability of the Corruption and Crime Commission (CCC) to charge and prosecute* (the Report). The Report contained two recommendations, one of which was that the Attorney General review the efficiency and effectiveness of prosecutions arising from CCC investigations.

The background to the issue of the CCC's power to prosecute is summarised in the Report's findings, but in brief:

- the CCC's predecessor the Anti-Corruption Commission had no power to prosecute;
- no intent to provide the power to prosecute could be found in the debate of the Bills establishing the CCC;
- recommendation 55 of the Archer Review of the *Corruption and Crime Commission Act 2003* (WA), published in 2008, recommended that it be made clear in legislation that the CCC had the power to prosecute. This recommendation was never implemented;
- the commencement of the *Criminal Procedure Act 2004* (WA) (the Act) limited the ability to conduct prosecutions to 'authorised officers' listed in section 80(2) or appointed under section 182(1) of the Act; and
- in other jurisdictions, prosecutions are referred to the Director of Public Prosecutions or Commissioner of Police.

Concurrent with the Report being prepared, the CCC continued to be satisfied that it had the power to charge and prosecute. The Court of Appeal decision in the case of *A v Maughan 2016 [WASCA] 128 (Maughan)* on 15 July 2016 held that the CCC did not have the legislative authority to prosecute any matter unrelated to the CCC or the administration of the CCM Act. According to the JSCCCC's report, the Court of Appeal left open the question of whether the CCC has the power to prosecute its own charges

in respect of matters relating to the administration and enforcement of the CCM Act. Such matters may include contempt, giving false evidence and destroying evidence.

As a result of the decision, the CCC ceased its own prosecutions and made arrangements to refer matters requiring prosecution to the State Solicitor's Office (SSO), with the possibility that some matters may be referred on to the Office of the Director of Public Prosecutions (ODPP) for ongoing conduct of the prosecution. This Review covers those cases that have been referred to the SSO (and subsequently to the ODPP). The Review also contains details of prosecutions arising as a result of CCC investigations which were commenced by other means, such as prosecutorial agencies acting on information contained in CCC reports.

2.2 Report Requirements

As per recommendation 2 of the Report, the Attorney General is required to:

Undertake a review into the efficiency and effectiveness of the commencement and conduct of prosecutions arising from Corruption and Crime Commission investigations and table a report on that review within 12 months of the tabling of the Corruption and Crime Commission's Annual Report for 2016-2017.

Due to the prorogation of the Parliament and the dissolution of the Legislative Council on 30 January 2017, the then Attorney General did not have the opportunity to respond to Report 33's recommendations. In Report 2 of the current JSCCCC, the above recommendation was re-issued and this required the Attorney General to undertake the Review within 12 months of the tabling of the CCC's Annual Report for 2017-2018 rather than the Annual Report for 2016-17.

Owing to a period of heightened operational activity involving the CCC and SSO in the second half of 2019 which impacted the ability of key officeholders to finalise consultations for this Report, the Attorney General wrote to the Chair of the JSCCCC on 19 September 2019 seeking an extension to the reporting timeframe.

2.3 Review Objectives

The Review will seek to determine the efficiency and effectiveness of the commencement and conduct of prosecutions arising from CCC investigations, as required by the JSCCCC. In this context, the Review will ascertain:

- since *Maughan*, the quantum of matters prosecuted by the State Solicitor and ODPP resulting from referrals by the CCC and:
 - the outcome of the prosecutions;
 - the timeliness of matters prosecuted by the State Solicitor and ODPP;
- a sample of prosecutions of persons subject to CCC investigations and who have been subsequently charged other than by referral to SSO by the CCC; and
- whether operational or procedural changes could improve the efficiency and effectiveness of prosecutions arising from CCC investigations.

2.4 Methodology

2.4.1 Jurisdictional comparison

A jurisdictional comparison was undertaken to examine arrangements in other Australian jurisdictions and to consider any assessments by those jurisdictions of the effectiveness of their arrangements.

This exercise informed the consideration of existing arrangements in Western Australia.

2.4.2 Data analysis

The Hon. John Quigley MLA, Attorney General; Minister for Commerce, wrote to the Commissioner, Corruption and Crime Commission seeking information on the quantum of matters referred to the SSO and/or the ODPP by the CCC since the Court of Appeal decision in *Maughan*. In particular, the Attorney General sought information on:

- the number of matters referred to the SSO and/or ODPP;
- the number of matters proceeding to prosecution;
- the outcome of each prosecution; and
- the timeframes involved at each stage.

The Department of Justice subsequently sought information from key stakeholders on prosecutions which had their genesis in CCC investigations but were not the result of a direct referral from the CCC to a prosecuting body.

2.4.3 Consultation with key stakeholders

To inform the Review, the Director General, Department of Justice wrote to the State Solicitor, Director of Public Prosecutions (DPP) and the CCC Commissioner seeking the following information.

- The CCC's processes for referring matters to prosecuting bodies and what, if any, requirements set by the prosecuting bodies must be met by the CCC before a matter can be referred for possible prosecution. This may include information on key decision points within the process; who has the authority to make particular decisions; and what, if any, internal KPIs apply. Documentation which describes the processes for preparing and referring matters for possible prosecution was also sought.
- The SSO's and ODPP's processes for handling referrals by the CCC of potential prosecution cases. This may include information on key decision points within the process; who has authority to make particular decisions; and what, if any, internal KPIs apply to the prosecution process. Documentation which describes the processes within the SSO and ODPP was also sought.

The Department also approached the Hon. Michael Murray AM QC, the then Parliamentary Inspector of the CCC to provide him with an opportunity to discuss any views he might have on the efficiency and effectiveness of prosecutions arising from CCC investigations.

3 Literature Review

The 2008 Statutory Review of the *Corruption & Crime Commission Act 2003* (the Archer Review), discussed whether the CCC had the power to prosecute. The author, Ms Gail Archer SC, proposed that the CCC did not have the power to prosecute, which was disputed by the CCC in a submission to that review. The CCC provided four reasons as to how the agency was entitled to prosecute.¹

“The first is that the Commission and its officers are able to prosecute as “authorised persons” under the *Criminal Procedure Act 2004*; the second is that “authorised officers” of the Commission were hitherto able to do so exercising the powers of a special constable under s.184(3) of the CCC Act; the third is that Commission officers may not do so as “public officers” exercising police powers under s.184(3c) of the CCC Act; and finally, those Commission officers who hold individual appointments as special constables under s.35 of the Police Act 1892 may do so in that capacity.”²

An alternative view was held by the then Parliamentary Inspector of the Corruption and Crime Commission (PICCC), Mr Malcolm McCusker AO, CVO, QC. Mr McCusker indicated to the Archer Review that he “supported amending the Act to make it clear that the CCC does have (and always had) this power.”³

The subsequent PICCC, the Hon. Chris Steytler QC, in a joint hearing with the then-Commissioner, the Hon. Len Roberts-Smith RFD, QC, responded to a direct question on this matter in a public hearing with the JSCCCC in the 38th Parliament:

*My inclination is that the Commission should have the power to lay charges, whether it should have the power to prosecute is a more difficult position. In my opinion it should not. I think that there is always an advantage in separating the investigating arm from the prosecuting arm. I appreciate that that does not happen in terms of charges brought and prosecuted by Police, but I think it is a desirable situation.*⁴

The Archer Review recommended to the Government that the *Corruption & Crime Commission Act 2003* (WA) (the CCC Act) be amended to make it clear that the CCC has, and has always had, the power to commence and conduct prosecutions in the Magistrates Court.⁵ This recommendation has not been expressly adopted or implemented by any of the State Governments since the Archer Review was published in 2008.

¹Joint Standing Committee on the Corruption and Crime Commission *The ability of the Corruption and Crime Commission to charge and prosecute*. Report No. 33, November 2016, p8.

² Ms Gail Archer SC, *Review of the Corruption & Crime Commission Act 2003*, Perth, February 2008, pp258-259. Cited from Joint Standing Committee on the Corruption and Crime Commission *The ability of the Corruption and Crime Commission to charge and prosecute*. Report No. 33, November 2016, p8.

³ Ibid.

⁴ Joint Standing Committee on the Corruption and Crime Commission *The ability of the Corruption and Crime Commission to charge and prosecute*. Report No. 33, November 2016, p10.

⁵ Ms Gail Archer SC, *Review of the Corruption & Crime Commission Act 2003*, Perth, February 2008, pp258-259. Recommendation 55. Cited from Joint Standing Committee on the Corruption and Crime Commission *The ability of the Corruption and Crime Commission to charge and prosecute*. Report No. 33, November 2016, p10.

4 Jurisdictional Comparison

Generally, in other jurisdictions the relevant anti-corruption body must pass matters to the DPP or another prosecuting agency to conduct prosecutions. There is a separation between the investigative function and the prosecutorial function. No other jurisdiction in Australia involves the equivalent of Western Australia's SSO.

Victoria's Independent Broad-based Anti-corruption Commission (IBAC) is the only anti-corruption body in Australia with the broad ability to prosecute. The IBAC has an agreement with the Office of Public Prosecutions (OPP) whereby IBAC retains responsibility for certain tasks during the prosecution of matters which have been referred to the OPP. Under this arrangement, the OPP will handle all indictable matters and prosecute some summary matters.

The *Independent Commission Against Corruption Act 1989* (NSW) does not grant the Independent Commission Against Corruption (ICAC) the express power to commence prosecutions, however under the *Criminal Procedures Act 1986* (NSW) an ICAC officer, as a 'public officer', has the power to commence proceedings but these are limited to circumstances where the NSW DPP has approved such action. The NSW DPP takes over and conducts the prosecution from the first hearing.

ICAC has a Memorandum of Understanding (MOU) with the NSW DPP such that ICAC gathers the evidence and the DPP decides whether there is sufficient evidence to prosecute.

A discussion paper was prepared by the NSW ICAC exploring issues relating to efficiency of prosecution processes. It identified a number of initiatives which were implemented in NSW to improve the efficiency of the prosecution process, including:

- improved coordination and planning to improve the timely preparation of briefs of evidence;
- amendments to the MOU to clarify evidence requirements of the DPP;
- improving liaison between the DPP and ICAC; and
- employing a former police officer to oversee the preparation of briefs at the NSW ICAC.

In 2016, the Queensland Parliamentary Crime and Corruption Committee (QCCC) conducted a review of the activities of the Crime and Corruption Commission and tabled a report about any further action that should be taken in relation to the *Crime and Corruption Act 2001* (Qld) (CCA Act).

The review resulted in a number of amendments to the CCA Act, including the way in which information obtained in the course of an investigation is shared with the DPP.

Further information on arrangements in other jurisdictions is contained in the [Appendix](#).

5 Prosecutions Arising from Corruption and Crime Commission Investigations

The heads of public authorities have primary responsibility for managing serious misconduct within their agency and have a responsibility to notify the CCC about it.

The CCC receives notifications and reports of suspected serious misconduct from a number of sources including members of the public, public sector agencies, the Police Commissioner and the Public Sector Commission. The CCC assesses all allegations of serious misconduct within the public sector and ensures that they are appropriately dealt with, either by the Commission or another public authority.

The CCC can also allege suspected serious misconduct based on its own experience or knowledge or from information obtained from other sources.

The CCC can consider allegations of misconduct against police officers, whether serious or minor, whereas allegations of minor misconduct by public servants is outside of its remit and these are dealt with by the Public Sector Commission.

Once an allegation is assessed, the Commission decides whether to:

- investigate to take action itself or in cooperation with an independent agency or appropriate authority;
- refer the matter to an independent agency or appropriate authority for action; or
- take no further action.

5.1 Investigations

In 2018-19, the CCC received 2,855 notifications and reports, and assessed 5,036 allegations. The CCC took no further action in relation to 3,429 (68.1%) of the allegations assessed. This was mainly due to the:

- allegation not relating to serious misconduct;
- allegation being, or having been, appropriately dealt with by the relevant public authority; or
- CCC was unable to form a reasonable suspicion of serious misconduct.

A further 1,554 (30.9%) allegations were referred to an appropriate authority or independent agency for action and in 21 (0.4%) matters, the CCC decided to investigate either independently, or in cooperation with the appropriate authority or independent agency.

In 2018-19, the CCC completed 29 serious misconduct investigations. Over this period:

- there were 10 charges laid arising from CCC investigations;
- 10 charges were still before the courts at the end of the reporting period;
- 12 convictions; and 21 charges were finalised, including sentencing for convictions in the previous reporting period.

5.2 Prosecutions

Prosecutions can arise from a CCC investigation in a number of ways.

One of the ways the CCC performs its serious misconduct function is by assembling evidence and furnishing it to an independent agency or other authority (pursuant to s.18(2)(h) of the CCM Act), such as the ODPP, SSO or the Western Australian Police Force (WA Police Force).

In addition to prosecutions arising from the referral of matters and the provision of briefs of evidence to appropriate prosecuting authorities, prosecution actions can result from reports furnished by the CCC on the outcome of an investigation.

Such reports may contain a recommendation from the CCC (pursuant to s.43 of the CCM Act) that consideration be given to the prosecution of an individual. An example of this would be the CCC's August 2018 *'Report into bribery and corruption in maintenance and service contracts within North Metropolitan Health Service'* which recommended that a relevant authority give consideration to the prosecution of several individuals.

A report may not contain any such recommendation, but that does not prevent the conduct of the individuals, made public by the report, being subject of consideration for prosecution action by a prosecuting authority. An example of this is the tasing incident referred to later in this Report.

Another way a prosecution may arise from a CCC investigation is as a result of the CCC investigating or taking action in cooperation with an independent agency or appropriate authority, such as the WA Police Force (pursuant to s.33(1)(b) of the CCM Act). The exercise of this power may also result in the initiation of a prosecution. An example of this is the CCC/WA Police Force investigation into the alleged theft of funds from the Department of Communities.

The following table contains details of prosecutions arising from CCC investigations, and includes only those prosecutions that were initiated after the decision in *Maughan* on 15 July 2016.

TABLE 1: Prosecutions arising from CCC investigations

Briefs provided by the CCC to SSO/ODPP				
Accused person	Nature of charges	Date brief provided	Date charged	Outcome
Person 1	Stealing as a servant Possess prohibited drug	10 August 2016	3 September 2016 and 19 October 2016	Sentence date 5 December 2016 Guilty plea (agreed facts) Sentence imposed 12 months imprisonment, wholly suspended and an 18 month Community Based Order
Person 2	Corruptly falsify record	Full brief provided on 10 August 2018 Initial brief provided on 23 October 2017	26 March 2018	23 August 2019 - Acquittal (with DPP)

Person 3	Corruptly falsify record	Full brief provided on 10 August 2018 Initial brief provided on 23 October 2017	26 March 2018	23 August 2019 - Acquittal (with DPP)
Person 4	Corruption	22 June 2017	January 2018	Sentence date 29 November 2018 Guilty plea (agreed facts) Sentence imposed Two years immediate imprisonment
Person 5	Assault occasioning bodily harm	10 August 2016	7 November 2016	Sentence date 20 March 2017 (guilty pleas on agreed facts to common assault – Fine of \$5,000 and spent conviction order granted)
Other prosecutions arising from CCC investigations				
Accused person	Nature of charges	Date charged	Prosecuting agency	Outcome
Person 6	2 x Disclosing Official Secrets (s 81(2) Criminal Code) 2 x Unlawful use of a computer for a benefit 2 x Public Officer Acts Corruptly in Performance/Discharge of Functions	Initial charges laid on 31 March 2017. In August 2017, the DPP prosecutor decided, by agreement with the defence counsel, to reduce the charges against Person 1 to 2 x Disclosing Official Secrets in exchange for pleas of guilty The charges of Unlawful Access and Corruption were dropped and Person 1 was dealt with in the Magistrates Court	DPP	Convicted and sentenced on 17 October 2017 in Perth Magistrates Court Sentence - Intensive Supervision Order - 12 months duration with supervision and programs
Person 7	2 x Disclosing Official Secrets 2 x Unlawful use of a computer for a benefit 2 x Public Officer Acts Corruptly in Performance/Discharge of Functions	Initial charges laid on 31 March 2017 On 22 November, all charges, except 2 x Disclosing Official Secrets were discontinued	DPP	Person 7 pleaded guilty to two charges of counselling/procuring Person 6, without lawful authority, to make an unauthorised disclosure of official information Person 7 was sentenced at the Bunbury District Court on 16 January 2018 to a 6 month custodial sentence to be served concurrently
Person 8	78 x Agent receiving payment (s 529 Criminal Code) - Charged by the WA Police Force (withdrawn) Fresh charges on 23 and 28 August 2018 by the WA	Initial charges laid on 4 October 2017 Subsequently withdrawn and a review conducted of the Commission's holdings with a view	WA Police Force	Ongoing

	Police Force 4 x Corruption (s 83 Criminal Code)	to considering charges of corruption The WA Police Force signed new prosecution notices on 16 August 2018		
Person 9	4 x Fraud (s 409 Criminal Code)	Initial charges laid on 4 October 2017 Subsequently withdrawn and a review conducted of the Commission's holdings with a view to considering charges of corruption The WA Police Force signed new prosecution notices on 16 August 2018	WA Police Force	Ongoing
Person 10	2 x Common Assault	2018	SSO	Found guilty of two counts of common assault and received an eight-month suspended sentence Person 10 will also have to pay a fine of \$1,500 and court costs of almost \$16,500
Person 11	18 x Gains Benefit by Fraud, Criminal Code, S409(1)(c)	1 August 2019	WA Police Force	Ongoing.
Person 12	4 x Public Officer Acts Corruptly in Performance/Discharge of Functions, Criminal Code, S83(c)	1 August 2019	WA Police Force	Ongoing.
Person 13	7 x Public Officer Acts Corruptly in Performance/Discharge of Functions, Criminal Code, S83(c)	1 August 2019	WA Police Force	Ongoing.
Person 14	2 x Public Officer Acts Corruptly in Performance/Discharge of Functions, Criminal Code, S83(c)	1 August 2019	WA Police Force	Ongoing.
Person 15	12 x Gains Benefit by Fraud, Criminal Code, S409(1)(c) 4 x Disclosed restricted matter – person served with notice or summons, Corruption, Crime	1 August 2019	WA Police Force	Ongoing.

	<p>Misconduct Act 2003, S167 (3) & (2)(a)</p> <p>1 x Wilfully destroyed evidence, Corruption, Crime and Misconduct Act 2003, S171</p> <p>1 x Public Officer Acts Corruptly in Performance/Discharge of Functions, Criminal Code, S83(c)</p>			
Person 16	530 x Public officer acts corruptly in performance/discharge of functions	14 November 2019	WA Police Force	Ongoing.
Person 17	<p>530 x Public officer acts corruptly in performance/discharge of functions</p> <p>3 x Brought into, or whilst in Western Australia received, possessed, concealed, disposed of or dealt with any money or property</p>	14 November 2019	WA Police Force	Ongoing.
Person 18	9 x Official corruption	3 December 2019	WA Police Force	Ongoing.
Person 19	<p>1 x Public Officer Omitted to make an Entry in any Record, Criminal Code, S85(b)</p> <p>20 x Public Officer Acts Corruptly in Performance/Discharge of Functions, Criminal Code, S83(c)</p> <p>26 x Gains Benefit by Fraud, Criminal Code, S409(1)(c)</p>	12 March 2020	WA Police Force	Ongoing
Person 20	<p>1 x Public Officer Omitted to make an Entry in any Record, Criminal Code, S85(b)</p> <p>9 x Public Officer Acts Corruptly in Performance/Discharge of Functions, Criminal Code, S83(c)</p>	12 March 2020	WA Police Force	Ongoing

Source: CCC

There were five cases where the CCC made direct referrals to either the SSO or the ODPP which resulted in prosecution actions.

In relation to Person 1, the SSO took less than a month to commence the prosecution process in relation to the first charge following receipt of the brief from the CCC and just over two months to commence prosecution of the second charge.

In the matters relating to Persons 2, 3 and 4, the SSO took between five and six months from receipt of briefs to the commencement of prosecution through to the laying of charges.

In relation to Person 5, less than three months elapsed between the provision of a brief of evidence and the laying of charges, with the court dealing with the case within 5 months.

The ODPP has advised that in April 2017, the CCC directly referred a prosecution brief to the ODPP. This direct referral from the CCC did not reflect the agreed arrangements regarding referral of possible prosecutions to the SSO for its consideration. Following discussion between the ODPP and CCC, the brief was returned to the CCC. Since then the only prosecutions referred to the ODPP which resulted from a CCC investigation have come from the State Solicitor following commencement of the prosecution by the SSO.

In total, the ODPP has been referred one prosecution after committal for sentence, and one prosecution which was adjourned to a disclosure/committal hearing.

Since 2016, prosecution actions which had their genesis in CCC investigations against a further 15 people have been initiated by prosecution agencies. Three of these cases have been finalised. The WA Police Force commenced prosecutions in relation to 12 of these people and these matters are still before the courts.

In addition to the above matters, the CCC has also conducted reviews of police internal investigations regarding the alleged excessive use of force.

The CCC in its *Report into a Taser Incident on 31 March 2017 at Fremantle*, did not formally refer the matter for consideration of criminal charges, as the matter had already been investigated by the WA Police Force. Nonetheless, the CCC concluded that the police officer, the subject of that report, had acted unlawfully in tasering the driver of a vehicle. The SSO approached both the CCC and the WA Police Force for all relevant materials. Following a review of those materials, SSO recommended that the police officer be prosecuted; that recommendation was acted upon by the WA Police Force, and, following a contested trial, the police officer was convicted of 2 counts of assault, and sentenced to an 8 month term of imprisonment (suspended for 8 months), plus a \$1500 fine which was payable to the victim.

In another matter involving alleged excessive use of force by a police officer, following a review of the police investigation into allegations of excessive use of force, the CCC furnished evidence to the SSO and invited the SSO to consider prosecution of the police officer. The brief was sent to the SSO on 21 August 2018. On 2 July 2019, the SSO advised the CCC that it had decided not to exercise its discretion to commence prosecution of the matter.

5.3 Other Actions Relating to CCC Matters

On 24 January 2017, the CCC tabled a parliamentary report titled *"Report on the activities of Certain Vehicle Examiners Contracted by the Department of Transport"*. Mr Tony Raphael of Cannington Auto House and Car Sales WA was adversely named in that report. On the basis of the CCC report findings, and other evidence gathered and

disclosed to the Commissioner for Consumer Protection (CCP), Mr Raphael's motor vehicle dealer's licence renewal application (submitted on 27 June 2017) was refused on 5 February 2018. Mr Raphael appealed that decision in the State Administrative Tribunal (SAT) and attempted to convince the sitting SAT Judge that he was no longer managing the business. SAT was not satisfied and upheld the CPP decision. On 12 February 2020, the SAT upheld a subsequent decision of the CPP to refuse to grant Mr Raphael a salesperson's licence on the ground the CPP was not satisfied, on the basis of the matters the subject of the CCC report, that Mr Raphael was a person of good character and repute and a fit and proper person to hold a licence.

In addition, it is not uncommon for the CCC to liaise with the SSO in relation to alleged serious misconduct in circumstances where the CCC (or the SSO, based on advice sought from Departments) consider that court action should be taken against an individual being investigated in order to protect the financial interests of the State. An example of where this has occurred was in December 2018, the CCC disclosed information to the SSO and the Department of Jobs, Tourism, Science and Innovation (DJTSI) concerning the CCC's investigation into, amongst others, Mr Craig Peacock, the then Trade Commissioner for Western Australia in Tokyo. The information was disclosed to enable the SSO to advise DJTSI in relation to disciplinary action and what protective action the State could take, if any, against Mr Peacock for alleged financial misconduct.

Following detailed consideration of the matter by the SSO, on or about 24 January 2019, the State obtained Freezing Orders against Mr Peacock in the Supreme Court of Western Australia, as well as leave to issue a writ and serve that writ on Mr Peacock outside of Australia. Between 24 January 2019 and 6 March 2019 the Freezing Orders were served on a number of financial institutions both within and outside of Australia. On 12 March 2019, the CCC tabled in Parliament its report in relation to the investigation into Mr Peacock, finding that Mr Peacock had corruptly used his position to obtain benefits for himself and others over a number of years, and did so to the detriment of the State, and that therefore Mr Peacock had engaged in serious misconduct for the purposes of the Act.

In early May 2019, the State entered into a Deed of Settlement with Mr Peacock pursuant to which Mr Peacock agreed to pay the State approximately \$541,000. In addition, Mr Peacock agreed to sign the minute of consent orders consenting to judgment being entered against him (plus interest and costs) in the event of a default of the terms of settlement.

On 23 July 2019, the SSO filed the minute of consent orders signed by Mr Peacock because he had failed to pay the aforementioned settlement monies. Judgment was entered for the State in the amount of approximately \$680,000.

Meanwhile, the WA Police Force is still investigating whether charges will be laid against Mr Peacock as a consequence of the CCC's findings.

The SSO has also initiated the issuing of writs to recover funds from a number of other people adversely named in CCC reports.

5.4 Timeliness of Prosecutions

The time taken for the SSO to consider and commence any prosecutions is a function of both the nature and quality of the materials within any brief received by the SSO, and the workload and availability of resources within the SSO. As far as the nature and quality of the brief is concerned, for some matters the SSO may need to engage with both any relevant department or agency where the serious misconduct was identified, and/or the WA Police Force, in order to ensure that all evidence is available to commence a prosecution, taking into account the DPP's *Statement of Prosecution Policy and Guidelines*. As far as the workload and availability of resources within the SSO is concerned, as the Department of Justice 2018-19 Annual Report indicates, SSO assessed or undertook 609 prosecutions in addition to responding to 4229 requests for advice; representing agencies in 162 coronial inquests; supported the State in 132 industrial relations matters; and delivered more than 5,186 other legal activities to support Government policies and programs.

It is difficult to draw meaningful comparisons, in terms of timeliness, with other similar cases as the circumstance of each matter can vary significantly. However, an examination of timelines in another jurisdiction may serve as guidance as to the timeframes that can be expected. To that end, the Review examined publicly available information of matters referred by the NSW ICAC to the NSW DPP.

- As at 10 September 2019, since mid-2014 ICAC had referred nine briefs of evidence to the DPP for consideration of prosecution. The average length of time between receipt of the brief of evidence and the DPP's advice on whether there is sufficient evidence to commence prosecutions was around 12 months, with periods ranging between four and a half months to 24 months.
- In addition, as at 1 April 2019, ICAC was awaiting DPP decisions in relation to five briefs of evidence with the oldest matter resting with the DPP for 30 months.

While the timeliness of Western Australian matters compare favourably to that of NSW, the opportunity to achieve better timeliness in the prosecution of CCC matters may remain.

6 Referral and Prosecution Process

6.1 Feedback from Agencies

6.1.1 Corruption and Crime Commission

In February 2019, the then CCC Commissioner advised that one of the ways the CCC may perform its serious misconduct function is by assembling evidence obtained during the course of an investigation and providing evidence which may be admissible in the prosecution of a person for a criminal offence to an independent agency (such as the ODPF) or to another authority (such as the SSO or the WA Police Force).

The CCC Commissioner further advised that there are no formal processes in place for the referral of matters to prosecuting bodies and there are no requirements set by those bodies the CCC has to satisfy before a matter can be referred by the CCC for prosecution.

The then CCC Commissioner advised that in his view the efficiency and effectiveness of the commencement and conduct of prosecutions by the SSO of briefs handed to it by the CCC was not satisfactory. It is apparent from correspondence from the CCC Commissioner to the State Solicitor in February 2018 that he is concerned with what he views as undue delays in the conduct of prosecutions by the SSO and their unresponsiveness. In response to correspondence from the State Solicitor in June 2019, the CCC Commissioner wrote to the State Solicitor in July 2019 reiterating his concern in delays experienced in the prosecution of matters by the SSO.

There has been communication between the CCC and the SSO regarding a draft set of procedures for the referral and handling of matters, including proposed timeframes. This remains an outstanding issue. The CCC has advised that the development of a formal MOU between the CCC and the SSO, as proposed by this Report, will provide greater confidence that the efficiency and effectiveness of the arrangements will improve.

The CCC's preference is that all briefs of evidence, for summary and indictable offences, be referred directly to the DPP for consideration as to prosecution.

It considers that it has the necessary expertise to prepare briefs of evidence to the required standard — a number of CCC investigators are former WA Police Force Officers who are experienced in preparing briefs for prosecution. In addition, the CCC employs former State and Commonwealth prosecutors to review CCC briefs prior to providing them to a prosecuting authority.

The CCC advises that it is in ongoing communications with the DPP regarding issues around disclosure resulting from agencies referring matters arising from CCC investigations to her office for prosecution.

6.1.2 State Solicitor's Office

The State Solicitor provided a high level outline of the process his Office has for managing prosecution briefs referred to it by the CCC. The SSO's process comprises the following six steps.

1. CCC briefs are, in the first instance, considered by the State Solicitor with his review generally taking 7-10 days depending on the size of the brief and other priorities.
2. Following the State Solicitor's consideration, matters are allocated to a Senior Prosecutor for detailed consideration. The Senior Prosecutor determines whether further information is required. The time taken by the Senior Prosecutor varies, and is largely dependent on their workload. Ordinarily, the review will be completed within eight weeks.
3. Where additional material is required, the Senior Prosecutor will engage with the CCC, WA Police Force or other sources. The time taken for this engagement is variable, but may take a number of months.
4. Once the Senior Prosecutor is in possession of all necessary materials he or she will undertake a very detailed review of the matter and provide the State Solicitor with a detailed brief. The brief will consider the evidence and the available defences and make a recommendation to the State Solicitor on whether a prosecution should be commenced. This step is completed as soon as practicable and the timing is contingent on the Senior Prosecutor's workload.

5. The State Solicitor will consider the Senior Prosecutor's brief which will generally take 10-14 days. The timing is contingent on the State Solicitor's workload.
6. After consideration of the matter and the DPP's *Statement of Prosecution Policy and Guidelines*, the State Solicitor will decide whether to proceed with a prosecution. Where the decision is made to prosecute, the Senior Prosecutor prepares a prosecution notice or notices.

In June 2019, the State Solicitor wrote to the CCC describing the above procedures.

As outlined in Section 5.2 above, the SSO conducted, amongst other matters, 609 prosecutions for various Departments and Agencies. It follows that CCC related prosecutions only account for a very small percentage of prosecution work in the SSO, and wherever possible priority is afforded to the matters, however other prosecutions are equally important.

6.1.3 Office of the Director of Public Prosecutions

The ODPP advised that the process for the referral of matters by the CCC for possible prosecution continue to be as described in the JSCCCC's Report no.33. That is, in the first instance, the CCC refers a prosecution brief to the State Solicitor for consideration if it forms a view during an investigation that an offence has been committed. If the State Solicitor believes that there is a prima facie case against the accused, and that 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 State Solicitor. Where an offence is an 'indictable offence', the prosecution will be taken over by the ODPP at the committal stage.

The DPP also advised that her Office has been unable to locate any document which records these arrangements but, in discussions between the ODPP, SSO and CCC in November 2016 all parties agreed that this approach would be followed.

In the ODPP's view there are many good reasons, previously articulated in hearings before the JSCCCC, as to why this approach should continue.

The ODPP manages prosecutions from the CCC 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, an evaluation is carried out as to the sufficiency of the evidence provided, any additional necessary evidence is requested and an indictment is filed, in appropriate cases, alleging appropriate charges.

All prosecution processes are governed by the *Criminal Procedure Act 2004* (WA). As an independent prosecution agency, the ODPP has the sole decision-making authority to continue any prosecution of which it has conduct, whether to amend or discontinue charges and how the prosecution is conducted. The ODPP will consult the CCC or the SSO in the event that a decision to alter or discontinue charges is being contemplated.

In terms of the timeliness of prosecutions, the ODPP has noted that a period of some months may pass between the referral from the CCC to the SSO and the commencement of a prosecution. This may, in part, be attributable to the standard of the briefs of evidence prepared by the CCC. The ODPP advises that there have been

issues with the content, volume, format and accessibility of material provided by the CCC as part of a referral.

The ODPP goes on to explain that:

Material gathered by the CCC 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 CCC, or put in a format which enables its disclosure to an accused. At times, ascertaining that disclosure has been fully complied with can be a very onerous exercise.

The practice of the SSO is to carry out these essential tasks before a prosecution is commenced. This enables the prosecution to proceed expeditiously. By contrast, if a prosecution were commenced before those tasks were completed, the disclosure/committal proceedings in the Magistrates Court would be lengthier and drawn out...

The ODPP's preference is that the SSO continue its role in prosecuting certain matters referred to it by the CCC.

6.1.4 Parliamentary Inspector of the Corruption and Crime Commission

The Parliamentary Inspector advised the Review that in reviewing files and reports as to whether the CCC should have the power to prosecute, he has seen no evidence that the Commission's investigative function is in any way made less effective by its inability to prosecute, except for offences under its Act.

In his view, the prosecution of a person for a criminal offence should only be taken by the ordinary process under the *Criminal Procedure Act 2004* (WA) which limits the power to prosecute to an authorised prosecutor, such as the State Solicitor.

That enables a senior, independent, legally qualified person to determine the sufficiency of the evidence to prove the offence to be charged beyond reasonable doubt, with the assistance, where appropriate, of the Director of Public Prosecutions.

Only then should a person of whom the CCC has formed an opinion of serious misconduct – not a finding of fact – be exposed to the potential of a criminal conviction and the reputational damage which may be occasioned by even an unsuccessful prosecution resulting in an acquittal.

Providing the CCC with the power to prosecute would not, in the Parliamentary Inspector's view, enhance its capacity to effectively perform its functions to investigate and deal with serious misconduct and corruption in public office.

6.1.5 Western Australian Police Force

The WA Police Force has advised that it endorses the recommendations of the Review.

6.2 Summary of Feedback from Agencies

Feedback from the two key stakeholders, the ODPP and CCC, is that the SSO provides a final quality assurance check which, in the ODPP's view, reduces the likelihood of matters encountering delays when they go to court. On the other hand, the SSO's involvement does slow the process from completion of an investigation by the CCC to the commencement of the prosecution in court. On balance, it would seem that without some form of intervention, either approach runs the risk of prolonging the prosecution process.

7 Discussion

The Review acknowledges the concerns over timeliness raised by the CCC Commissioner and notes the State Solicitor has advised that any delays in the handling of certain matters is attributable to workload pressures. The State Solicitor will continue to seek additional resources for his Office which should have a positive impact on the timely management of CCC matters.

In the meantime, formalising arrangements through an MOU may enhance the efficient and effective management of potential prosecutions of CCC matters by providing clarity around the process and each party's obligations.

8 Recommendation

The Review recommends that in consultation with the ODPP, the SSO and CCC to develop an MOU within six months of the tabling of this Report which contains agreed:

- procedures for the referral of matters by the CCC to the SSO;
- standards for briefs of evidence;
- timeframes; and
- arrangements for the ongoing liaison and monitoring of the process.

APPENDIX — Cross Jurisdictional Analysis

1 New South Wales

The New South Wales (NSW) Independent Commission Against Corruption's (the ICAC) primary function is to investigate and expose corrupt conduct. Gathering evidence for the prosecution of criminal proceedings is considered a secondary function.⁶

The relevant legislation in NSW is the *Criminal Procedure Act 1986* (NSW). The *Criminal Procedure Act 1986* (NSW) notes that the ICAC cannot commence a prosecution unless the NSW DPP has provided advice in writing that proceedings can commence.⁷

The DPP must act independently in deciding whether proceedings for the offence may be commenced.⁸ The ICAC has the power to lay charges by preparing a Court Attendance Notice for the defendant, but can only do so with the approval of the DPP. The NSW DPP conducts all prosecutions commenced by the ICAC whether they are summary or indictable proceedings.⁹

The arrangement between the ICAC and DPP is through a memorandum of understanding (MOU). This outlines that the ICAC is responsible for providing briefs and admissible evidence to the DPP. The DPP considers the evidence and decides whether there is enough to prosecute.¹⁰

The ICAC prepared a discussion paper in November 2014 to explore ways to improve the prosecution processes and explore strategies to reduce delays. Strategies that were implemented to improve the efficiency of the prosecution process in section 1.5 of the discussion paper included:¹¹

- "Improved co-ordination and planning to ensure the timely preparation of briefs of evidence during investigations, rather than after an investigation concluded. The ICAC sought to balance brief preparation with investigative work by making the investigation case officer responsible for preparing material for the DPP, and removing them from other duties. More recently, the Deputy Director of the Investigation Division has taken on primary responsibility for brief preparation.

⁶ Submission No.7 from Hon Megan Latham, Commissioner, Independent Commission Against Corruption, 6 September 2016. Cited from Joint Standing Committee on the Corruption and Crime Commission *The ability of the Corruption and Crime Commission to charge and prosecute*. Report No. 33, November 2016, p30.

⁷ *Criminal Procedure Act 1986* (NSW) s14A.

⁸ Independent Commissioner Against Corruption South Australia, Review of Legislative Schemes, 30 June 2015. Retrieved from:

https://icac.sa.gov.au/sites/default/files/Legislative_reviews_report.pdf

⁹ Joint Standing Committee on the Corruption and Crime Commission *The ability of the Corruption and Crime Commission to charge and prosecute*. Report No. 33, November 2016, p30.

¹⁰ Committee on the Independent Commission Against Corruption, *Prosecutions Arising from Independent Commission Against Corruption Investigations, Discussion Paper*, November 2014. Retrieved from:

<https://www.parliament.nsw.gov.au/ladocs/other/9024/Discussion%20paper%20%20prosecutions%20arising%20from%20ICAC%20investigations.pdf>

¹¹ Ibid.

- Amendments to the MOU to clarify evidence to be provided to the DPP and ensure that only relevant material is provided, and set out a timetable for the ICAC and the DPP in their handling briefs of evidence.
- Improved liaison between DPP lawyers and lawyers at the ICAC to resolve issues about briefs, regular two monthly meetings between Deputy Commissioner and the Managing Lawyer of the DPP group responsible for ICAC prosecutions. The ICAC now briefs the DPP's office on new matters before they are referred to assist with advance planning.
- The ICAC employed a former police officer to assemble briefs and assist investigators and lawyers in ensuring that briefs are better organised and comply with DPP requirements. A DPP lawyer was seconded to the ICAC to oversee the preparation of briefs, review brief preparation processes and train ICAC officers on evidentiary requirements for briefs.”

It does not appear that a final report was completed on the effectiveness and efficiency of the prosecution process following the discussion paper.

New South Wales also has the Law Enforcement Conduct Commission (LECC), which oversees the NSW Police Force and the NSW Crime Commission.¹² LECC functions involve gathering evidence for and information that could be used in prosecuting criminal offences.¹³ LECC does not prosecute offences.¹⁴

2 Victoria

The main difference between the Victorian Independent Broad-based Anti-corruption Commission (the IBAC) and other jurisdictions, is that it does have the ability to prosecute. Section 189 of The *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (the IBAC Act) states that proceedings for an offence under the IBAC Act can be commenced by the IBAC, a sworn IBAC Officer who is authorised by the Commissioner, or a member of the police force who is authorised by the Commissioner.¹⁵

Section 190 of the IBAC Act states that proceedings for an offence in relation to any matter arising out of an IBAC investigation may also be brought by the IBAC, a sworn IBAC Officer who is authorised by the Commissioner, or a member of the police force.¹⁶

This is different to other jurisdictions because it is explicitly stated that the IBAC has the ability to commence proceedings. In the IBAC Commissioner's submission to the Joint Standing Committee on the Crime and Corruption Commission, it was noted that the IBAC lawyers retain carriage of summary offences. The IBAC can ask the Office of Public Prosecutions (OPP) to take over, however the OPP has the ability to refuse. The

¹² <https://www.lecc.nsw.gov.au/what-we-do/who-we-are-and-what-we-value/who-we-are-and-what-we-value>.

¹³ *Law Enforcement Commission Act 2016* (NSW) s28.

¹⁴ Joint Standing Committee on the Corruption and Crime Commission. *The Ability of the Corruption and Crime Commission to charge and prosecute*. Report No. 33, November 2016, p33.

¹⁵ *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s189

¹⁶ *Independent Broad-based Anti-corruption Commission 2011* (Vic) s190.

OPP and the IBAC have an arrangement where the OPP will handle all indictable matters and prosecute some summary matters.¹⁷

If the OPP accepts to take over a matter, the IBAC must prepare a brief for the OPP. The OPP will conduct the matter from the first hearing to the decision. In the agreement, the IBAC:¹⁸

- Drafts and files charges;
- Arranges for the matter to be listed at the appropriate venue;
- Produces the brief of evidence and bears the costs;
- Serves the brief and delivers a copy to the Court; and
- Provides two hard copies to the OPP within 5 days of service.

For all matters which the OPP prosecutes for the IBAC, the IBAC retains the responsibility to:¹⁹

- Prepare witness summonses;
- Provide conduct money to witnesses;
- Serve all summonses;
- Any costs associated with service of summonses;
- Provide a witness list to the OPP that is updated as required;
- Serve all subpoenas issued by the OPP;
- Complete affidavits of service;
- Meet any costs associated with the service of subpoenas;
- Contact the witnesses throughout the prosecution and advising them of when and where to give evidence; and
- Manage arguments and representation in relation to subpoenas, save for where relevance is the only issue to be argued.

3 Queensland

The Queensland Crime and Corruption Commission's (QCCC) functions and powers are set out in the *Crime and Corruption Act 2001* (Qld) (CCA Act). A key responsibility of the QCCC is to deal with corruption in the public sector and the Queensland Police Service. The term 'corruption' is defined in the CCA Act as 'corrupt conduct' and 'police misconduct'.

Police officers seconded to the QCCC can charge people before the matters are progressed by prosecuting authorities, including police prosecutions and the Office of the Director of Public Prosecutions.²⁰

In 2016 Queensland's Parliamentary and Crime and Corruption Committee (QPCCC) published a report on its review of the QCCC. In a submission to the QPCCC, the QCCC highlighted the need for legislative amendment following consideration of a matter by the High Court. Specifically:

¹⁷ Joint Standing Committee on the Corruption and Crime Commission *The ability of the Corruption and Crime Commission to charge and prosecute*. Report No. 33, November 2016, p34.

¹⁸ Ibid.

¹⁹ Ibid, p35.

²⁰ <https://www.ccc.qld.gov.au/about-us/our-functions>

*In Lee v R [2014] HCA20, the High Court considered a matter in which the transcripts of the evidence of two witnesses given in coercive hearings of the NSW Crime Commission were unlawfully published to a prosecutor in advance of those persons' joint trial, contrary to the terms of a non-publication order made by the Crime Commission. The unanimous judgement of the court was that what had occurred affected the criminal trial in a fundamental respect, because it altered the position of the prosecution vis-a-vis the accused.*²¹

The QCCC described this issue as critical. The *Crime Corruption and Other Legislation Amendment Act 2018* (Qld) amended s49(2)(a) of the CCA Act to address this issue.²²

4 South Australia

The South Australian Independent Commissioner Against Corruption (SA ICAC) operates under *Independent Commissioner Against Corruption Act 2012* (SA). The SA ICAC provides information to a law enforcement agency or the SA DPP for prosecution.²³

After the matter has been referred to the SA DPP for prosecution, the Commissions functions are discharged. While the SA ICAC can refer matters for prosecution to South Australia Police, all matter for prosecution are referred to the SA DPP as a matter of practice.²⁴

5 Tasmania

The Tasmanian Integrity Commission operates under the *Integrity Commission Act 2009* (Tas). Section 8 of the *Integrity Commission Act 2009* (Tas) notes that matters must be referred to the Commissioner of Police, the DPP or another person the Integrity Commission considers appropriate for action. The Commission ensures evidence is gathered the prosecution of persons for offences, or proceedings to investigate a breach of a code of conduct or proceedings under any other Act.²⁵

6 Northern Territory

The relevant legislation in the Northern Territory is the *Independent Commissioner Against Corruption Act 2017* (NT). Section 18 describes the functions of the Northern Territory Independent Commissioner Against Corruption (NT ICAC) including referring matters to a referral entity for investigation, further investigation, disciplinary action or prosecution.²⁶ Therefore, prosecutions are not carried out by NT ICAC itself. As the

²¹ <https://www.parliament.qld.gov.au/documents/committees/PCCC/2015/five-year-review/submissions/014.pdf>, p43.

²² *Crime and Corruption and Other Legislation Amendment Act 2018* (Qld), s12.

²³ Joint Standing Committee on the Corruption and Crime Commission. *The Ability of the Corruption and Crime Commission to charge and prosecute*. Report No. 33, November 2016, p37-39.

²⁴ Joint Standing Committee on the Corruption and Crime Commission. *The Ability of the Corruption and Crime Commission to charge and prosecute*. Report No. 33, November 2016, p38.

²⁵ *Integrity Commission Act 2009* (Tas.), s8.

²⁶ *Independent Commissioner Against Corruption Act 2017* (NT), s18.

Independent body began operations on 30 November 2018, no assessments of effectiveness or efficiency have been conducted.²⁷

7 Commonwealth

The Australian Commission for Law Enforcement Integrity (ACLEI) operates under the *Law Enforcement Integrity Commissioner Act 2006* (Cth). The function of the ACLEI is to assemble evidence and provide it to the Commissioner of the Australian Federal Police, or another person or authority who is authorised by or under a law of the Commonwealth to prosecute the offence or bring the civil penalty proceedings.²⁸ The Commonwealth DPP is referred briefs by ACLEI, and the DPP decides whether to prosecute the matter.²⁹

8 Australian Capital Territory

The Australian Capital Territory does not currently have an anti-corruption body.

²⁷ NT ICAC commissioner received 'serious allegations' of corruption within public service. ABC Radio Darwin, 5 December 2018. Retrieved from: <https://www.abc.net.au/news/2018-12-05/icac-nt-commissioner-ken-fleming-corruption-allegations-public/10584840>

²⁸ *Law Enforcement Integrity Commissioner Act 2006* (Cth), s142(1).

²⁹ Submission No. 19 from Mr Michael Griffin AM, Integrity Commissioner, Australia Commission for Law Enforcement Integrity, 16 September 2016, cited from Joint Standing Committee on the Corruption and Crime Commission. *The Ability of the Corruption and Crime Commission to charge and prosecute*. Report No. 33, November 2016, p40.