



DIRECTOR OF PUBLIC PROSECUTIONS
for WESTERN AUSTRALIA

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Office of the Director

Our Ref: ADM2013/355:JMG:mf
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The Hon Mr Nick Goiran MLC
Chairman
Joint Standing Committee on the Corruption and Crime Commission
Parliament of Western Australia
Parliament House
PERTH WA 6000

Dear Mr Goiran

JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

I refer to your letter dated 18 August 2016.

I have been invited to make a submission in respect to your inquiry into the consequences of the Court of Appeal decision of *A v Maughan* [2016] WASCA 128.

The consequence of the *A v Maughan* is that the Corruption and Crime Commission (CCC) is unable to prefer charges against persons and is unable to conduct prosecutions.¹ Otherwise, there are no other practical consequences for the criminal justice system in Western Australia. Presently, the CCC is able to continue its investigative role and persons identified by any CCC investigation for prosecution are subject to being charged and prosecuted by numerous persons able to exercise that power in Western Australia.

Therefore, the issues that arise may be distilled into whether the CCC should have the power to charge and conduct prosecutions and if not, what are practical consequences. Further, if the CCC is to be given a power to charge or conduct prosecutions what should the scope of that power be.

Ultimately, whether the CCC should have the power to prosecute is a matter for the Government to determine. A critical aspect of this issue is what role the Government wishes the CCC to undertake in Western Australia. In answering that question the Government must appreciate and respect the roles undertaken by other agencies in the criminal justice system.

The Office of the Director of Public Prosecutions (ODPP) only wishes to make a short submission in respect to this issue for the purpose of assisting the Committee.

¹ *A v Maughan* [134]-[135].

It is clear that a review of the position in the other States of the Commonwealth supports the proposition that there is no necessity for an agency such as the CCC to have the power to charge or prosecute. As the Court observed in *A v Maughan* the other analogous bodies of the Commonwealth each operate as investigative bodies without conducting prosecutions.² Moreover, it may be contended that the fact that no other analogous body in the Commonwealth, other than IBAC in Victoria, is reposed with such a power lends support to the proposition those bodies should not exercise the power to prosecute.

In *A v Maughan* the Court noted that there are a number of persons who have the power to charge or commence a prosecution based on an investigation undertaken by the CCC.³

There is some merit in the proposition that an agency such as the CCC that exercises extraordinary coercive powers should not prosecute. Whether there are operational reasons why the CCC should have the power to prosecute is best articulated by the CCC. It may be contended that there are two possible reasons for the CCC having such a power.

The first contention may be that the CCC is required, on occasions, to charge as a matter of urgency. I am not aware of any occasion when the CCC has been required to charge a person in such circumstances. The CCC should be able to provide the relevant information. In any event, there does not appear to be any practical impediment to the CCC seeking the assistance of the WA Police to prefer charges in circumstances of urgency. A police officer may be apprised of the investigation promptly and exercise the power to charge immediately. The consequence of the police charging is that the police become the prosecutor for the purposes of the *CPA* (which consequences are considered below).

The second contention in support of the CCC being granted the power to prosecute is that it permits the CCC to undertake a police integrity function. However, there is no reason why the CCC is unable to undertake the police integrity function without having the power to prosecute. The court in *A v Maughan* observed that the WA Police was a 'large and disciplined force which has long undertaken and discharged the responsibility of investigating and prosecuting police officers for offences committed by them utilising appropriate administrative arrangements in order to overcome any potential conflicts of interest.'⁴ Whether the CCC is able to properly undertake its police integrity role without having the power to prosecute is an issue that is necessarily best addressed by the CCC and the WA Police.

In the event that the CCC is not granted the power to prosecute there may be a halfway proposal that the CCC is granted the power to charge but not prosecute.

Such a proposition should not be entertained. It is untenable for an agency such as the CCC to charge and then refer the conduct of the prosecution obligations and in particular the duty of disclosure to the ODPP which is solely a prosecuting agency. It would be tantamount to exercising an authority to commence a criminal prosecution but not having the responsibility to undertake the disclosure obligations that are imposed on the investigator by the *CPA*.

² *A v Maughan* [133].

³ *A v Maughan* [136].

⁴ *A v Maughan* [132].

The CCC, similar to the WA Police, has historically charged persons without seeking advice or concurrence of the ODPP. That is appropriate. The ODPP is not an agency that should ordinarily exercise a charging power. Whilst the ODPP has the right to charge by commencing a prosecution pursuant to section 11(1) (a) of the *Director of Public Prosecutions Act 1991* that power is not exercised except in rare circumstances. In Western Australia, the investigating agencies investigate, charge and complete the obligation of disclosure pursuant to s39 and 42 of the *CPA*.

The *CPA* provides the legislative framework for the commencement of criminal prosecutions and the procedure that follows. Significantly, whoever signs the Prosecution Notice becomes the Prosecutor for disclosure and other procedural purposes under the *CPA*.⁵ The power to charge must be regarded, in Western Australia, as synonymous with the power to commence a prosecution.⁶

With the signing of a Prosecution Notice comes significant obligations which are outlined in the *CPA*. In short, whoever signs a Prosecution Notice owns the prosecution and with that ownership comes responsibility.

The role of the ODPP in respect to CCC prosecutions is to undertake the role of the prosecutor in respect to indictable matters commencing at or after the committal stage of proceedings. That is, at the point in time when the CCC has prepared a committal disclosure brief of evidence pursuant to section 45 of the *CPA*. This is consistent with the statutory framework in Western Australia.

The ODPP is unable to investigate or direct the CCC regarding the disclosure obligation. The investigation and preparation of the evidence continues after the charging of a person. Only after committal the ODPP is reposed with the separate disclosure obligation pursuant to section 95 of the *CPA*.

Therefore, should the CCC be granted the power to charge persons (with indictable offences) then the CCC should be permitted to conduct the prosecution in the Magistrates Court prior to committal. This ensures that the CCC acts as the prosecutor (as defined by the *CPA*) and therefore undertakes the disclosure obligations.

I am available to provide further assistance or comment.

I thank you for affording the opportunity to the ODPP to make a submission to the Committee.

Yours sincerely



Joseph McGrath SC
DIRECTOR OF PUBLIC PROSECUTIONS

27 September 2016

⁵ *A v Maughan* [108]-[110];[134].

⁶ See: definition of prosecutor s 3 of the *CPA*.