

13 September 2016

Hon Nick Goiran, MLC
Chairman
Joint Standing Committee on the Corruption and Crime Commission
Legislative Assembly Committee Office
WA Parliament
Level 1, 11 Harvest Terrace
WEST PERTH WA 6005

By email: jscccc@parliament.wa.gov.au

Dear Mr Chairman,

Submission to the Joint Standing Committee's Enquiry into the Corruption and Crime Commission

I refer to your letter of 18 August 2016 inviting submissions to the Inquiry in the light of the decision in *A v Maughan* [2016] WASCA 128.

The Criminal Lawyers Association of Western Australia is of the view that, relevant to points a) and c) in your letter, there are no amendments required to the *Corruption, Crime and Misconduct Act 2003*; no further prosecutorial power should be given to the Corruption and Crime Commission of Western Australia (CCC), and it should not have the power to prosecute any offences other than those against its own Act.

There are 3 stages in the commencement of the prosecution of an offence:

1. The gathering of intelligence;
2. Investigation: the analysis of the intelligence gathered;
3. Prosecution:
 - a. The decision to charge, followed by
 - b. The decision to prosecute the charge.

The agency which prosecutes any offence investigated by the CCC should be an independent prosecutorial agency because:

1. *Quis custodiet ipsos custodes?* Who will guard the guards themselves? The CCC has wide powers of investigation, such as the compulsory acquisition of information. It is itself a guard against corruption, a vice which can seriously undermine the proper administration of the State. While there are agencies who have powers to investigate the CCC, direct oversight may be achieved by the court process, however, where the gathering of intelligence or the investigation of that intelligence is tainted, a party with interest in the resulting evidentiary

material is not in a position to make an objective decision about the fairness of the prosecution.

While magistrates and judges may be in a position to 'guard' against the unfairness of a CCC prosecution run by the CCC, being an adversarial system, a judicial officer only sees what each party chooses to produce. In contrast, an independent prosecutorial agency, such as the Office of the Director of Prosecutions, has the opportunity to review all evidence, and decline to prosecute should it be of the opinion that intelligence or the investigation has been tainted, or information is being withheld.

2. Intelligence agencies, investigative agencies and prosecutorial agencies each have a different focus. The role of the prosecutor is to uphold the rule of law and ensure consistency in the application of the rule of law. The prosecutor decides to prosecute by objectively considering evidentiary material which arises out of the investigation. In addition to being able to decline to prosecute where it feels evidence is tainted or information is being withheld, an independent agency has the power to institute a prosecution despite the investigative agency having a view that there should be no prosecution. It does this by weighing all the interests relevant to commencing a prosecution, not just those of the investigative agency.
3. While the Association accepts that some intelligence gathering and investigative agencies also prosecute, it notes that those agencies:
 - a. Such as police prosecutions, prosecute simple offences, or offences which can be dealt with summarily. Further, the Police Prosecutions Branch is currently overseen by a Consultant State Prosecutor, and a number of lawyers who are not police officers, and brief to external counsel matters which are sensitive; or
 - b. Are generally agencies involved in the administration of civil penalty and regulatory regimes;
 - c. Do not generally deal with offences which strike at the heart of justice, and the maintenance of the rule of law. Neither do they possess the wide ranging and necessarily sometimes secretive powers of the CCC used in intelligence gathering; and
 - d. Do not prosecute offences which are also being prosecuted by other agencies; the offences charged in *A v Maughan* were an assault, and an assault occasioning bodily harm – offences which are routinely prosecuted by police prosecutions and the DPP.

The Association is therefore of the view that:

- It is not appropriate for an agency gathering intelligence and analysing that intelligence in relation to offences which effect the application of the rule of law in this state, to prosecute those offences;
- It is not desirable to have a dual system of 2 separate prosecutorial agencies prosecuting the same offences;
- There are independent agencies, such as the Office of the Director of Prosecutions, who are better placed and equipped to independently make decisions in relation to prosecution of offences over which the CCC gathers intelligence and investigates.

Therefore, it is of the view that there should be no amendments to widen the powers of the CCC to enable it to prosecute offences, other than its current limited powers in relation to breaches of its own Act.

Thank you for the invitation to make submissions. Should you have any queries, please do not hesitate to contact me on 9220 0483.

Yours sincerely

pf: 
GENEVIEVE CLEARY
President