



13 September 2016

Our ref: G2 2016 05

The Hon. Nick Goiran, MLC
Chairman
Joint Standing Committee on
the Corruption and Crime Commission
Legislative Assembly Committee Office
WA Parliament
Level 1, 11 Harvest Tce
West Perth WA 6005.

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

Dear Sir,

Re: Request to assist the Joint Standing Committee's Inquiry

I refer to your letter of 18 August 2016 informing me that the Joint Standing Committee resolved on 20 July to undertake an inquiry into the Corruption and Crime Commission ("CCC") in Western Australia being able to prosecute its own charges. The Inquiry's terms of reference require it to enquire into:

- a) The operation of the State's prosecution system in relation to Corruption and Crime Commission matters subsequent to the Court of Appeal decision in the case of *A v Maughan [2016] WASCA*;
- b) arrangements for the prosecution of offences associated with corrupt conduct and misconduct in other jurisdictions: and
- c) any amendments required to the *Corruption, Crime and Misconduct Act 2003*, following the Court of Appeal decision in the case of *A v Maughan [2016] WASCA*



You invited me to make a submission to your Inquiry addressing the second term of reference about the procedures in NSW, specifically addressing the following:

- Does ICAC and the PIC's legislation allow it to charge and prosecute, even for the enforcement of actions in its own legislation?
- If ICAC and the PIC do not have the power to charge and prosecute, do these organisations think that they should have this power?
- If they do not have the power to charge and prosecute, which agency undertakes this process and how effectively does it work?

As it currently stands, pursuant to section 14A of the *Criminal Procedure Act 1986 (NSW)*, officers of ICAC have the power to commence proceedings for an offence (defined under that Act as "an offence against the laws of the State, (including a common law offence)"). However, officers of the Police Integrity Commission ("PIC") do not have this power.

The section reads:

Proceedings for offences commenced by officers of ICAC or PIC

14A Proceedings for offences commenced by officers of ICAC or PIC

(1) An officer of ICAC does not have the power to commence proceedings for an offence unless the Director of Public Prosecutions has advised the Independent Commission Against Corruption in writing that the proceedings may be commenced by an officer of ICAC.

(2) For that purpose, the Director of Public Prosecutions may liaise with the Independent Commission Against Corruption, but is to act independently in deciding to advise that proceedings for the offence may be commenced.

(3) The Commissioner, an Assistant Commissioner and an officer of the Police Integrity Commission do not have the power to commence proceedings for an offence.

(4) In this section:

"officer of ICAC" means a person acting in the capacity of the Commissioner, an Assistant Commissioner or officer of the Independent Commission Against Corruption.



This provision came into effect on 24 November 2015, consequent upon the assent to the *Courts and Other Justice Portfolio Legislation Amendment Act 2015*, which, *inter alia*, included amendments to the NSW *Criminal Procedure Act*. Prior to this amendment, it was generally understood that officers of the ICAC and the PIC had the power to facilitate the commencement of criminal prosecutions as they were considered “public officers” for the purposes of the Criminal Procedure Act. This enabled ICAC and PIC officers to issue court attendance notices to commence proceedings for summary and indictable offences in the same way as police officers.

I am of the view that for practical reasons, it is entirely appropriate for ICAC officers (and PIC officers for that matter - see comments below) to have the power to facilitate the commencement of criminal prosecutions but only after the advice of the DPP that such proceedings should in fact be commenced.

The *Courts and Other Justice Portfolio Amendment Bill 2015* presented to Parliament for debate proposed that PIC officers would also have the power to facilitate the commencement of criminal prosecutions. This was rejected and the Bill passed with amendment excluding PIC officers. I do not see the reason for the difference in treatment of officers of the 2 bodies, both being inquisitorial bodies tasked with investigating, exposing and preventing corrupt conduct (whether it be by public officials (ICAC) or police officers (PIC)). Ultimately this is, of course, a matter for the Legislature. I note that in early 2017 the PIC is to be replaced by a new Commission which will be called the Law Enforcement Conduct Commission (“LECC”) and there is to be a new Act passed which will set out its function and jurisdiction. No doubt legislative changes will follow to accommodate the establishment of LECC, including provision as to whether its officers may initiate criminal prosecutions.

It is important for me to emphasise that whilst I am of the view that ICAC officers (or officers of agencies performing similar functions to the ICAC, such as PIC (or the soon to be created LECC) should be able to facilitate the commencement of criminal prosecutions, as the “informant”, it should otherwise be entirely the responsibility of the Office of the NSW DPP to determine at first instance, whether proceedings should be commenced and for which offence/s, and thereafter to have total control over the prosecutorial process until its finalisation. ICAC’s role should only be that of an investigative body, and no more. The clear distinction and separation between the investigative/administrative functions (as performed by ICAC and PIC) and the prosecutorial/judicial functions (as performed by the DPP and the Courts) should remain and there should be no mingling or blurring of these



distinct and separate functions. Thus, I am of the strong view that neither ICAC nor PIC should have the power to conduct its own prosecutions, even for the enforcement of actions in its own legislation.

It is important to refer to the reasons for the existence of ICAC. The second reading speech by the then Premier Mr Greiner was delivered in the Legislative Assembly in support of the ICAC Act on 26 May 1988 and it is often quoted. Relevantly, Mr Greiner stated:

The proposed Independent Commission Against Corruption will not have power to conduct prosecutions for criminal offences or disciplinary offences, or to take action to dismiss public officials. Where the commission reaches the conclusion that corrupt conduct has occurred, it will forward its conclusion and evidence to the Director of Public Prosecutions, department head, a Minister or whoever is the appropriate person to consider action. In doing so the commission can make recommendations. The person to whom the matter is referred is not required to follow the recommendation. However, the commission can require a report back on what action was taken. Where the commission considers that due and proper action was not taken, the commission's sanction is to report to Parliament. It is important to note that the independent commission will not be engaging in the prosecutorial role. The Director of Public Prosecutions will retain his independence in deciding whether a prosecution should be instituted.

The question of whether ICAC and PIC think that it should have this power, is more appropriately directed to the Commissioners of those bodies.

The Office of the NSW Director of Public Prosecutions is the independent body tasked with the function of prosecuting for the State of New South Wales. Matters are referred to it from investigative agencies, including the NSW Police Force, ICAC and PIC. The question of how effectively does this work depends upon how efficiency is measured. The Office of the DPP is better placed to provide relevant statistics, as are the investigative agencies themselves, who can provide statistics as to the number of matters referred to the DPP, the number which lead to prosecution action being commenced and the outcome of those prosecutions. It is essential to the proper administration of justice that the prosecutorial body is independent of the investigative agency, as is the NSW DPP, and that the body is appropriately resourced and staffed so as to be able to efficiently meet its very important function within the State.



You may be aware that at present the Joint Parliamentary Committee on ICAC is conducting an Inquiry into my Report to the Premier: Review of the ICAC which I published in May of this year. One of the issues being agitated before that Inquiry is the provision of evidence to the DPP by a body such as the ICAC. There have been allegations from a number of persons who have been the subject of adverse findings by ICAC, that exculpatory evidence was improperly withheld from the DPP. This is a particular area of concern for me as Inspector of ICAC.

In a recent prosecution of a former SES Commissioner, Murray Kear, arising from the ICAC Investigation in Operation Dewar, the Magistrate was very critical of ICAC and the fact that it withheld exculpatory evidence from the DPP. Mr Kear was acquitted by the Magistrate of the charge of acting in reprisal contrary to section 20 of the *Public Interest Disclosures Act 1994 (NSW)* and the DPP was ordered to pay his costs. This case and the issues arising therefrom highlight the tensions which can exist between an investigatory body, such as ICAC, which has a vested interest in seeing a matter run its full course through to a successful prosecution and the functions of a prosecutorial body such as the DPP, which has to determine whether a prosecution should be initiated but which ultimately relies on the investigatory body to provide all relevant material, both inculpatory and exculpatory, in making that determination. The lack of full disclosure by that investigatory body can have serious consequences which then reflect poorly on both it and the prosecuting body as seen in *Kear*.

The NSW Inquiry's terms of reference include:

- 1. the extent, nature and exercise of the ICAC's current powers and procedures including the rationale for and conduct of investigations and public hearings, and possible options for reform;*
- 2. the current structure and governance of the ICAC, best practice models adopted by other integrity institutions, and possible options for reform.*

Some of the issues debated in this Inquiry may assist your Committee Inquiry. The full terms of reference and submissions lodged in Response to the Inquiry may be found on the NSW Parliamentary website at parliament.nsw.gov.au/committees/inquiries.

I thank you for giving me the opportunity to provide a submission and I trust that it is of some assistance to the Committee.

Yours sincerely,

The Hon. David Levine AO RFD QC
Inspector: ICAC

