



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**

Parliament of Western Australia

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Joint Standing Committee on the Corruption and Crime Commission

The ability of the Corruption and Crime Commission to charge and prosecute

Report No. 33

Presented by

Hon Nick Goiran, MLC and Mr Nathan Morton, MLA

Laid on the Table of the Legislative Assembly and Legislative Council
on 17 November 2016

Chairman's Foreword

The Joint Standing Committee originally commenced an Inquiry into the Corruption and Crime Commission (CCC) being able to prosecute its own charges on 26 June 2014 and was due to report to Parliament on the matter by 30 December 2015. In July 2015, however, an appeal was made to the Supreme Court by a former police officer which challenged the power of the CCC to charge and prosecute for an alleged assault while he was on duty. When the Committee became aware of this appeal, it resolved to put its initial Inquiry on hold pending the outcome of the appeal.

The Court of Appeal handed down its decision in *A -v- Maughan* 2016 [WASCA] 128 (*A -v- Maughan*) on 15 July 2016. As part of its judgment, the Court of Appeal held that “the Commission’s powers and functions do not extend to the prosecution of persons in respect of matters investigated by the Commission which are otherwise unrelated to the administration and enforcement of the legislation establishing the Commission.”¹

Following the judgment, the Joint Standing Committee resolved to continue its Inquiry, but with amended Terms of Reference.

This is not the first time the issue of the Commission’s prosecution powers has been questioned and this report describes earlier debate and previous recommendations made regarding its power to lay charges and prosecute. The Committee describes the recommendations made in the Archer Review in 2008, as well as approaches taken by past and present CCC Commissioners and Parliamentary Inspectors of the Corruption and Crime Commission (PICCCs). This report also provides a summary of the opinions and advice the Commission has received in regard to its power to charge and prosecute (see Appendix 9).

The report also reviews the power to prosecute held by a number of Western Australian government agencies. The Department of Fisheries, the Department of Mines and Petroleum and the Department of Commerce all have Acts they administer that allow them to commence prosecutions. These powers are clear and specific in their respective legislation, but in the main, any charges are laid and prosecuted by the State Solicitor’s Office.

An examination of integrity agencies in other jurisdictions reveals that most of these agencies have powers to refer matters arising from investigations to a relevant

1 Supreme Court of Western Australia, *A -v- MAUGHAN* [2016] WASCA 128, at [2], 15 July 2016. Available at: <http://decisions.justice.wa.gov.au/supreme/supdcns.nsf/judgment.xsp?documentId=F1D1521E9F2048B74825804F000C2A44&action=openDocument>. Accessed on 24 October 2016.

prosecutorial agency. None have the express power to prosecute in their own right, other than the Independent Broad-based Anti-corruption Commission in Victoria.

This report also provides the background to the Supreme Court Appeal which arose following a CCC investigation into the conduct of a former Western Australian Police (WAPOL) officer who was alleged to have used excessive force on a detainee in the Broome Police Station in March and April 2013. The former police officer was later charged by the CCC and his hearing was held in the Kalgoorlie Magistrates Court before Stipendiary Magistrate Andrew Maughan on 17 April 2014, who handed down his decision on 28 November 2014.

The former police officer sought an Application for Review of Magistrate Maughan's decision not to grant a permanent stay in relation to the prosecution initiated by the Commission. There were four grounds of appeal by the Applicant; three relating to an alleged abuse of process, and the fourth challenging the CCC's authority to prosecute him.

The CCC Commissioner, Hon John McKechnie QC, told the Committee that prior to the decision of *A -v- Maughan*, the Commission had commenced prosecutions against 140 people for offences arising from its investigations. These did not include proceedings initiated by the Commission for contempt of the Commission.² The Committee was advised that the Commissioner had made arrangements with the Director of Public Prosecutions (DPP) and the State Solicitor to deal with prosecutions arising from CCC investigations in anticipation that the judgment in *A -v- Maughan* would find the Commission did not have the power to charge and prosecute.

The current process the Commission uses to charge and prosecute people following *A -v- Maughan* is described in the report. That process requires the Commission to refer a prosecution brief to the State Solicitor for his 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, he will commence proceedings. Where the alleged offence is a 'simple offence', the prosecution will be conducted by the State Solicitor. Where the offence is an 'indictable offence', the proceedings will be taken over by the DPP at the committal stage.

The Court of Appeal left open the issue on whether the CCC has the power to prosecute its own charges in respect to matters which are related to the administration and enforcement of the *Corruption, Crime and Misconduct Act 2003*, and the Commissioner said "having regard to the reasoning behind the decision, it is difficult to

2 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 18 October 2016, p3.

see how there could be such a power.”³ The Commissioner told the Committee during a public hearing that this matter needs to be put beyond doubt.

The Committee received 24 submissions to its Inquiry, including from the Attorney General, Hon Michael Mischin MLC, the CCC Commissioner, Hon John McKechnie QC, and the Parliamentary Inspector, Hon Michael Murray QC. It undertook closed hearings with the CCC Commissioner and PICCC, as well as with the State Solicitor, Mr Paul Evans, and the Director of Public Prosecutions, Mr Joseph McGrath SC.

The evidence obtained by the Committee overwhelmingly supports the maintenance of a separation between the investigation of serious misconduct and the prosecution of criminal offences. It has considered the approach taken by interstate and international anti-corruption agencies. At the present time, the Committee is not persuaded that it is either necessary or desirable for the CCC to be empowered to commence or conduct prosecutions for offences unrelated to the administration and enforcement of the *Corruption, Crime and Misconduct Act 2003*.

The Committee has recommended that the CCC include a specific update, on the efficiency and effectiveness of its arrangements with the State Solicitor for the commencement and conduct of prosecutions, in its Annual Report for 2016-17 and that the Attorney General undertake a review into the efficiency and effectiveness of the commencement and conduct of prosecutions arising from CCC investigations and table a report on that review within 12 months of the tabling of the Commission’s Annual Report for 2016-17.

I would like to take this opportunity to thank all of the people who have contributed to the Committee being able to complete its Inquiry in a timely fashion since the *A -v- Maughan* judgment, in particular those from other jurisdictions who interrupted their own busy schedules to brief the Committee in a very open fashion on the involvement of their oversight agencies in prosecutions.

I would also like to thank my fellow Committee Members, whose contribution to this 33rd report of the Committee in this 39th Parliament, I have very much appreciated: the Committee’s Deputy Chairman, the Member for Albany, Mr Peter Watson MLA; the Member for Forrestfield, Mr Nathan Morton MLA, and the Member for the South West, Hon Adele Farina MLC.

3 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 18 July 2016.

The Committee members would have been unable to complete this report in the limited window of time available without the support of the Committee's Secretariat, Dr David Worth and Ms Jovita Hogan.

A handwritten signature in blue ink, consisting of a stylized 'N' and 'G' intertwined.

HON NICK GOIRAN, MLC
CHAIRMAN

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Ministerial Response

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Joint Standing Committee directs that the Minister representing the Attorney General report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

Findings and Recommendations

Finding 1

Page 4

The Corruption and Crime Commission's predecessor, the Anti-Corruption Commission, was an investigative body with no express power to prosecute.

Finding 2

Page 8

No express intent to empower the Corruption and Crime Commission to prosecute can be found in any debate during the passage of the Bills establishing the Commission in 2003.

Finding 3

Page 9

The Archer Review recommended (recommendation 55) that the *Corruption and Crime Commission Act 2003* be amended to make it clear that the Corruption and Crime Commission had, and had always had, the power to commence and conduct prosecutions in the Magistrates Court.

Finding 4

Page 9

Recommendation 55 of the Archer Review was supported by the then-Parliamentary Inspector, Mr Malcolm McCusker AO, CVO, QC.

Finding 5

Page 9

Recommendation 55 of the Archer Review to amend the *Corruption and Crime Commission Act 2003* to clarify the power of the Commission to commence a prosecution has not been expressly adopted or implemented by any of the State Governments since the Review was published in 2008.

Finding 6

Page 10

Upon inquiry by the Joint Standing Committee in May 2010, the Corruption and Crime Commission advised the Committee that it was satisfied that it did have the power to prosecute.

Finding 7

Page 10

Subsequent Parliamentary Inspector, Hon Chris Steytler QC, did not support the Corruption and Crime Commission having a power to prosecute.

Finding 8

Page 13

Upon further inquiry by the Joint Standing Committee in the 38th Parliament in October 2010, the Corruption and Crime Commission remained satisfied it had the power to charge and prosecute.

Finding 9 **Page 15**

Prior to the decision of the Court of Appeal in *A -v- Maughan* 2016 [WASCA] 128, the Corruption and Crime Commission had preferred 1,976 charges against 171 people, which resulted in 1,249 convictions against 133 people.

Finding 10 **Page 15**

Prior to 8 December 2004, Corruption and Crime Commission officers could commence a prosecution in their private capacity.

Finding 11 **Page 16**

Prior to 8 December 2004, the Corruption and Crime Commission preferred nine charges in two prosecutions.

Finding 12 **Page 17**

The commencement of the *Criminal Procedure Act 2004* limited the ability to conduct prosecutions in the State to those ‘authorised officers’ listed in section 80(2) of the Act.

Finding 13 **Page 18**

Then-Commissioner, Hon Len Roberts-Smith RFD, QC, submitted to the Archer Review of the *Corruption and Crime Commission Act 2003* that the Commission and its officers were able to prosecute as an ‘authorised person’ as defined by section 20(1) of the *Criminal Procedure Act 2004*.

Finding 14 **Page 19**

The Corruption and Crime Commission has not been appointed under section 182(1) of the *Criminal Procedure Act 2004* as an ‘authorised person’ to conduct prosecutions.

Finding 15 **Page 19**

After the commencement of the *Criminal Procedure Act 2004*, the Corruption and Crime Commission sought and received legal advice on 14 occasions regarding its power to prosecute.

Finding 16 **Page 19**

Prior to the Court of Appeal decision in *A -v- Maughan* 2016 [WASCA] 128, the Corruption and Crime Commission was satisfied that it had the power to charge and prosecute matters in the Magistrates Court.

Finding 17 **Page 27**

The Department of Fisheries, the Department of Mines and Petroleum and the Department of Commerce all have Acts they administer that expressly allow certain authorised persons to commence prosecutions.

Finding 18 **Page 27**

Regulations for the *Criminal Procedure Act 2004* allow authorised investigators in the Department of Child Protection and the Public Transport Authority to commence summary prosecutions.

Finding 19 **Page 32**

The NSW Independent Commission Against Corruption has the power to lay charges by preparing a Court Attendance Notice for a defendant, but can only do so with the written approval of the Director of Public Prosecutions that the proceedings may be commenced.

Finding 20 **Page 32**

The NSW Director of Public Prosecutions conducts all prosecutions commenced by the Independent Commission Against Corruption, whether summary or indictable.

Finding 21 **Page 33**

Neither the NSW Police Integrity Commission nor its intended successor, the Law Enforcement Conduct Commission, has the power to commence or conduct prosecutions.

Finding 22 **Page 33**

The NSW Director of Public Prosecutions conducts all prosecutions arising from investigations of the Police Integrity Commission.

Finding 23 **Page 36**

Notwithstanding its express statutory power to prosecute, the Independent Broad-based Anti-corruption Commission (IBAC) has a protocol with the Victorian Office of Public Prosecutions (OPP) that provides for the OPP to handle all indictable matters and also prosecute some summary matters flowing from IBAC investigations.

Finding 24 **Page 37**

Criminal charges arising from investigations undertaken by the Queensland Crime and Corruption Commission are prosecuted by either the Commissioner of Police or the Director of Public Prosecutions.

Finding 25 **Page 39**

All South Australian Independent Commission Against Corruption prosecutions, both summary and indictable, and including against its own Act, are referred for prosecution to the Director of Public Prosecutions.

Finding 26 **Page 40**

All Australian Commission for Law Enforcement Integrity prosecutions, both summary and indictable, and including against its own Act, are referred for prosecution to the Commonwealth Director of Public Prosecutions.

Finding 27 **Page 40**

The Tasmanian Integrity Commission has no power to prosecute and instead refers matters for prosecution to the Commissioner of Police, the Director of Public Prosecutions or other agencies that it considers appropriate for action.

Finding 28 **Page 41**

The Independent Police Complaints Commission in the United Kingdom can arrest and charge a person but has no capacity to prosecute. Instead, it submits a file of evidence from their investigations to the Crown Prosecution Service for possible prosecution.

Finding 29 **Page 42**

The Garda Síochána Ombudsman Commission does not have a power to commence or conduct prosecutions but provides its reports, investigation files and recommendations to the Irish Director of Public Prosecutions for the consideration of laying charges.

Finding 30 **Page 43**

The Police Ombudsman for Northern Ireland does not have a power to commence or conduct prosecutions but provides a file of evidence on a matter involving an officer of the Police Service of Northern Ireland to the independent Public Prosecution Service for it to consider the laying of charges.

Finding 31 **Page 45**

In New Zealand, the Independent Police Conduct Authority does not have a power to commence or conduct prosecutions, but makes recommendations to the Commissioner for Police.

Finding 32 **Page 46**

Hong Kong's Independent Commission Against Corruption has the power to commence a prosecution but must first obtain the consent of the Secretary for Justice.

Finding 33 **Page 56**

On 15 July 2016 the Western Australian Court of Appeal found that the Corruption and Crime Commission's functions do not extend to the prosecution of offences the subject of investigations conducted by it, but which have no other connection with the CCC or the administration of its Act.

Finding 34 **Page 57**

The Court of Appeal left open the issue on whether the Corruption and Crime Commission has the power to prosecute its own charges in respect to matters which are related to the administration and enforcement of the *Corruption, Crime and Misconduct Act 2003*.

Finding 35 **Page 60**

Following the judgment in *A -v- Maughan*, the Corruption and Crime Commission has made arrangements to refer matters to the State Solicitor, who will consider whether to commence prosecutions which will then be conducted by either the State Solicitor or the Director of Public Prosecutions.

Finding 36 **Page 61**

The Corruption and Crime Commission has the power to arrest but must thereafter liaise with an authorised person if charges are to be laid.

Finding 37 **Page 62**

The Corruption and Crime Commissioner would prefer if the Director of Public Prosecutions conducted all prosecutions arising from the Commission's investigations.

Finding 38 **Page 63**

It is a normal function of the State Solicitor to commence and conduct prosecutions arising from investigations conducted by many government departments.

Finding 39 **Page 66**

The State Solicitor's preference for all agencies is to be briefed prior to a prosecution being commenced.

Finding 40 **Page 66**

The State Solicitor has established arrangements to ensure there are no untimely delays in having prosecutions commenced.

Finding 41 **Page 66**

The likely number of summary and 'either way' matters provided each year by the Corruption and Crime Commission to the State Solicitor's Office (SSO) to prosecute will be a small part of the total number of prosecutions being conducted by the SSO.

Recommendation 1 **Page 67**

The Corruption and Crime Commission include a specific update, on the efficiency and effectiveness of its arrangements with the State Solicitor for the commencement and conduct of prosecutions, in its Annual Report for 2016-17.

Finding 42 **Page 69**

The likely number of indictable matters provided each year by the Corruption and Crime Commission to the Director of Public Prosecutions (DPP) through the State Solicitor will be a small part of the total number of indictable matters received by the DPP.

Finding 43 **Page 72**

The Corruption and Crime Commission is satisfied that its power to commence and conduct the prosecution of the offence of contempt under Part 10 of the *Corruption, Crime and Misconduct Act 2003* has not been affected by the decision of *A -v- Maughan*.

Finding 44 **Page 75**

The Parliamentary Inspector does not support empowering the Corruption and Crime Commission to commence and conduct prosecutions for offences arising outside of the *Corruption, Crime and Misconduct Act 2003*.

Finding 45 **Page 78**

The overwhelming majority of submissions to this Inquiry support an ongoing separation between the Corruption and Crime Commission's investigative function and an independent agency's prosecution function.

Finding 46 **Page 81**

Investigations undertaken by the Corruption and Crime Commission gather evidence which can result in opinions of serious misconduct. The standard of proof required to form those opinions is at a lesser standard than required in prosecutions for criminal offences.

Finding 47 **Page 82**

The WA Police Union acknowledges that the Corruption and Crime Commission has the power to prosecute its own charges in respect to matters which are related to the administration and enforcement of the *Corruption, Crime and Misconduct Act 2003*.

Finding 48 **Page 85**

No compelling case has been presently made out to justify empowering the Corruption and Crime Commission to either commence or conduct prosecutions.

Recommendation 2 **Page 85**

The Attorney General 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 2016-17.

Chapter 1

The power to prosecute, or not?

...it seems to me not to make much sense for us to be investigating something and to have gained all the evidence and then to have to send it to the police for them to go over it all and form a view about it and then send it on to the Director of Public Prosecutions, particularly if it is only a summary matter.

Hon Len Roberts-Smith RFD, QC, then-CCC Commissioner.

Background to the inquiry

The Joint Standing Committee originally commenced an Inquiry into the Corruption and Crime Commission (CCC) being able to prosecute its own charges on 26 June 2014. It was due to report to Parliament on this matter by 30 December 2015. The Committee had hoped to identify during the Inquiry:

- a) the operation of the State's prosecution system in relation to Corruption and Crime Commission matters;
- b) whether there is a need to create new criminal offences that capture corrupt conduct; and
- c) arrangements for the prosecution of corrupt conduct and misconduct in other jurisdictions.

In July 2015 an appeal was made to the Supreme Court by a former police officer which challenged the power of the CCC to charge and prosecute for an alleged assault while he was on duty.⁴ The Committee was concerned that by continuing with its Inquiry at that time it would have inevitably overlapped with matters being considered by the Court of Appeal.

In its Report No. 23, *Suspension of the Committee's Inquiry into the CCC being able to prosecute its own charges*, tabled on 13 August 2015, the Committee advised both Houses of Parliament that it would cease its Inquiry and, at the conclusion of the appeal before the Supreme Court, it would "re-examine the issue and consider whether to reinstate its Inquiry into this matter with the current, or modified, terms of reference."⁵

4 Ms Amanda Banks, 'Cop facing charges challenges CCC', *The West Australian*, 25 July 2015, p11.

5 Joint Standing Committee on the Corruption and Crime Commission, *Suspension of the Committee's Inquiry into the CCC being able to prosecute its own charges*, Parliament of Western

Chapter 1

The Court of Appeal handed down its decision in *A -v- Maughan* 2016 [WASCA] 128 (*A -v- Maughan*) on 15 July 2016 and found:

*...the Commission's powers and functions do not extend to the prosecution of persons in respect of matters investigated by the Commission which are otherwise unrelated to the administration and enforcement of the legislation establishing the Commission...*⁶

A summary of this decision, and its important implications for the CCC's future operations, are provided in Chapters 4 and 5.

On 21 July 2016 the Committee recommenced its inquiry into the CCC being able to prosecute its own charges. In doing so, it took the opportunity to revise the terms of reference for the Inquiry.

Terms of reference for this inquiry

The terms of reference for this Inquiry were that the Committee would 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 128;
- 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 128.

Conduct of the Inquiry

The Committee advertised in *The West Australian* on 6 August 2016 and called for submissions to the Inquiry. It also wrote to the following stakeholders seeking a submission:

- the Attorney General;
- the State Solicitor;

Australia, Perth, 13 August 2015. Available at:
[www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/B4CDB6F3F1826BE948257E9F002F8B20/\\$file/Report%2023-%20CCC%20prosecute-Interim-%20FINAL%20for%20web.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/B4CDB6F3F1826BE948257E9F002F8B20/$file/Report%2023-%20CCC%20prosecute-Interim-%20FINAL%20for%20web.pdf). Accessed on 17 October 2016.

- 6 Supreme Court of Western Australia, *A -v- MAUGHAN* [2016] WASCA 128, at [2], 15 July 2016. Available at:
<http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/judgment.xsp?documentId=F1D1521E9F2048B74825804F000C2A44&action=openDocument>. Accessed on 24 October 2016.

- the Director of Public Prosecutions (DPP);
- the Chief Justice of the Supreme Court;
- the CCC Commissioner;
- the Parliamentary Inspector of the CCC (PICCC);
- each of the previous CCC Commissioners;
- the Police Commissioner;
- the WA Police Union;
- the WA Bar Association;
- the Criminal Lawyers' Association of WA;
- the anti-corruption bodies in all Australian jurisdictions and New Zealand, and their respective oversight inspector; and
- the DPP in Victoria and NSW.

The Committee received 24 submissions in total (see Appendix 4).

The Committee held closed hearings to discuss the current process for charging and prosecuting people investigated by the CCC following the Court of Appeal decision with the State Solicitor, the DPP, the CCC Commissioner and the PICCC (see Appendix 2). The Committee also undertook investigative travel in October 2016 to undertake briefings with organisations in other jurisdictions to add to information gathered for its initial Inquiry in 2014 (see Appendix 3).

Previous consideration of the CCC's power to charge and prosecute

Anti-Corruption Commission Act 1988

The CCC was preceded as the State's anti-corruption agency by the Anti-Corruption Commission (ACC). Section 12(1)(g)(i) of the *Anti-Corruption Commission Act 1988* made it clear that the ACC was an investigative agency and could not prosecute charges itself, but should provide the information it had gathered to another agency for prosecution:

12. Functions

(1) The functions of the Commission are

Chapter 1

(b) to consider whether further action is needed in relation to an allegation and, if so, by whom that further action should be carried out;

(c) to carry out further action in relation to allegations itself, if it is appropriate for it to do so, or to refer allegations to other authorities so that they can carry out further action; ...

(g) to assemble evidence obtained in the course of its functions and —

(i) furnish to an independent agency or an appropriate authority, evidence which may be admissible in the prosecution of a person for a criminal offence against a written law or which may otherwise be relevant to the functions of the agency or authority; and...⁷ (emphasis added)

Finding 1

The Corruption and Crime Commission's predecessor, the Anti-Corruption Commission, was an investigative body with no express power to prosecute.

Legislative debate on the CCC Bill in 2003

The *Corruption and Crime Commission Bill 2003* (CCC Bill) was introduced into Parliament on 15 May 2003 and received Royal Assent on 3 July 2003.⁸ During its progress through the Parliament the Bill was split into a similarly-named *Corruption and Crime Commission Bill 2003* and the *Corruption and Crime Commission Amendment Bill 2003* on 26 June 2003. Both Bills were referred to the Legislative Council's Standing Committee on Legislation for review and the *Corruption and Crime Commission Amendment Bill 2003* received Royal Assent on 22 December 2003.⁹

In introducing the CCC Bill, then-Attorney General, Hon Jim McGinty MLA, said that the CCC was to continue the work of the Royal Commission *Into Whether There Has Been Any Corrupt or Criminal Conduct by Western Australian Police Officers*. He said that the

7 AustLII, *Anti-Corruption Commission Act 1988*, nd. Available at: www.austlii.edu.au/au/legis/wa/repealed_act/aca1988319/s12.html. Accessed on 18 October 2016.

8 Parliament of Western Australia, *Corruption and Crime Commission Bill 2003*, 2016. Available at: www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=1B8593898FB7580948256D5600013AE2. Accessed on 18 October 2016.

9 Parliament of Western Australia, *Corruption and Crime Commission Amendment and Repeal Bill 2003*, 2016. Available at: www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=65FDB134A9ADC59048256D5600242718. Accessed on 18 October 2016.

Government had accepted the recommendation of Royal Commissioner, Hon Geoffrey Kennedy AO, QC, in the Commission's interim report in December 2002 that it was possible:

...to conclude that the identifiable flaws in the structure and powers of the ACC have brought about such a lack of public confidence in the current processes for the investigation of corrupt and criminal conduct that the establishment of a new permanent body is necessary.¹⁰

During the debate in both Houses on the Bills there was little direct discussion on the issue of the prosecution of matters arising from CCC investigations. The Explanatory Memorandum to the CCC Bill includes no reference to the new Commission having a power to commence criminal prosecutions. In his second reading speech, Mr McGinty provides as one of the ten improvements the proposed Commission would make over the ACC:

*Disclosure by the Commissioner: There will be less secrecy surrounding the CCC generally. The Commissioner can reveal details about particular matters and outcomes of investigations when the Commissioner decides that disclosure of those matters is in the public interest. The Commissioner can also reveal **when a matter has been referred to an appropriate authority or an independent body for consideration of prosecution** or disciplinary action of the person concerned.*

...

If the Corruption and Crime Commission investigates an allegation and recommends that an independent body such as the Director of Public Prosecutions give consideration to prosecution, the independent body will be obliged to notify the person concerned that it has received such a recommendation prior to any charge being laid.¹¹
(emphasis added)

When noting improvements in regard to the Commission's misconduct functions, the then-Attorney General again made a reference to prosecutions:

Misconduct Function: A major function of the CCC will be to ensure that allegations and information about misconduct are dealt with in an appropriate way.

10 Hon Jim McGinty MLA, Attorney General, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 May 2003, p7861.

11 Ibid, p7862.

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...

*The CCC may not make a finding or form an opinion on whether a person has committed, is committing, or is about to commit a criminal or disciplinary offence. This is consistent with the position that **it is for the prosecuting authorities and the courts to deal with these matters.***¹² (emphasis added)

In the second reading speech in the Legislative Council, the Minister representing the Attorney General, Hon Nick Griffiths MLC, said that one of the additional safeguards that had been included in the CCC Bill to protect the rights of persons who were the subject of complaints was:

***The CCC may recommend that an independent body such as the Director of Public Prosecutions give consideration to prosecution.** If it does, it must also give that body all the material in its possession that would be required to be disclosed as part of the prosecution's statutory obligation of disclosure if that prosecution were to take place. Also, in the event of the independent body then deciding to lay a charge, it must first notify the person concerned of the recommendation from the CCC.*¹³ (emphasis added)

On 26 June 2003, the Legislative Council referred the *Corruption and Crime Commission Act 2003* and the *Corruption and Crime Commission Amendment Bill 2003* to the Standing Committee on Legislation (SCL) for inquiry. The SCL reported back to the Council on 9 December 2013. The SCL reported on the prosecution issue in just two pages of its 341 page report.

This reference to prosecutions by the SCL was in relation to the 'significant difficulties' experienced by the Anti-Corruption Commission in obtaining advice from the Director of Public Prosecutions as to whether or not a prosecution should be launched, and four possible alternatives to resolve this issue in the new Commission:

- *the Director of Public Prosecutions Act 1991 be amended to provide for an Assistant Director of Public Prosecutions whose functions are primarily to deal with CCC work;*
- *the CCC be permitted to lay charges on the advice of the Crown Solicitor with provision that if the matter is an indictable offence, the Director of Public Prosecutions assume*

¹² Ibid, pp7863-7864.

¹³ Hon Nick Griffiths MLC, Minister for Racing and Gaming, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 10 June 2003, p8356.

responsibility for the prosecution and if it is a summary matter, the prosecution be conducted by the Crown Solicitor;

- *CCC matters be dealt with by the Crown Solicitor who, for the purposes of the CCC work, should have all the powers and discretions of the Director of Public Prosecutions; and*
- *the Director of Public Prosecutions be given extra resources to deal with the CCC.*¹⁴

The ACC indicated in its submission to the SCL that it preferred either of the first two options from the point of view of practicality and efficiency. The SCL considered that the matter raised by the ACC “must be addressed” but was of the view that the “issue is primarily an administrative one which the Committee cannot address within the context of this inquiry.”¹⁵ The SCL did not make a recommendation in its final report to Parliament on this matter.

Section 18 of the CCC Act provided that “[i]t is a function of the Commission ... to ensure that an allegation about, or information or matter involving, misconduct is dealt with in an appropriate way.”¹⁶ The Court of Appeal discussed in depth this section of the Act and whether it provided the Commission with the power to prosecute (see Chapter 4 below). The Court noted that section 18(h)(i) allowed the Commission to assemble evidence obtained in the course of exercising its serious misconduct function:

*(i) furnishing to an independent agency or another authority, evidence which may be admissible in the prosecution of a person for a criminal offence against a written law or which may otherwise be relevant to the functions of the agency or authority.*¹⁷

This section of the Act has remained unchanged since 2004, other than for an amendment contained in the *Corruption and Crime Commission Amendment (Misconduct) Act 2014* that limited the Commission to investigating ‘serious misconduct’.

14 Standing Committee on Legislation, *Report of the Standing Committee on Legislation in Relation to the Corruption and Crime Commission Act 2003 and the Corruption and Crime Commission Amendment Bill 2003*, Parliament of Western Australia, Perth, December 2003, pp186-187. Available at:

[www.parliament.wa.gov.au/C8257837002F0BA9/\(Report+Lookup+by+Com+ID\)/27D89F43FB1015E948257831003E95D5/\\$file/In.ccc.031209.rpf.021.xx.a.pdf](http://www.parliament.wa.gov.au/C8257837002F0BA9/(Report+Lookup+by+Com+ID)/27D89F43FB1015E948257831003E95D5/$file/In.ccc.031209.rpf.021.xx.a.pdf). Accessed on 17 October 2016.

15 Ibid, p187.

16 AustLII, *Corruption, Crime and Misconduct Act 2003 - Sect 18*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/ccama2003330/s18.html. Accessed on 31 October 2016.

17 Ibid.

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Finding 2

No express intent to empower the Corruption and Crime Commission to prosecute can be found in any debate during the passage of the Bills establishing the Commission in 2003.

The Archer statutory review of the CCC Act in 2008

In February 2008 Ms Gail Archer SC, published her statutory review of the *Corruption and Crime Commission Act 2003*¹⁸ (CCC Act). In five paragraphs in Chapter 23, 'Minor Amendments and Other Matters', Ms Archer addressed whether the CCC had the power to prosecute.¹⁹ The CCC submitted to the Review its response to a proposal that it did not have such a power. The CCC submitted that it did have the power, however, to eliminate any uncertainty, it sought a declaratory amendment to the CCC Act to confirm that it had, and had had, the power to commence and conduct prosecutions in the Magistrates Court.²⁰

The CCC submitted to the Archer Review that it believed its power to prosecute flowed from four sources:

*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 now 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.*²¹

The then-PICCC, Mr Malcolm McCusker AO, CVO, QC, told the Review that "he supported amending the Act to make it clear that the CCC does have (and always had) this power."²²

The Review recommended to the Government that:

*Recommendation 55- That the 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.*²³

18 Now known as the *Corruption, Crime and Misconduct Act 2003* following amendments which came into force on 1 July 2015.

19 Ms Gail Archer SC, *Review of the Corruption & Crime Commission Act 2003*, Perth, February 2008, pp258-259.

20 Ibid, p258.

21 Ibid.

22 Ibid.

This recommendation has not been expressly adopted or implemented by any of the State Governments since the Archer Review was published in 2008.

Finding 3

The Archer Review recommended (recommendation 55) that the *Corruption and Crime Commission Act 2003* be amended to make it clear that the Corruption and Crime Commission had, and had always had, the power to commence and conduct prosecutions in the Magistrates Court.

Finding 4

Recommendation 55 of the Archer Review was supported by the then-Parliamentary Inspector, Mr Malcolm McCusker AO, CVO, QC.

Finding 5

Recommendation 55 of the Archer Review to amend the *Corruption and Crime Commission Act 2003* to clarify the power of the Commission to commence a prosecution has not been expressly adopted or implemented by any of the State Governments since the Review was published in 2008.

JSCCCC reports from the 38th Parliament

The JSCCCC in the 38th Parliament tabled its Report 13, *Analysis of Recommended Reforms to the Corruption and Crime Commission Act 2003*, in February 2011.²⁴ This report was a summary of the responses of the Committee, the CCC and the Parliamentary Inspector to each of the 58 recommendations set out in Ms Archer's report. It was prepared in consultation with the then-Commissioner, Hon Len Roberts-Smith RFD, QC, and senior staff members of the CCC, the then-Parliamentary Inspector, Hon Chris Steytler QC, and Ms Archer SC who, subsequent to the tabling of her report, had served as an Acting Commissioner of the CCC.²⁵

In response to the Archer Review's recommendation 55, the Committee's reported on the position of the CCC, the PICCC and itself to the recommendation:

...(b) CCC response

The CCC supports this recommendation.

(c) PI response

23 Ibid, p259.

24 Joint Standing Committee on the Corruption and Crime Commission, *Analysis of Recommended Reforms to the Corruption and Crime Commission Act 2003*, Parliament of Western Australia, Perth, 17 February 2011. Available at: [www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/50FB970F704F4F964825783E00141C7B/\\$file/32775854.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/50FB970F704F4F964825783E00141C7B/$file/32775854.pdf). Accessed on 17 October 2016.

25 Ibid, pix.

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The Parliamentary Inspector has no comment regarding this recommendation.

(d) Committee response

*In the event that Parliament decides that the CCC should have the power to prosecute, the JSCCCC supports this recommendation.*²⁶

Earlier in May 2010, the JSCCCC in the 38th Parliament wrote to the Commission informing it that the Committee was proposing to inquire into whether the Commission should have the power to charge and prosecute. In its submission to this inquiry, the Commission confirmed it had responded that it “was satisfied that it did have the power to prosecute...”²⁷

Finding 6

Upon inquiry by the Joint Standing Committee in May 2010, the Corruption and Crime Commission advised the Committee that it was satisfied that it did have the power to prosecute.

The approach by previous PICCCs to the CCC being able to charge and prosecute

As noted above, the then-PICCC, Mr Malcolm McCusker AO, CVO, QC, supported the Archer Review’s recommendation to amend the Act to make it clear that the CCC had (and always had) the power to charge and prosecute. The subsequent PICCC, Hon Chris Steytler QC, in a joint hearing with the then-Commissioner, 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.*²⁸ (emphasis added)

Finding 7

Subsequent Parliamentary Inspector, Hon Chris Steytler QC, did not support the Corruption and Crime Commission having a power to prosecute.

²⁶ Ibid, p60.

²⁷ Submission No. 18 from Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, 16 September 2016, p21.

²⁸ Hon Chris Steytler QC, Parliamentary Inspector of the CCC, *Transcript of Evidence*, 13 October 2010, p17.

The use by the CCC of their power to prosecute before A -v- Maughan

Shortly after the conclusion of the Archer Review, the then-Commissioner, Hon Len Roberts-Smith RFD, QC, told the JSCCCC 38th Parliament in a public hearing that:

...during 2008 the Commission laid a total 97 charges of criminal offences, not including alternative charges against particular individuals, against 22 people. Of those 97 charges, 39 convictions were recorded as a result of guilty pleas. The remaining charges laid by the Commission during 2008 are still pending.²⁹

The then-Commissioner provided examples of the charges that the Commission had laid in that year, such as:

- a TAFE lecturer was charged and convicted of all but one of 37 counts of stealing and three counts of fraud;
- a senior officer of the Department of Health was charged with 50 counts of forgery and 50 counts of uttering;
- six employees of the Fremantle Port Authority were charged with offences ranging from stealing as a servant, receiving stolen property, cultivating or possessing cannabis and several minor drug charges, and five of the six pleaded guilty;
- three public officers at Landgate and another person were charged with serious criminal offences, with a developer pleading guilty to bribing a public officer and one public officer pleading guilty to three charges of accepting bribes; and
- a detective sergeant was charged with one count of corruption, 22 counts of unlawful use of a police computer, two offences of playing a restricted police interview to an unauthorised person, two offences of making a visual recording of a private sexual activity and two offences of communicating a record of a private sexual activity.³⁰

In clarifying for the Committee the Commission's power to charge individuals for criminal offences, and its ability to then prosecute through criminal proceedings, the then-Commissioner said:

The Commissioner is ex officio an authorised person under the CCC Act and may also appoint other officers of the Commission to be

29 Hon Len Roberts-Smith RFD, QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 16 February 2009, p8.

30 Ibid, pp8-9.

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authorised persons under the CCC Act. That carries with it a number of consequences not only in relation to the CCC Act but also in relation to other legislation such as the Criminal Investigation Act 2006 of Western Australia and various other pieces of legislation. The answer to the question is reasonably complex. The powers that accrue to authorised officers under the Commission's regime include, for example, a range of police powers— powers held by WA Police. They include powers to charge and prosecute for offences as well as a range of other things.

In addition, all our investigators are actually special constables appointed by the Commissioner of Police, although those appointments do not make the officers subject to the Commissioner of Police. There is a specific proviso that they remain responsible to the Commissioner of the CCC, but they do have the powers of special constables under the Police Act. It is a reasonably complex answer and one needs to look at a range of legislative provisions.³¹

Commissioner Roberts-Smith then concluded his evidence on this matter by noting “We have in place a protocol with the DPP’s office, which is essentially the same as the protocol it has in place with the police in terms of the prosecution of charges and which ones the DPP will do and which ones the agency will do.”³²

The Commission’s relationship with the DPP in considering prosecuting people was also highlighted by then-Acting Commissioner Mark Herron in May 2011 in a public hearing with the JSCCC 38th Parliament:

I mean, we do not lightly bring prosecutions against people. That is something we consider long and hard about, and on occasions we will seek the advice of the DPP before making any decision.³³

In a later hearing with the JSCCC 38th Parliament, Commissioner Roberts-Smith was again asked whether for the purpose of independence, would it always be better for the Commission to provide a recommendation and leave the charging and prosecuting to WA Police or the DPP, and he responded:

I do not think so. Many of the things that we would be dealing with, I think, given the competing pressures on them, the police would not be particularly interested in taking on in any event. Secondly, it seems to me not to make much sense for us to be investigating something

31 Ibid, pp15-16.

32 Ibid, p16.

33 Mr Mark Herron, Acting Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 18 May 2011, p8.

and to have gained all the evidence and then to have to send it to the police for them to go over it all and form a view about it and then send it on to the Director of Public Prosecutions, particularly if it is only a summary matter.

It needs to be borne in mind that our position is the same as that of the Police in respect of charging people and in terms of our relationship with the Director of Public Prosecutions. I should also point out that, unlike the Crime and Misconduct Commission in Queensland, all our investigators first of all are actually ex-police officers from various jurisdictions; only a couple are from Western Australia. We have people who have long histories as senior police officers or senior investigators in other jurisdictions, so they are accustomed to that.

They also are authorised persons under the Corruption and Crime Commission Act, which in effect relevantly vests in them the powers of a police officer in Western Australia. If we are conducting an investigation and come across somebody committing an offence—if we, say, move in on a public officer buying drugs or whatever—we can deal with that ourselves, and we do. We would charge them and we are able to prosecute them in the Magistrates Court.

As with the Police, if it is a particularly difficult or complex issue, or there is a public interest consideration that would suggest that we need advice from the DPP on that, we go to the DPP and get that advice, just like the police do. But, like the Police, we do it only in those circumstances. Alternatively, when it is going to be an indictable matter that is going to have to go to trial in a superior court, which the DPP would have to prosecute anyway, we would get the advice of the DPP in relation to that.

*Bearing in mind that the DPP is not a charging authority—they do not conduct investigations or charge people—if their advice to us is, “Yes, there is evidence of an offence. The person should be charged”, we would charge them, as the Police would if they were in that situation.*³⁴

Finding 8

Upon further inquiry by the Joint Standing Committee in the 38th Parliament in October 2010, the Corruption and Crime Commission remained satisfied it had the power to charge and prosecute.

34 Hon Len Roberts-Smith RFD, QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 13 October 2010, p17.

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Types of offences charged

The Commission has continued to charge and prosecute people up until the Court of Appeal's decision. The Committee requested information from the Commission about its history of charging summary and indictable matters. Information on the types of summary offences charged and prosecuted by the CCC before the decision in *A -v- Maughan* are listed in Appendix 5.

In regards to indictable matters, Commissioner McKechnie told the Committee that the progression of indictable offences arising from CCC investigations may occur in the following scenarios:

(a) matters where the Commission has commenced the prosecution for an indictable or either way offence and referred the prosecution to the DPP at the committal stage of proceedings;

(b) matters where the Commission has commenced the prosecution and referred the proceedings to the DPP at another point in time; and

(c) matters where the Commission has not yet commenced proceedings but has referred the prosecution to the DPP by provision of a brief of evidence. On these occasions the DPP has commenced the prosecution itself.³⁵

The Commissioner noted that when a prosecution for a Commonwealth offence has been commenced by a Commission officer, proceedings have also been referred to the Commonwealth DPP (CDPP) for prosecution. The types of indictable (or 'either way') offences that have arisen from Commission investigations since 2004 that have been referred to either the Western Australian DPP or CDPP for prosecution are wide ranging, and are listed in Appendix 6.

According to its latest Annual Report, for example, during 2015-16 the Commission preferred 165 charges which resulted in 24 convictions and four acquittals.³⁶ Table 1 below summarises the charges commenced each year flowing from the Commission's investigations. Some of the convictions relate to people charged in an earlier period.

35 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 18 October 2016, p2.

36 Corruption and Crime Commission, *Annual Report 2016*, Perth, 22 September 2016, p30.

Table 1- Charges and convictions arising from the CCC's misconduct function³⁷

Year	Charges commenced	People charged	Convictions	People convicted
2004-05	43	7	*	0
2005-06	147	12	*	10
2006-07	156	14	*	10
2007-08	62	18	19	9
2008-09	81	14	101	16
2009-10	174	9	146	13
2010-11	257	26	152	20
2011-12	627	24	441	11
2012-13	98	15	211	17
2013-14	84	15	87	12
2014-15	82	13	68	13
2015-16	165 [#]	4	24	2 ³⁸
TOTAL	1,976	171	1,249	133

* Not recorded in annual report.

[#] 139 of these charges related to the investigation of one public officer where one charge was amended to represent a consolidated offence, and the remaining 138 charges were withdrawn.

Finding 9

Prior to the decision of the Court of Appeal in *A -v- Maughan* 2016 [WASCA] 128, the Corruption and Crime Commission had preferred 1,976 charges against 171 people, which resulted in 1,249 convictions against 133 people.

Impact of the enactment of the *Criminal Procedure Act 2004*

Prior to the commencement of the *Criminal Procedure Act 2004* (CP Act) on 8 December 2004, any person (in a private capacity) could commence a prosecution by the laying of a complaint of a summary offence, or an indictable offence with the leave of the Supreme Court.

Finding 10

Prior to 8 December 2004, Corruption and Crime Commission officers could commence a prosecution in their private capacity.

The Commissioner provided information to the Committee that two prosecutions were commenced by the Commission prior to the commencement of the CP Act on 8 December 2004:

37 Corruption and Crime Commission, *Annual Reports*, 2015. Available at: www.ccc.wa.gov.au/annual-reports. Accessed on 7 November 2016.

38 Ms Lesley Storey, Executive Manager, Corruption and Crime Commission, Email, 10 November 2016.

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- 30 September 2004- 1 charge of stealing under section 378 of *The Criminal Code 1913*; and
- 1 October 2004- 8 charges of stealing as a servant under section 378 of *The Criminal Code 1913*.³⁹

The outcome of these two prosecutions by the CCC were not affected by *A -v- Maughan*.

Finding 11

Prior to 8 December 2004, the Corruption and Crime Commission preferred nine charges in two prosecutions.

The CP Act provides the legislative framework for the prosecution of both summary and indictable offences in WA. The then-Attorney General, Hon Jim McGinty MLA, said when introducing the CP Act in August 2004 that it would shorten times for criminal court proceedings and “bring procedures in the summary jurisdiction in line with those of superior courts.”⁴⁰

In recent evidence to the Committee on the impact of the decision in *A -v- Maughan*, the Parliamentary Inspector of the CCC, Hon Michael Murray QC, argued the importance of the CP Act:

*The whole of the Criminal Procedure Act is built upon the independence of the prosecuting authority and power. It requires disclosure by that prosecutor, which is as complete as it can be made. That disclosure is on material which is provided by the investigating agency who is recommending prosecution.*⁴¹

The introduction of the CP Act followed the *Criminal Code Amendment Act 2004* (CCA Act) coming into effect on 21 May 2004. The CCA Act created a number of new offences which, although indictable, can also be dealt with summarily (so called ‘either way’ offences). The effect of the CCA Act was to shift the jurisdiction of many offences, such as stealing, from the District Court to the Magistrates Court.⁴² This meant that the offences could then be prosecuted by WA Police, instead of the DPP.

39 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 18 October 2016, p3.

40 Hon Jim McGinty MLA, Attorney General, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 August 2004, pp5722-5723.

41 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence*, 21 September 2016, p10.

42 Hon Jim McGinty MLA, Attorney General, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 August 2004, p5722.

Another reform introduced by the CP Act was to remove the right of individuals to commence a prosecution unless they were authorised by legislation. This was aimed at preventing unnecessary prosecutions by vexatious litigants. Section 80(2) of the CP Act sets out that only ‘authorised officers’ may now commence summary prosecutions in the Magistrates Court, and these are limited to:

- (a) authorised persons;*
- (b) the Attorney General;*
- (c) the Solicitor General;*
- (d) the State Solicitor;*
- (e) the DPP (or staff);*
- (f) a police officer; or*
- (g) a person appointed under section 182 (by the Governor) in accordance with the terms of their appointment.⁴³*

Finding 12

The commencement of the *Criminal Procedure Act 2004* limited the ability to conduct prosecutions in the State to those ‘authorised officers’ listed in section 80(2) of the Act.

Then-Commissioner Roberts-Smith submitted to the Archer Review of the CCC Act that the Commission and its officers were able to prosecute as an ‘authorised person’ under the CP Act.⁴⁴ Section 20(1) defines an ‘authorised person’ as:

- (1) In this section, unless the contrary intention appears — authorised person in relation to an offence, means —*
 - (a) if under another written law a person or class of person is authorised to commence a prosecution for the offence, that person or a person of that class; or*
 - (b) in any other case, a person —*
 - (i) who is a public authority or an employee of a public authority; or*

43 AustLII, *Criminal Procedure Act 2004 - Sect 80*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cpa2004188/s80.html. Accessed on 17 October 2016.

44 Ms Gail Archer SC, *Review of the Corruption & Crime Commission Act 2003*, Perth, February 2008 p258.

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*(ii) who is authorised in writing by a public authority to commence a prosecution for the offence.*⁴⁵

Finding 13

Then-Commissioner, Hon Len Roberts-Smith RFD, QC, submitted to the Archer Review of the *Corruption and Crime Commission Act 2003* that the Commission and its officers were able to prosecute as an ‘authorised person’ as defined by section 20(1) of the *Criminal Procedure Act 2004*.

Section 182 of the CP Act allows for the appointment of other agencies, including interstate ones, to be appointed as an ‘authorised person’ to prosecute offences in WA:

(1) The Governor may appoint a person who is not otherwise authorised under this Act to do so, including an officer of another jurisdiction in Australia, to prosecute offences.

(2) Such an appointment may be made subject to any terms the Governor thinks fit including restrictions as to which offences or classes of offences it applies and as to the circumstances in which the power to prosecute may be exercised.

(3) The Governor’s power in subsection (1) may be exercised in relation to any offence and despite any enactment that limits who may commence or conduct a prosecution for the offence.

(4) Any such appointment must be in writing and must specify any such terms.

*(5) In the absence of evidence to the contrary, a court must presume that a person appointed under subsection (1) is acting in accordance with any terms applicable to it.*⁴⁶

In its submission to this Inquiry, the Commission said that this section of the Act was introduced to allow interstate agencies to prosecute offences, and that in 2015 the Governor appointed Australian Federal Police officers who were living and working in WA as ‘authorised people’ to initiate prosecutions.⁴⁷

45 AustLII, *Criminal Procedure Act 2004 - Sect 20*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cpa2004188/s20.html. Accessed on 17 October 2016.

46 AustLII, *Criminal Procedure Act 2004 - Sect 182*, nd. Available at: www.austlii.edu.au/cgi-bin/sinodisp/au/legis/wa/consol_act/cpa2004188/s182.html. Accessed on 28 October 2016.

47 Submission No. 18 from Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, 16 September 2016, p7.

The Commission also said in its submission that then-Commissioner Roberts-Smith drafted a letter to the then-Attorney General, Hon Jim McGinty MLA, on 3 July 2007 seeking that he recommend to the Governor that the CCC be appointed to prosecute under section 182(1) of the CP Act “in respect of any offence against a law of the State of Western Australia.”⁴⁸ The Commission is unsure whether the letter was sent or not, but the Commission has not been so appointed.⁴⁹

Finding 14

The Corruption and Crime Commission has not been appointed under section 182(1) of the *Criminal Procedure Act 2004* as an ‘authorised person’ to conduct prosecutions.

Commission’s opinions and advice on its power to prosecute

In its response to a question taken on notice at a closed hearing on 19 October 2016, the Commissioner provided a listing of 14 opinions or advice and statements since 1999 in regard to the Anti-Corruption Commission and the CCC’s legal position to charge and prosecute (see Appendix 9). The Commission waived any legal professional privilege or confidentiality which might otherwise attach to this information to assist the Committee’s inquiry.⁵⁰

Of the 14 opinions, only three seem to raise doubts as to whether the Commission had the power to charge and prosecute. Those who supported the view that the Commission **did** have these powers include the then-State Solicitor, the then-Commissioner and the then-PICCC.

Finding 15

After the commencement of the *Criminal Procedure Act 2004*, the Corruption and Crime Commission sought and received legal advice on 14 occasions regarding its power to prosecute.

Finding 16

Prior to the Court of Appeal decision in *A -v- Maughan* 2016 [WASCA] 128, the Corruption and Crime Commission was satisfied that it had the power to charge and prosecute matters in the Magistrates Court.

48 Ibid.

49 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 18 October 2016.

50 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 31 October 2016.

Chapter 2

The power to prosecute held by other Western Australian agencies

It is respectfully noted that quite a number of government departments or instrumentalities have that power [to prosecute], for example, the Department of Commerce, the Department of Fisheries and the Department of Minerals and Energy. Their power to prosecute of course is perhaps reflective of expertise in a particular area. Hon John McKechnie QC, Commissioner, Corruption and Crime Commission.

Introduction

WA Police have long had the power to investigate crimes, charge offenders, and then prosecute them in summary cases in the State's Magistrates Court. In recent evidence to the Committee on the impact of the decision in *A -v- Maughan*, the PICCC said:

That has been the process ever since I was in knee-high pants just coming out of law school. The independence of the oversight process was handled in those days, and is still, by a separate organisation or [prosecution] unit within the police force.⁵¹

Australia and New Zealand are the only common law countries where police are given the power to conduct summary prosecutions. Over the past 30 years in Australia, four Royal Commissions of Inquiry, three Commissions of Inquiry, and other government-appointed Reports have all strongly recommended that the power of the police to conduct summary prosecutions should be abolished and this responsibility should be transferred to a separate prosecution agency.⁵²

In December 1997, then-DPP, Mr John McKechnie QC, and then-Police Commissioner, Robert Falconer, forwarded a joint submission to the Government proposing the transfer of the conduct of summary prosecutions from the Police to the DPP. In April 1999 the Cabinet accepted the report of a Working Party consisting of the DPP and the Commissioner of Police, and Chaired by Dr Ken Michael. It supported in principle the

51 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, Transcript of Evidence, 21 September 2016, p11.

52 Dr Chris Corns, 'Police Summary Prosecutions: The Past, Present and Future', Paper presented at the *History of Crime, Policing and Punishment Conference*, Canberra, 9-10 December 1999.

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transfer to the DPP of summary prosecutions, but postponed the implementation to a later date.⁵³

In July 2016, the CCC Commissioner, Hon John McKechnie, QC, wrote to the Committee about the implications for the CCC of the Court of Appeal decision in *A -v- Maughan*. The Commissioner said, while there were differing views as to whether the Commission should have the power to conduct prosecutions:

*It is respectfully noted that quite a number of government departments or instrumentalities have that power, for example, the Department of Commerce, the Department of Fisheries and the Department of Minerals and Energy [sic]. Their power to prosecute of course is perhaps reflective of expertise in a particular area. Having regard to the definition of serious misconduct in the Corruption, Crime and Misconduct Act, the Commission's jurisdiction is more general.*⁵⁴

This chapter reviews the relevant legislation for these three departments to confirm whether there is an express head of power in them for the agencies to initiate prosecutions. It concludes by detailing two other agencies that have such a power under the CP Act.

Department of Fisheries

The Department of Fisheries web site says that “the principal but not the only Act regulating the management of, and utilisation and conservation of fish (which includes all aquatic organisms except reptiles, birds, mammals, amphibians) and their habitat in WA is the *Fish Resources Management Act 1994* (FRMA).” Other Acts the Department has responsibility for, relating to the management of the utilisation and conservation of fish and their habitat, include the *Pearling Act 1990*, *Fisheries Adjustment Schemes Act 1987*, *Fishing Industry Training Promotion and Management Levy Act 1994* and *Fishing and Related Industries Compensation (Marine Reserves) Act 1997*.⁵⁵

53 Ibid, p16.

54 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 18 July 2016.

55 Department of Fisheries, *Western Australian Fisheries legislation*, 25 July 2012. Available at: www.fish.wa.gov.au/About-Us/Legislation/Western_Australian_Fisheries_Legislation/Pages/default.aspx. Accessed on 17 October 2016.

Fish Resources Management Act 1994

Part 17, Division 1, of the FRMA outlines the Department's power to prosecute, which is granted to the Department's Chief Executive Officer (CEO), a police officer, a fisheries officer or any other person authorised in writing to do so by the CEO.⁵⁶

Pearling Act 1990

Similarly, Part 8 of the *Pearling Act 1990* gives the Department's power to prosecute to the CEO or any person authorised to do so by the CEO.⁵⁷

There seems to be no power for the Department of Fisheries to initiate a prosecution under the other Acts it administers.

Department of Mines and Petroleum

The Department of Mines and Petroleum administers 21 Acts and 33 regulations.⁵⁸ The Department has the power to prosecute within four of these Acts.

Dangerous Goods Safety Act 2004

Section 7 allows a prosecution for an offence under the *Dangerous Goods Safety Act 2004* to be commenced by the Chief Officer, or a person authorised to do so by the Chief Officer.⁵⁹

Mines Safety and Inspection Act 1994

Section 96(1) allows proceedings for an offence under the *Mines Safety and Inspection Act 1994* to be instituted and conducted "by an inspector or by some member of the Public Service authorised in writing for the purpose by the Minister." Section 96(A)(1) requires any such prosecutions to be heard and determined by a safety and health magistrate.⁶⁰

Coal Industry Tribunal of Western Australia Act 1992

Part 4, section 26(5) of the *Coal Industry Tribunal of Western Australia Act 1992* gives the power to prosecute someone who has not complied with a summons to appear at a

56 AustLII, *Fish Resources Management Act 1994*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/frma1994256/s201.html . Accessed on 17 October 2016.

57 AustLII, *Pearling Act 1990*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/pa199095/s52.html. Accessed on 17 October 2016.

58 Department of Mines and Petroleum, *Legislation administered by DMP*, nd. Available at: www.dmp.wa.gov.au/About-Us-Careers/Legislations-14186.aspx. Accessed on 17 October 2016.

59 AustLII, *Dangerous Goods Safety Act 2004*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/dgsa2004241/s57.html. Accessed on 17 October 2016.

60 AustLII, *Mines Safety and Inspection Act 1994*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/msaia1994276/. Accessed on 17 October 2016.

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hearing before the Tribunal, a board of investigation or the local board of reference, to any person “duly authorised by the chairperson of the Tribunal.”⁶¹

Coal Miners’ Welfare Act 1947

Part VI of the *Coal Miners’ Welfare Act 1947* provides a power to the Coal Miners’ Welfare Board of WA to institute legal proceedings.⁶²

Department of Commerce

The Department of Commerce administers 80 Acts of Parliament.⁶³ The following nine Acts give the Department power to commence legal proceedings.

Architects Act 2004

Section 75 of the *Architects Act 2004* states that “proceedings for an offence under this Act, and any civil proceedings in which the Board is a party, may be taken in the name of the Board by the registrar or any other person authorised in that behalf by the Board.”⁶⁴

Building Act 2011

Section 133 establishes the process for commencing prosecutions under the *Building Act 2011*:

PART 12 -- Legal proceedings

Division 1 -- General provisions about legal proceedings

133. Prosecutions

(1) A prosecution for an offence against this Act may be commenced by, and only by —

(a) a permit authority or a person authorised to do so by a permit authority; or

61 AustLII, *Coal Industry Tribunal of Western Australia Act 1992*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/citowaa1992468/s26.html. Accessed on 17 October 2016.

62 AustLII, *Coal Miners’ Welfare Act 1947*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cmwa1947183/index.html. Accessed on 17 October 2016.

63 Department of Commerce, *Our legislation*, 29 May 2014. Available at: www.commerce.wa.gov.au/corporate/our-legislation. Accessed on 17 October 2016.

64 AustLII, *Architects Act 2004 - Sect 75*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/aa2004117/s75.html. Accessed on 18 October 2016.

(b) a local government or a person authorised to do so by a local government. ...

(3) Subsection (1) does not limit the functions of the Director of Public Prosecutions under the Director of Public Prosecutions Act 1991 section 11. ...

(5) All prosecutions for offences against this Act are to be heard in a court of summary jurisdiction constituted by a magistrate.⁶⁵

Building Services (Complaint Resolution and Administration) Act 2011

Section 106 of the *Building Services (Complaint Resolution and Administration) Act 2011* establishes that prosecutions can only be commenced by “the Building Commissioner or a person authorised to do so by the Building Commissioner.”⁶⁶

Building Services (Registration) Act 2011 and Home Building Contracts Act 1991

The Building Commissioner, or a person authorised to do so by the Building Commissioner, is also given the power to prosecute in section 102 of the *Building Services (Registration) Act 2011*⁶⁷ and section 31 of the *Home Building Contracts Act 1991*.⁶⁸

Fair Trading Act 2010

Section 92 of the *Fair Trading Act 2010* allows prosecutions for offences against the Act to be instituted by the Commissioner for Consumer Protection, or by a person authorised in writing by the Commissioner.⁶⁹

Industrial Relations Act 1979

Section 104 of the *Industrial Relations Act 1979* provides four ways in which prosecutions can be commenced under the Act:

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- 65 AustLII, *Building Act 2011 - Sect 133*, nd. Available at: www.austlii.edu.au/au/legis/wa/num_act/ba201124o2011137/s133.html. Accessed on 18 October 2016.
- 66 AustLII, *Building Services (Complaint Resolution and Administration) Act 2011 - Sect 106*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/bsraaa2011583/s106.html. Accessed on 18 October 2016.
- 67 AustLII, *Building Services (Registration) Act 2011 - Sect 102*, nd. Available at: www.austlii.edu.au/au/legis/wa/num_act/bsa201119o2011372/s102.html. Accessed on 18 October 2016.
- 68 AustLII, *Home Building Contracts Act 1991 - Sect 31*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/hbca1991232/s31.html. Accessed on 18 October 2016.
- 69 AustLII, *Fair Trading Act 2010 - Sect 92*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/fta2010117/s92.html. Accessed on 18 October 2016.

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(1) A person authorised by the Minister to prosecute offences under this Act of a particular kind may commence and conduct a prosecution for an offence of that kind. ...

(3) An industrial inspector may, of his own motion, commence and conduct a prosecution for an offence under this Act.

(4) The Registrar or a deputy registrar may, of his own motion, and shall, if he is directed under this Act to do so, commence and conduct a prosecution for an offence under this Act.

(5) A person not referred to in subsection (1), (3) or (4) may commence a prosecution for an offence under this Act but the charge must be dismissed for want of prosecution unless the court is satisfied that the prosecutor has been affected by the conduct giving rise to the offence.⁷⁰

Retail Trading Hours Act 1987

Section 37 of the *Retail Trading Hours Act 1987* states that “[p]roceedings for an offence against this Act shall not be commenced without the consent in writing of the chief executive officer.”⁷¹

Long Service Leave Act 1958

Section 12 of the *Long Service Leave Act 1958* provides power to industrial inspectors to institute proceedings under section 11 of the Act in an industrial magistrate’s court.⁷²

Occupational Safety and Health Act 1984

Section 52 of the *Occupational Safety and Health Act 1984* provides the power for the commencement of prosecutions to “any person authorised in that behalf by the Commissioner.”⁷³

70 AustLII, *Industrial Relations Act 1979 - Sect 104*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/ira1979242/s104.html. Accessed on 18 October 2016.

71 AustLII, *Retail Trading Hours Act 1987 - Sect 37*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/rtha1987222/s37.html. Accessed on 18 October 2016.

72 AustLII, *Long Service Leave Act 1958 - Sect 12*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/lsla1958179/s12.html. Accessed on 18 October 2016.

73 AustLII, *Occupational Safety and Health Act 1984 - Sect 52*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/osaha1984273/s52.html. Accessed on 18 October 2016.

Finding 17

The Department of Fisheries, the Department of Mines and Petroleum and the Department of Commerce all have Acts they administer that expressly allow certain authorised persons to commence prosecutions.

Agencies empowered to prosecute under the *Criminal Procedure Act 2004*

Regulation 7A for the CP Act was published in the *Western Australian Government Gazette* in April 2009 and now allows the Department of Child Protection and the Public Transport Authority to appoint ‘authorised investigators’⁷⁴ under section 18(c) of the CP Act, who can commence prosecutions under section 21(3)(b) of the Act:

(3) A prosecution is commenced — ...

*(b) in the case of a prosecution notice signed under section 23 by an authorised investigator alone — on the day on which the notice is lodged with the court in which the prosecution is being commenced, whether or not the notice has been served on the accused.*⁷⁵

Section 18 of the CP Act defines ‘authorised investigators’ as those listed in section 80(2) (eg the Attorney General and DPP) of the Act and:

...(c) an officer of a prescribed public authority who is authorised by the public authority, or under a written law, to commence prosecutions; or

*(d) a person appointed under section 182 to prosecute offences who is acting in accordance with the terms of the appointment.*⁷⁶

Finding 18

Regulations for the *Criminal Procedure Act 2004* allow authorised investigators in the Department of Child Protection and the Public Transport Authority to commence summary prosecutions.

74 Submission No. 18 from Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, 16 September 2016, p6.

75 AustLII, *Criminal Procedure Act 2004 - Sect 21*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cpa2004188/s21.html. Accessed on 17 October 2016.

76 AustLII, *Criminal Procedure Act 2004 - Sect 18*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cpa2004188/s18.html. Accessed on 17 October 2016.

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Prosecution procedures for anti-corruption agencies in other jurisdictions

The scheme of the CCC Act, under which the Commission's powers and functions include the receipt of allegations of misconduct, the investigation of such allegations...and reporting upon the outcome ... including by referring the matters investigated to an appropriate authority is entirely consistent with the legislation establishing analogous bodies in other jurisdictions.

A -v- MAUGHAN [2016] WASCA 128 at [133].

Introduction

An examination of interstate and Commonwealth integrity agencies reveals that most of these agencies have powers to refer matters arising from investigations to a relevant prosecutorial agency. None have the express power to prosecute in their own unfettered right, other than the Independent Broad-based Anti-corruption Commission in Victoria.

The Committee sought and received submissions from a number of interstate agencies which are detailed below. This chapter also looks at the situation for several overseas integrity agencies that the Committee has received briefings from.

NSW- Independent Commission Against Corruption

The Independent Commission Against Corruption (ICAC) in NSW provided a submission in which they explain that its primary function is to investigate and expose corrupt conduct other than in the NSW Police force, with the gathering of admissible evidence for the prosecution of criminal offences a secondary function.⁷⁷

The *Independent Commission Against Corruption Act 1989*⁷⁸ does not grant ICAC the express power to commence prosecutions; this power is granted under the NSW *Criminal Procedure Act 1986*. An officer of ICAC, acting as a 'public officer', has power to commence proceedings but these are limited to circumstances where the NSW Director of Public Prosecution (NSWDPP) has provided written advice to ICAC that such

77 Submission No. 7 from Hon Megan Latham, Commissioner, Independent Commission Against Corruption, 6 September 2016.

78 AustLII, *Independent Commission Against Corruption Act 1989*, nd. Available at: www.austlii.edu.au/au/legis/nsw/consol_act/icaca1988442/. Accessed on 28 October 2016.

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proceedings may commence. Once proceedings have been commenced by an ICAC officer they are then taken over at the first hearing and conducted by the NSW DPP.⁷⁹

This arrangement between ICAC and the NSW DPP is covered under a Memorandum of Understanding (MOU) which sets out the responsibilities of the two agencies in relation to the commencement of proceedings. Under the MOU, ICAC is responsible for providing the NSW DPP with briefs of admissible evidence. If the NSW DPP considers there is sufficient admissible evidence to commence proceedings, it will provide the required wording for the Court Attendance Notice (CAN) as well as a statement of facts. If this advice is accepted by ICAC, an ICAC officer commences the proceedings by issuing the CAN. Under the MOU, once a CAN has been issued and the affidavit filed with the relevant court registry, the NSW DPP takes over the prosecution on the first court date.⁸⁰

ICAC's submission makes clear that:

*ICAC's investigative processes are not necessarily concerned with the admissibility of evidence in judicial proceedings. The ICAC's primary function is to investigate and expose corrupt conduct. ... The gathering of admissible evidence for the prosecution of criminal offences is, therefore, a secondary function of the ICAC.*⁸¹

ICAC does not seek the advice of the NSW DPP unless it is satisfied that there is likely to be sufficient admissible evidence to warrant the commencement of a prosecution, with consideration given to the likelihood of being able to obtain further admissible evidence. In addition, ICAC may not seek the opinion of the NSW DPP in circumstances where it considers it better serves the public interest to work cooperatively with a witness to identify and expose corrupt conduct and system weaknesses.⁸²

ICAC says the arrangements are effective in ensuring timely prosecutions:

*The process has proven effective in ensuring there is an objective appraisal of evidence to determine whether there is sufficient admissible evidence to commence a prosecution and that suitably experienced prosecutors from the Office of the Director of Public Prosecutions conduct prosecutions arising from ICAC investigations.*⁸³

79 The power to do so is provided by section 9 of the *Director of Public Prosecutions Act 1986* (NSW). Available at: www.austlii.edu.au/au/legis/nsw/consol_act/doppa1986343/s9.html. Accessed on 28 October 2016.

80 Submission No. 7 from Hon Megan Latham, Commissioner, Independent Commission Against Corruption, 6 September 2016, pp3-4.

81 Ibid, p3.

82 Ibid.

83 Ibid, p1.

ICAC actively monitors the progress in preparing briefs of evidence and the progress of prosecutions through monthly reports to its Investigations Management Group which comprises the Commissioner, Deputy Commissioner and executive directors of the ICAC's Investigation, Corruption Prevention and Legal divisions.⁸⁴

While ICAC's ability to commence criminal proceedings for statutory offences is clear under the *Criminal Procedure Act 1986* (NSW), its position with respect to common law offences was not. This uncertainty was removed in 2015 when a new section 14A of the *Criminal Procedure Act 1986* was inserted to make it clear that ICAC officers could commence proceedings for common law offences, and the decision of the NSW DPP to allow this to proceed was its alone to make:

(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.

The term "offence" was amended to specifically include "a common law offence".⁸⁵

In a briefing with the Committee, Commissioner Latham added that, when a case that had been initiated by ICAC was before the court, there was an ICAC officer, usually the chief investigator of the matter, in court to assist the DPP. The issuing of a CAN by an ICAC officer was similar to the way that NSW Police deliver a CAN for matters that they have initiated and the DPP was handling. On occasion, the DPP would decline to approve a prosecution that had been recommended to be considered by ICAC. The DPP had two stand-alone units within his office to prosecute ICAC matters. With the large ICAC cases, such as the current Obeid matters⁸⁶, the DPP had received additional resources from the NSW Government to fund the prosecutions.

The NSW DPP, Mr Lloyd Babb SC, told the Committee in a briefing that his office handled all prosecutions flowing from investigations by ICAC and the Police Integrity

84 Ibid, p6.

85 Ibid, p4.

86 Ms Michaela Whitbourn and Ms Kate McClymont, 'Eddie Obeid and son Moses charged over \$30 million coal deal', *Sydney Morning Herald*, 19 July 2016. Available at: www.smh.com.au/nsw/eddie-obeid-and-son-moses-charged-over-30-million-coal-deal-20160706-gpzycv.html. Accessed on 1 November 2016.

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Commission, but their matters represented a very small fraction of the matters handled annually by his office.⁸⁷

Finding 19

The NSW Independent Commission Against Corruption has the power to lay charges by preparing a Court Attendance Notice for a defendant, but can only do so with the written approval of the Director of Public Prosecutions that the proceedings may be commenced.

Finding 20

The NSW Director of Public Prosecutions conducts all prosecutions commenced by the Independent Commission Against Corruption, whether summary or indictable.

NSW- Law Enforcement Conduct Commission

In November 2015, the NSW Deputy Premier announced the creation of a new Law Enforcement Conduct Commission (LECC) after adopting recommendations from a review into police oversight by former Shadow Attorney General Andrew Tink AM. Mr Tink had recommended replacing the Police Integrity Commission (PIC) and the Police Division of the Office of the Ombudsman with a single body.⁸⁸ The LECC will also replace the work of the Inspector of the NSW Crime Commission. The legislation to establish the LECC was introduced on 14 September 2016 and the new organisation is to become operational in 2017.⁸⁹

The current Inspector of ICAC and PIC will become the new Inspector of ICAC and LECC. Part 4 of the *Law Enforcement Conduct Commission Bill 2016* (NSW) indicates that the LECC will not be able to prosecute offences, as one of its functions will be “assembling evidence and information that may be used in prosecuting criminal offences or dealing with disciplinary infringements and giving it to appropriate authorities”.⁹⁰

The PIC was established in 1996 on the recommendation of the Royal Commission into the NSW Police Service. It oversees the officers of both the NSW Police Force and the

87 Mr Lloyd Babb SC, Director of Public Prosecutions, NSW Office of the Director of Public Prosecutions, *Briefing*, 4 October 2016.

88 Department of Justice, *New law enforcement watchdog for NSW*, 26 November 2015. Available at: www.justice.nsw.gov.au/Pages/media-news/media-releases/2015/New-law-enforcement-watchdog-for-NSW.aspx. Accessed on 31 October 2016.

89 ABC News, *NSW Government introduces bill for new police watchdog*, 14 September 2016. Available at: www.abc.net.au/news/2016-09-14/police-integrity-proposal-to-replace-three-bodies-with-one/7842698. Accessed on 31 October 2016.

90 Parliament of NSW, *Law Enforcement Conduct Commission Bill 2016*, nd. Available at: www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3331. Accessed on 31 October 2016.

NSW Crime Commission.⁹¹ Section 83 of the *Police Integrity Commission Act 1996* (NSW) allows the PIC to refer a matter to an ‘appropriate authority’ for action. Section 83(5) limits this referral unless there has been “appropriate consultation with the authority and with the concurrence of the authority.”⁹² The PIC is unable to commence or conduct prosecutions.

Finding 21

Neither the NSW Police Integrity Commission nor its intended successor, the Law Enforcement Conduct Commission, has the power to commence or conduct prosecutions.

Finding 22

The NSW Director of Public Prosecutions conducts all prosecutions arising from investigations of the Police Integrity Commission.

Victoria- Independent Broad-based Anti-corruption Commission

Like the CCC, the Independent Broad-based Anti-corruption Commission (IBAC) investigates complaints and notifications of both public sector corruption and police misconduct. It began operations in February 2013 and in 2015-16 it received and assessed about 4,600 allegations.⁹³

Under section 189 of the *Independent Broad-based Anti-corruption Commission Act 2011*⁹⁴ (IBAC Act) IBAC has the power to bring criminal proceedings for offences under the IBAC Act or its Regulations, including for breaching a confidentiality notice, hindering or obstructing IBAC or making a false or misleading statement. Section 190 of the IBAC Act allows IBAC to prosecute for an offence in relation to any matter arising out of its investigations. Proceedings under either of these sections can be brought by IBAC, a sworn IBAC officer, or a police officer if they have been authorised by the IBAC Commissioner.⁹⁵

The IBAC Commissioner, Mr Stephen O’Bryan QC, said that “IBAC has the power to bring criminal proceedings for an offence, make recommendations to the relevant principal officer of a body, a Minister or the Premier, and can refer any matter to the

91 Police Integrity Commission, *Welcome*, nd. Available at: www.pic.nsw.gov.au/. Accessed on 8 November 2016.

92 AustLII, *Police Integrity Commission Act 1996*, nd. Available at: www.austlii.edu.au/au/legis/nsw/consol_act/pica1996312/s83.html. Accessed on 8 November 2016.

93 Independent Broad-based Anti-corruption Commission, *About us*, 2016. Available at: www.ibac.vic.gov.au/about-us. Accessed on 31 October 2016.

94 AustLII, *Independent Broad-based Anti-corruption Commission Act 2011*, nd. Available at: www.austlii.edu.au/au/legis/vic/consol_act/ibaca2011479/. Accessed on 31 October 2016.

95 Ibid.

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Office of Public Prosecutions (OPP) or another entity for consideration of disciplinary or other action.”⁹⁶

Summary offenses are prosecuted in the Magistrates Court, where IBAC lawyers or external counsel will, in most instances, retain carriage of the prosecution. All offences in Part 9, Division 2 and Part 6, Division 2 of the IBAC Act fall within this category. IBAC may request the OPP take over such matters, although the OPP may refuse such a request.⁹⁷

IBAC and the OPP have a written protocol under which it has been agreed that the OPP will “provide advice and prosecution services to IBAC on matters that would be prosecuted on indictment and, in some limited circumstances, summary matters.” The OPP may decline to prosecute where it has previously provided contrary advice to IBAC in relation to the conduct of the prosecution.⁹⁸

IBAC’s first conviction was an outcome from Operation Wyong in July 2014 and resulted in a fine of \$10,000 for attempted bribery.⁹⁹ This prosecution in the Magistrates Court was undertaken by IBAC themselves after the OPP declined to conduct it.¹⁰⁰

The OPP’s power to conduct indictable offences is provided under the *Public Prosecutions Act 1994* (VIC), and the Commissioner described the process:

When IBAC seeks to charge a person with an indictable ... offence, a hand-up brief is prepared and delivered to the OPP. Advice is then provided as to the appropriateness of the charges and sufficiency of evidence. In the event the OPP advises that IBAC should proceed, IBAC will draft and file the charges and arrange for the matter to be listed at the appropriate venue. IBAC is responsible for producing the brief of evidence and bearing the costs of same. IBAC must serve the brief and deliver a copy to the Court in accordance with the rules as set out in

96 Submission No. 8 from Mr Stephen O’Byrne QC, Commissioner, Independent Broad-based Anti-corruption Commission, 6 September 2016, p1.

97 Ibid, pp5-6.

98 Ibid.

99 Mr Cameron Houston, *The Age*, ‘Point Cook real estate agent the first to be charged under corruption watchdog’, 21 July 2014. Available at: www.theage.com.au/victoria/point-cook-real-estate-agent-the-first-to-be-charged-under-corruption-watchdog-20140720-zv0um.html.

Accessed on 31 October 2016.

100 Ms Joanna Austin, Principal Lawyer, Independent Broad-based Anti-corruption Commission, *Briefing*, 7 October 2016.

*the Criminal Procedure Act 2009 and within 5 days of service, provide two hard copies to the OPP.*¹⁰¹

The OPP then conducts the matter from the First Hearing until the decision. The protocol between IBAC and the OPP provides that IBAC remains responsible for a range of tasks, even where the OPP conducts summary matters and in all indictable matters, as follows:

- *Preparation of witness summonses*
- *Providing conduct money for witnesses*
- *Serving all summonses*
- *Any costs associated with service of summonses*
- *Provision of a witness list to the OPP that is updated as required*
- *Service of all subpoenas issued by the OPP*
- *Completing affidavits of service*
- *Meeting any costs associated with service of subpoenas*
- *Contacting the witnesses throughout the prosecution and advising them of when and where to give evidence*
- *Managing arguments and representation in relation to subpoenas, save for where relevance is the only issue to be argued.*¹⁰²

Dr John Lynch PSM, IBAC's General Counsel, told the Committee of the agency's need for a good relationship with the OPP. The protocol between IBAC and the OPP was signed in 2013. During investigations, IBAC can request that the OPP provide advice in relation to proposed charges and the sufficiency of evidence. The protocol also allows IBAC to refer confiscation matters to the OPP's Proceeds of Crime Directorate. During investigations into Operation Ord, the OPP based one of their confiscation lawyers at IBAC's offices which resulted in property being restrained under the *Confiscation Act*

101 Submission No. 8 from Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, 6 September 2016, p6.

102 Ibid, p7.

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1997 (Vic). In assisting IBAC develop a 'hand up' brief for charges, there are occasions that IBAC seeks advice from the OPP.¹⁰³

Finding 23

Notwithstanding its express statutory power to prosecute, the Independent Broad-based Anti-corruption Commission (IBAC) has a protocol with the Victorian Office of Public Prosecutions (OPP) that provides for the OPP to handle all indictable matters and also prosecute some summary matters flowing from IBAC investigations.

Queensland- Crime and Corruption Commission

The Queensland Crime and Corruption Commission's (QCCC) statutory corruption functions and powers are broadly similar to those of the CCC's. QCCC provided a submission to the inquiry where they report that its power to prosecute its own charges are "very limited". The QCCC's Chairperson, Mr Alan MacSporran QC, states that "criminal charges and disciplinary matters in respect of corrupt conduct, police misconduct or misconduct are prosecuted independently of the Qld CCC."¹⁰⁴

Under the *Crime and Corruption Act 2001* (QLD) the QCCC is responsible for:

- dealing with complaints about, or information or matters involving, corrupt conduct; and
- monitoring how the Commissioner of Police deals with police misconduct.¹⁰⁵

In explaining the QCCC's prosecution powers, the Chairperson, Mr Alan MacSporran QC said:

In respect of its corruption function, the Qld CCC may take disciplinary action for 'corrupt conduct' in the Queensland Civil and Administrative Tribunal. Otherwise, the Qld CCC is not empowered to prosecute any public official for a criminal offence; or to take disciplinary action against a public official on any grounds.

Where sufficient evidence exists, criminal offences arising from corruption investigations are prosecuted by the Queensland Director of Public Prosecutions, or another prosecuting authority.

103 Dr John Lynch PSM, General Counsel, Independent Broad-based Anti-corruption Commission, *Briefing*, 7 October 2016.

104 Submission No. 14 from Mr Alan MacSporran QC, Chairperson, Crime and Corruption Commission, 15 September 2016, p2.

105 AustLII, *Crime and Corruption Act 2001*, nd. Available at: www.austlii.edu.au/au/legis/qld/consol_act/caca2001219/. Accessed on 28 October 2016.

*Similarly, disciplinary actions for 'police misconduct', or 'misconduct', are taken against Queensland police officers, or other public officials, by the Queensland Police Commissioner or the chief executive officers of the other agencies...*¹⁰⁶

The QCCC Chairperson said that he considers separating the power to investigate and the power to prosecute "is important in maintaining public confidence in the Qld CCC and the prosecuting authorities."¹⁰⁷

Finding 24

Criminal charges arising from investigations undertaken by the Queensland Crime and Corruption Commission are prosecuted by either the Commissioner of Police or the Director of Public Prosecutions.

South Australia- Independent Commissioner Against Corruption

The South Australian Independent Commissioner Against Corruption (SAICAC) operates under the *Independent Commissioner Against Corruption Act 2012* (SA).¹⁰⁸ SAICAC has the power to arrest people without a warrant for obstruction, with obstruction being described as actions such as refusing or failing to provide a statement to SAICAC, providing a false statement, and hindering or obstructing an investigator.¹⁰⁹ Circumstances that allow for an immediate arrest under section 33(2) of the SAICAC Act include:

(a) when required to do so by an investigator the person failed to state truthfully his or her personal details or to produce true evidence of those details; or

(b) the investigator has reasonable grounds for believing that the person would, if not arrested-

(i) fail to attend court in answer to a summons issued in respect of the

offence; or

(ii) continue the offence or repeat the offence; or

106 Submission No. 14 from Mr Alan MacSporran QC, Chairperson, Crime and Corruption Commission, 15 September 2016, p2.

107 Ibid.

108 AustLII, *Independent Commissioner Against Corruption Act 2012*, nd. Available at: www.austlii.edu.au/au/legis/sa/consol_act/icaca2012463/. Accessed on 28 October 2016.

109 Submission No. 9 from Hon Bruce Lander QC, Commissioner, Independent Commission Against Corruption, 31 August 2016, p1.

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(iii) alter, destroy, conceal or fabricate evidence relating to the offence; or

(iv) intimidate, harass, threaten or interfere with a person who may provide or produce evidence of the offence.¹¹⁰

According to Commissioner Lander QC, the SAICAC Act specifies:

On arresting a person under this section [S 33], the investigator must immediately deliver the person, or cause the person to be delivered, into the custody of a police officer (and the person will, for the purposes of any other law, then be taken to have been apprehended by the police officer without warrant).¹¹¹

The SAICAC Act provides for police officers seconded to SAICAC to continue to hold powers and authorities granted to them under the *Police Act 1988* (SA). This has the effect that a seconded police officer can arrest a person for a substantive offence in addition to the offence of obstruction.¹¹²

The SAICAC Commissioner says that he has no power to prosecute any person who is arrested for an offence that constitutes corruption:

The Commissioner's function is to provide the evidence that has been obtained in the investigation either to a law enforcement agency for investigation and prosecution, or to the Director of Public Prosecutions for prosecution.¹¹³

The Commission's functions are discharged once the matter is referred to the SADPP. Commissioner Lander explains that, although the ICAC Act contemplates that the Commissioner could refer a matter for prosecution for a summary offence to the South Australian Police, as a matter of practice and by agreement with the SADPP, all matters for prosecution are referred to the SADPP. SAICAC has a protocol with the SADPP in which once an offence against the SAICAC Act is identified, then the SADPP will decide whether a prosecution should be launched.¹¹⁴

The SAICAC Commissioner has no power to prosecute anyone for an offence under the SAICAC Act. Commissioner Lander QC said that:

...an investigation into offences of that kind will generally be made by SAPOL [SA Police] and must be made by SAPOL if the person of interest

¹¹⁰ Ibid, pp1-2.

¹¹¹ Ibid, p2.

¹¹² Ibid.

¹¹³ Ibid, p3.

¹¹⁴ Ibid, p4.

*is not a public officer. If the person is a public officer and the offence occurred whilst the public officer was carrying out his or her public duties the Commissioner could investigate the conduct. But as I say, generally, SAPOL would investigate the matter.*¹¹⁵

Commissioner Lander supports the model adopted in South Australia:

*I think it is appropriate that the investigator (the Commissioner) is not empowered to prosecute [those] who have been investigated. The requirement to provide the evidence to a law enforcement agency or the DPP provides the necessary detachment from the investigation process before a prosecution is launched.*¹¹⁶

Finding 25

All South Australian Independent Commission Against Corruption prosecutions, both summary and indictable, and including against its own Act, are referred for prosecution to the Director of Public Prosecutions.

Australian Commission for Law Enforcement Integrity

The Australian Commission for Law Enforcement Integrity (ACLEI) was established by the *Law Enforcement Integrity Commissioner Act 2006* (Cth)¹¹⁷ (LEIC Act), to oversight a number of Commonwealth agencies which, due to their functions and roles, puts them at increased risk of criminal infiltration or corruption. These agencies include the Australian Federal Police, the Australian Criminal Intelligence Commission, the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Department of Immigration and Border Protection, as well as prescribed parts of the Department of Agriculture and Water Resources.¹¹⁸

The LEIC Act confers a range of functions on the Integrity Commissioner – including notices to produce information and hold coercive information-gathering hearings – but does not confer any powers on him or ACLEI to charge or prosecute offences, including offences arising from the LEIC Act.¹¹⁹

Integrity Commissioner Michael Griffin AM says that due to the functions and roles of the agencies under their jurisdiction, ACLEI's investigation activities often culminate in criminal charges being laid. The ACLEI submission provides information on the process

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ AustLII, *Law Enforcement Integrity Commissioner Act 2006*, nd. Available at: www.austlii.edu.au/au/legis/cth/consol_act/leica2006419/. Accessed on 28 October 2016.

¹¹⁸ Submission No. 19 from Mr Michael Griffin AM, Integrity Commissioner, Australian Commission for Law Enforcement Integrity, 16 September 2016, p1.

¹¹⁹ Ibid.

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followed when admissible evidence is obtained as a result of its investigations.¹²⁰ The LEIC Act stipulates that the Integrity Commissioner must assemble the evidence and give it to the Commissioner of the Australian Federal Police or another authority that has been authorised under a law of the Commonwealth.¹²¹

In accordance with section 142(1) of the LEIC Act, ACLEI refers briefs of evidence to the Commonwealth Director of Public Prosecutions (CDPP). In accordance with the *Director of Public Prosecutions Act 1983* (Cth), and guided by the *Prosecution Policy of the Commonwealth*, decisions to prosecute in relation to ACLEI investigations are made by the CDPP.¹²²

Finding 26

All Australian Commission for Law Enforcement Integrity prosecutions, both summary and indictable, and including against its own Act, are referred for prosecution to the Commonwealth Director of Public Prosecutions.

Tasmania- Integrity Commission

The Tasmanian Integrity Commission (IC) was established in October 2010 and works to improve the standard of conduct, propriety and ethics in Tasmania's public sector.¹²³ Any person can make a complaint to the IC about public sector misconduct, including serious misconduct by police officers. Complaints about police can also be made to Tasmania Police or the Ombudsman.¹²⁴

The IC operates under the *Integrity Commission Act 2009* (Tas)¹²⁵ and does not have the power to prosecute in its own right. Under section 8 of that Act, the Commission instead refers matters to the Commissioner of Police, the Director of Public Prosecutions or another person that the Integrity Commission considers appropriate for action.¹²⁶

Finding 27

The Tasmanian Integrity Commission has no power to prosecute and instead refers matters for prosecution to the Commissioner of Police, the Director of Public Prosecutions or other agencies that it considers appropriate for action.

120 Ibid.

121 Ibid, p2.

122 Ibid.

123 Integrity Commission, *About the Commission*, 2 March 2016. Available at:

www.integrity.tas.gov.au/about_the_commission. Accessed on 28 October 2016.

124 Tasmania Police, *Compliments and Complaints*, 2016. Available at: www.police.tas.gov.au/about-us/compliments-and-complaints/. Accessed on 28 October 2016.

125 AustLII, *Integrity Commission Act 2009*, nd. Available at:

www.austlii.edu.au/au/legis/tas/num_act/ica200967o2009304/. Accessed on 28 October 2016.

126 Ibid.

United Kingdom- Independent Police Complaints Commission

The Independent Police Complaints Commission (IPCC) was established in April 2004 and oversees the police complaints system in England and Wales. It makes its decisions entirely independently of the police and the British Government. In addition, English and Welsh police forces must refer to the IPCC the most serious cases (such as those involving a death) – whether or not a complaint has been made. The IPCC is also responsible for dealing with serious complaints and conduct matters relating to staff at the National Crime Agency, Her Majesty’s Revenue and Customs and the Home Office immigration and enforcement staff.¹²⁷

The establishment and functions of the IPCC are set out in section 9 of the *Police Reform Act 2002*. IPCC investigators undertaking an investigation have all the powers and privileges of a police constable.¹²⁸ The effect of this is that IPCC investigators can arrest and charge a person but the IPCC has no capacity to prosecute. Instead, the IPCC submits a file of evidence from their investigations to the Crown Prosecution Service (CPS) for possible prosecution. The Casework Directorate of the CPS have developed a protocol concerning the co-operation and exchange of services and information between it and the IPCC. Section 2 of the protocol seeks to identify those cases that would benefit from early consultation by the IPCC with, or formal submission to, the CPS Casework Directorate for advice. The CPS has three offices in York, Birmingham and London which cover the 43 police forces overseen by the IPCC.¹²⁹

Finding 28

The Independent Police Complaints Commission in the United Kingdom can arrest and charge a person but has no capacity to prosecute. Instead, it submits a file of evidence from their investigations to the Crown Prosecution Service for possible prosecution.

Republic of Ireland- Garda Síochána Ombudsman Commission

The Committee met with Commissioners of the Garda Síochána Ombudsman Commission (GSOC) on 4 November 2014 to be briefed on issues that it was investigating for its *Inquiry into improving the working relationship between the Corruption and Crime Commission and the Western Australia Police* and the original *Inquiry into the Corruption and Crime Commission being able to prosecute its own charges*.

127 Independent Police Complaints Commission, *About us*, nd. Available at: www.ipcc.gov.uk/page/about-us. Accessed on 24 October 2016.

128 *Police Reform Act 2002*, nd. Available at: www.legislation.gov.uk/ukpga/2002/30/part/2/crossheading/the-independent-police-complaints-commission. Accessed on 24 October 2016.

129 Crown Prosecution Service, *Protocol Between The Crown Prosecution Service Casework Directorate And The Independent Police Complaints Commission*, nd. Available at: www.cps.gov.uk/publications/agencies/ippc.html. Accessed on 24 October 2016.

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GSOC is an independent statutory body, established under the *Garda Síochána Act 2005*¹³⁰ and began operations in 2007. Its mission is to provide the efficient, fair and independent oversight of the Garda Síochána (police) in the Republic of Ireland and it replaced the previous Garda Síochána Complaints Board.¹³¹

Commissioner Carmel Foley told the Committee that the Irish Director of Public Prosecutions was the sole determiner of whether charges would be laid against an officer investigated by GSOC. Section 101 of the Garda Síochána Act provides:

(2) If the Ombudsman Commission, after considering the designated officer's report, is of the opinion that the conduct under investigation may constitute an offence by the member of the Garda Síochána concerned, it shall—

*(a) send a copy of the report and of the investigation file to the Director of Public Prosecutions together with any recommendations that appear to the Commission to be appropriate...*¹³²

The DPP assesses the evidence developed by GSOC to determine whether or not a prosecution is warranted. If a prosecution proceeds, then the DPP brings the matter to court and GSOC staff provide evidence. If the DPP was not willing to lay charges and prosecute, GSOC can request a review of the decision, or use the evidence gathered to pursue disciplinary actions against a police officer.¹³³ During 2015, GSOC investigated 1,267 complaints (containing 3,528 allegations) of which 19 matters (relating to 68 allegations) were sent to the DPP for assessment as to whether a charge will be laid. Two matters were prosecuted.¹³⁴

Finding 29

The Garda Síochána Ombudsman Commission does not have a power to commence or conduct prosecutions but provides its reports, investigation files and recommendations to the Irish Director of Public Prosecutions for the consideration of laying charges.

130 Government of Ireland, *Garda Síochána Act 2005*, nd. Available at: www.irishstatutebook.ie/eli/2005/act/20/enacted/en/html. Accessed on 24 October 2016.

131 Garda Síochána Ombudsman Commission, *About GSOC*, 2015. Available at: www.gardaombudsman.ie/about/about.html. Accessed on 24 October 2016.

132 Government of Ireland, *Garda Síochána Act 2005*, nd. Available at: www.irishstatutebook.ie/eli/2005/act/20/enacted/en/html. Accessed on 24 October 2016.

133 Ms Carmel Foley, Commissioner, Garda Síochána Ombudsman Commission, *Briefing*, 4 November 2014.

134 Garda Síochána Ombudsman Commission, *2015 Annual Report*, 31 March 2016, p48. Available at: www.gardaombudsman.ie/docs/publications/AnnualReports/GSOC_AnnualReport_2015.pdf. Accessed on 24 October 2016.

Northern Ireland- Police Ombudsman for Northern Ireland

The Committee met with the Police Ombudsman for Northern Ireland (PONI), Dr Michael Maguire, on 5 November 2014. The PONI does not have its own legislation but is governed by 15 Acts.¹³⁵

In a similar process to that used in the Republic of Ireland, the PONI provide a file of evidence on a matter involving an officer of the Police Service of Northern Ireland to the Public Prosecution Service (PPS), an independent prosecutorial body, to decide if charges should be laid and prosecuted. If the PPS decides not to proceed with charges, PONI may consider using the evidence to pursue disciplinary actions against the officer.¹³⁶

Section 13 of the *Police (Northern Ireland) Act 2003* requires the PONI to report on an investigation to the Chief Constable and the Northern Ireland Policing Board when it has been completed.¹³⁷

Finding 30

The Police Ombudsman for Northern Ireland does not have a power to commence or conduct prosecutions but provides a file of evidence on a matter involving an officer of the Police Service of Northern Ireland to the independent Public Prosecution Service for it to consider the laying of charges.

New Zealand- Independent Police Conduct Authority

New Zealand does not have an overarching anti-corruption body. The Independent Police Conduct Authority (IPCA) is charged with investigating complaints only against New Zealand Police. The IPCA operates under the *Independent Police Conduct Authority Act 1988* (NZ).¹³⁸ Section 12 of this Act describes IPCA's functions:

(a) to receive complaints—

(i) alleging any misconduct or neglect of duty by any Police employee; or

135 Police Ombudsman for Northern Ireland, *Legislation*, nd. Available at:

www.policeombudsman.org/About-Us/Legislation. Accessed on 24 October 2016.

136 Dr Michael Maguire, Ombudsman, Police Ombudsman for Northern Ireland, *Briefing*, 5 November 2014.

137 *Police (Northern Ireland) Act 2003*, nd. Available at:

www.legislation.gov.uk/ukpga/2003/6/section/13. Accessed on 24 October 2016.

138 Parliamentary Counsel Office (NZ), *Independent Police Conduct Authority Act 1988*, nd. Available at: www.legislation.govt.nz/act/public/1988/0002/latest/DLM126222.html. Accessed on 28 October 2016.

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(ii) concerning any practice, policy, or procedure of the Police affecting the person or body of persons making the complaint in a personal capacity;

(b) to investigate of its own motion, where it is satisfied that there are reasonable grounds to carry out an investigation in the public interest, any incident involving death or serious bodily harm notified to the Authority by the Commissioner under section 13;

(c) to take such action in respect of complaints, incidents, and other matters as is contemplated by this Act.¹³⁹

The actions provided for in section 12(c) of the Act does not allow the IPCA to lay charges as a result of its investigations. The IPCA provided a submission to the Inquiry in which they say the power to charge and prosecute for criminal offending in New Zealand largely resides with the Police, and that the IPCA has recommendation powers only.¹⁴⁰

Sir David Carruthers, the current Chair of the IPCA, said in his submission that:

I have often been invited as Chair by politicians and others to recommend to Parliament that it should have this power but I have resisted that for reasons which I will elaborate on.

In difficult complex or finely balanced cases Police will normally obtain an opinion from the Solicitor General as the Senior Crown Legal Advisor on whether to proceed or not.

In New Zealand the Solicitor General's guidelines on prosecution govern that decision. Briefly what is involved is an assessment of evidential sufficiency and then, providing that is positive, an assessment about the public interest.¹⁴¹

The IPCA's submission describes the processes followed when reports have been produced containing recommendations that have not been accepted by the Commissioner for Police:

If the Commissioner does not accept and implement the recommendations, the Authority must ...send a copy of its opinion... to the Attorney General and the Minister for Police. If it considers it

¹³⁹ Ibid.

¹⁴⁰ Submission No. 6 from Sir David Carruthers KNZM, Chair, The Independent Police Conduct Authority, 26 August 2016, p1.

¹⁴¹ Ibid.

*appropriate, the Authority can transmit to the Attorney General for tabling such report as it thinks fit.*¹⁴²

Sir David Carruthers advised the Committee that during his tenure he has not yet had to resort to these steps in order to secure the acceptance and implementation of IPCA recommendations.¹⁴³ Sir David Carruthers suggested that another reason for the success of the current process is that if the IPCA is to make any recommendations, “we run those past Police at a very senior level to see that they are actionable and doable before we make them.” Another reason is that:

*Section 31 of the Act contains a requirement based on principles of natural justice, which means that when the Authority is minded to be critical of Police, a draft with the criticism is first sent to those Police Officers involved and to the Police Commissioner for comment ahead of publication.*¹⁴⁴

Finding 31

In New Zealand, the Independent Police Conduct Authority does not have a power to commence or conduct prosecutions, but makes recommendations to the Commissioner for Police.

Hong Kong- Independent Commission Against Corruption

Hong Kong’s Independent Commission Against Corruption (HKICAC) was established on 15 February 1974 following a report from the Commission of Inquiry chaired by Sir Alastair Blair-Kerr, a Senior Puisne Judge, appointed to investigate the escape of Mr Peter Godber.¹⁴⁵ After completion of investigations by HKICAC in both the private and public sectors, the power to prosecute is vested with HK’s Secretary for Justice, and this ensures that no case is brought to the courts solely on the judgment of the HKICAC.¹⁴⁶ The 2015 Annual Report says that “[i]n practice, the ICAC seeks the advice of the Department of Justice before commencing any prosecution.”¹⁴⁷ HKICAC does not employ any prosecution staff within its 1,350 staff.¹⁴⁸

Section 10(1) of the *Independent Commission Against Corruption Ordinance* (Cap 204) (ICACO) authorises its officers to arrest without warrant a person if they are suspected

¹⁴² Ibid, pp1-2.

¹⁴³ Ibid, p2.

¹⁴⁴ Ibid, p2.

¹⁴⁵ Independent Commission Against Corruption, *Brief History*, 7 March 2016. Available at: www.icac.org.hk/en/about_icac/bh/index.html. Accessed on 24 October 2016.

¹⁴⁶ Independent Commission Against Corruption, *Balancing Forces*, 12 December 2012. Available at: www.icac.org.hk/en/checks_and_balances/bf/index.html. Accessed on 24 October 2016.

¹⁴⁷ Independent Commission Against Corruption, *2015 Annual Report*, nd, p34. Available at: www.icac.org.hk/filemanager/en/Content_1238/2015.pdf. Accessed on 24 October 2016.

¹⁴⁸ Ibid, p83.

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of breaching the ICACO or the *Prevention of Bribery and Elections (Corrupt and Illegal Conduct) Ordinances*. The ICACO does not prescribe the processes for prosecuting people arrested by ICAC.¹⁴⁹

Section 31(1) of the Prevention of Bribery Ordinance (Cap 201) does, however, provide that “No prosecution for an offence under Part II shall be instituted except with the consent of the Secretary for Justice.” Section 31(2) of this Ordinance provides that where a person has been arrested or charged with an offence under Part II and without the consent of the Secretary for Justice, they can’t be “remanded in custody or on bail for longer than 3 days on such charge unless in the meantime the consent of the Secretary for Justice aforesaid has been obtained.”¹⁵⁰

Finding 32

Hong Kong’s Independent Commission Against Corruption has the power to commence a prosecution but must first obtain the consent of the Secretary for Justice.

149 *Independent Commission Against Corruption Ordinance (Cap 204)*, nd, p3. Available at: [www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/A3E9ED78744D8631482575EE004CB37D/\\$FILE/CAP_204_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/A3E9ED78744D8631482575EE004CB37D/$FILE/CAP_204_e_b5.pdf). Accessed on 24 October 2016.

150 *Prevention of Bribery Ordinance (Cap 201)*, nd, p24. Available at: [www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/660A25EA15B8C9D6482575EE004C5BF1/\\$FILE/CAP_201_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/660A25EA15B8C9D6482575EE004C5BF1/$FILE/CAP_201_e_b5.pdf). Accessed on 24 October 2016.

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The decision of the Court of Appeal

...the Commission's powers and functions do not extend to the prosecution of persons in respect of matters investigated by the Commission which are otherwise unrelated to the administration and enforcement of the legislation establishing the Commission. A -v- Maughan 2016 [WASCA] 128 at [2]

Prosecutions conducted by the Commission before A -v- Maughan

The Court of Appeal's judgment was front page news:

The validity of more than 100 convictions secured by WA's Corruption and Crime Commission have been thrown into doubt after a landmark Court of Appeal ruling that indicated the prosecutions may have been "unlawful".

*The unanimous ruling is expected to result in a flood of appeals and potential damages claims by up to 121 people who have been prosecuted by the CCC during its 12-year history, including former Premier Brian Burke, who confirmed yesterday he was considering his legal options.*¹⁵¹

The Commissioner provided information to the Committee that prior to the decision of A -v- Maughan, the Commission had commenced prosecutions against 140 people for offences arising from CCC investigations. These did not include proceedings initiated by the Commission for contempt of the Commission.¹⁵²

Background to the appeal

On 23 April 2013, the Corruption and Crime Commission was contacted by WA Police (WAPOL) officers from its Internal Affairs Unit (IAU) to report the alleged excessive use of force by a police officer on a detainee which had occurred on 19 April 2013 in the Broome Police Station. The Commission decided to investigate the matter and issued a section 42 notice upon WAPOL instructing it to refrain from investigating the matter any further. They took this action after a meeting with the IAU and viewing the CCTV footage of the incident. Whilst their officers were in Broome investigating the first

151 Mr Grant Taylor and Ms Gabrielle Knowles, 'Blow to CCC- Ruling could overturn convictions', *The West Australian*, 20 July 2016, p1.

152 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 18 October 2016, p3.

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incident, the Commission was made aware of an earlier incident involving the same WAPOL officer on 29 March 2013.¹⁵³

The Commission commenced an investigation under section 33(1)(a) of the then-*Corruption and Crime Commission Act 2003*¹⁵⁴ (CCC Act) to investigate if there had been an excessive use of force. If the allegations were established, then they could be considered either misconduct or serious misconduct. In its final report on the two incidents published on 23 December 2013, the Commission said its main focus was:

*...on the action or inaction of the other police officers present, including physical or verbal intervention, the duty of care to a detainee, reports and record keeping. The Commission was also concerned with the adequacy of the supervision, the use of padded cells, stripping of detainees, restraints, use of force, and care, and WAPOL policies in relation to those matters. The treatment and care of detainees in a police lockup was of particular interest. The adequacy of supervision within WAPOL is an area of ongoing evaluation, and any reluctance on the part of police officers to intervene or report the conduct of another officer is an issue of significance.*¹⁵⁵

As part of its investigations, the Commission held public examinations at its offices between 10 and 14 June 2013 and an additional private examination was held on 18 July 2013. In its Report, the Commission replaced the name of the First Class Constable involved in both incidents with D5 and released pixelated and edited CCTV footage of both incidents.¹⁵⁶

D5 resigned from WAPOL on 27 May 2013.¹⁵⁷ In its Report, the Commission's opinion on his conduct was:

*...that D5's conduct constituted misconduct in that it constituted a breach of duty and hence a breach of the trust under section 4(d)(iii), which could constitute an assault, which is an offence under a written law under section 4(d)(v) of the CCC Act.*¹⁵⁸

153 Corruption and Crime Commission, *Report on the Investigation of Alleged Public Sector Misconduct by Western Australia Police Officers in Relation to Incidents that Occurred at Broome Police Station on 29 March and 19 April 2013*, Perth, 23 December 2013, p1.

154 Now known as the *Corruption, Crime and Misconduct Act 2003* following amendments which came into force on 1 July 2015.

155 Corruption and Crime Commission, *Report on the Investigation of Alleged Public Sector Misconduct by Western Australia Police Officers in Relation to Incidents that Occurred at Broome Police Station on 29 March and 19 April 2013*, Perth, 23 December 2013, p1.

156 Ibid, pp3-4.

157 Ibid, p6.

158 Ibid, p14.

The former police officer was later charged by the CCC¹⁵⁹ and his hearing was held in the Kalgoorlie Magistrates Court before His Honour Andrew Maughan on 17 April 2014, who handed down his decision on 28 November 2014.¹⁶⁰

Supreme Court appeal

The Commissioner, Hon John McKechnie QC, wrote to the Committee on 13 August 2015 confirming that the Commission was both the Second and Third Respondent to “a Supreme Court (Court of Appeal) civil proceeding which will examine, in part, the Commission’s power to prosecute criminal offences under the Criminal Code.”¹⁶¹

The Commissioner said the appeal was an Application for Review of a decision His Honour Magistrate Maughan had made in the Kalgoorlie Magistrates Court not to grant to the former officer a permanent stay in relation to the criminal prosecution initiated by the Commission. The Commissioner provided the Committee with the Notice of Originating Motion dated 22 June 2015, and the Order for Review dated 24 July 2015. He also noted that there was a suppression order in place with respect to the name of the Applicant.¹⁶²

In describing in his judgment the application to the Court of Appeal, Chief Justice Wayne Martin AC, QC, said:

*A (the applicant) has been charged with unlawfully assaulting B at Broome on 29 March 2013, contrary to s 313(1) of the Criminal Code (WA) (Criminal Code), and with assaulting C at Broome on 19 April 2013 and thereby causing C bodily harm, contrary to s 317(1) of the Criminal Code. The applicant contends that the proceedings which have been brought against the applicant are an abuse of process ... [and] that the Magistrates Court of Western Australia has no jurisdiction to entertain the charges brought against the applicant, because the proceedings in that court were not lawfully instituted...*¹⁶³

The Applicant’s grounds for the appeal were that:

159 Ms Joanna Menagh, 'Court questions WA corruption watchdog's prosecution powers', *ABC News*, 15 July 2016. Available at: www.abc.net.au/news/2016-07-15/court-ruling-on-police-assault-may-remove-ccc-prosecution-powers/7634096. Accessed on 20 October 2016.

160 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 13 August 2015.

161 Ibid.

162 Ibid.

163 Supreme Court of Western Australia, *A -v- MAUGHAN [2016] WASCA 128*, at [1], 15 July 2016. Available at: <http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/judgment.xsp?documentId=F1D1521E9F2048B74825804F000C2A44&action=openDocument>. Accessed on 24 October 2016.

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1. the learned Magistrate made an error of law in dismissing the application for a stay of prosecution in:

1.1. finding that section 145(2) of the Corruption and Crime Commission Act 2003 (WA) permitted the prosecution to have possession of an accused person's compellable testimony when that finding is contrary to the proper interpretation of section 145(2) of that Act;

1.2. finding that section 145(2) of the Corruption and Crime Commission Act 2003 (WA) permitted an incursion into the fundamental common law rights of the applicant when that finding is contrary to the decision of the High Court of Australia in Lee v The Queen (2014) 308 ALR252;

1.3. finding that section 23(a)(iii) of the Criminal Procedure Act 2004 (WA) and section 184(3)(c) of the Corruption and Crime Commission Act 2003 (WA) empowers the CCC to commence prosecutions for offences contrary to the Criminal Code of WA;

1.4. failing to grant a stay of the prosecution on the grounds of an abuse of process.¹⁶⁴

The appeal to the Supreme Court on these four grounds was funded by the WA Police Union.¹⁶⁵ The Applicant had previously appealed to the Supreme Court on 18 June 2013, the Court of Appeal on 19 August 2013, and had made an application for special leave to the High Court on 20 June 2014 in regard to a decision of the CCC Commissioner to publish the video recordings of the incidents in the Broome Police Station.¹⁶⁶ The Applicant was not successful in any of these actions.¹⁶⁷

Delay for a High Court judgment

The Commissioner wrote to the Committee in late December 2015 providing an update on the progress of the Appeal. He said that the matter (CACV 123/2015) proceeded on

164 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 13 August 2015.

165 Mr Phil Hickey, 'CCC crisis: WA Police Union against changes to allow CCC to prosecute', *Perth Now*, 21 July 2016. Available at: www.news.com.au/national/western-australia/ccc-crisis-wa-police-union-against-changes-to-allow-ccc-to-prosecute/news-story/82a33d8786e263f165eb4cea97300b5d. Accessed on 20 October 2016.

166 *Re Roger Macknay QC; Ex parte A* [2013] WASC 243; *A v Corruption and Crime Commissioner* [2013] WASCA 288.

167 Supreme Court of Western Australia, *A -v- MAUGHAN* [2016] WASCA 128, at [12], 15 July 2016. Available at: <http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/judgment.xsp?documentId=F1D1521E9F2048B74825804F000C2A44&action=openDocument>. Accessed on 24 October 2016.

17 December 2015 before the Supreme Court of Western Australia's Court of Appeal (SCA) before Hons Martin CJ, McLure P and Corboy J. The parties to the Appeal had been given leave to file supplementary written submissions by February 2016.¹⁶⁸

The SCA reserved its decision and adjourned proceedings pending a High Court of Australia (HCA) hearing on 2 February 2016 in the matter of *R and M v Independent Broad Based Anti-Corruption Commission* [2015] VSCA 271, which might impact the Applicant in regard to his ground 1.2 for the appeal. The Commissioner said that common law developments since the earlier HCA decision in *Lee v The Queen* [2014] HCA 20 would be argued by the parties in this matter after they were granted special leave in the HCA on 13 November 2015.¹⁶⁹ The High Court delivered its judgment in the matter of *R and M v Independent Broad Based Anti-Corruption Commission* [2015] VSCA 271 on 10 March 2016.¹⁷⁰

At the conclusion of the Court of Appeal's first hearing, the Commissioner's barrister, Mr Peter Quinlan SC, reported to the Commission "that the most difficult issue faced by the Commission in relation to the matter is the question of the power to prosecute", and that:

*...their Honours were clearly troubled by the absence of an express power of prosecution on the part of the Commission. There is a very real chance that the Commission will be held not to have that power.*¹⁷¹

The Court of Appeal's judgment

The Court of Appeal's decision in the case of *A -v- Maughan* [2016] WASCA 128 was delivered on 15 July 2016 and found that the "applicant's application should be granted in part, and orders made quashing the prosecution notices and the proceedings commenced against the applicant in the Magistrates Court."¹⁷²

168 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 21 December 2015.

169 Ibid.

170 High Court of Australia, *R v Independent Broad-based Anti-corruption Commissioner* [2016] HCA 8, 10 March 2016. Available at: <http://eresources.hcourt.gov.au/showCase/2016/HCA/8>. Accessed on 24 October 2016.

171 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 21 December 2015.

172 Supreme Court of Western Australia, *A -v- MAUGHAN* [2016] WASCA 128, at [2], 15 July 2016. Available at: <http://decisions.justice.wa.gov.au/supreme/supdcns.nsf/judgment.xsp?documentId=F1D1521E9F2048B74825804F000C2A44&action=openDocument>. Accessed on 24 October 2016.

Chapter 4

Grounds 1, 2 and 4: abuse of process

Section 145(2) of the *Corruption and Crime Commission Act 2003* (now renamed the *Corruption, Crime and Misconduct Act 2003*) says that statements that a witness is compelled by the CCC to make are not admissible in evidence against them in criminal proceedings, but “the witness may, in any civil or criminal proceedings, be asked about the statement”.¹⁷³

Following the High Court’s unanimous judgment in the matter of *R v Independent Broad Based Anti-Corruption Commissioner* [2016] HCA 8, two of the three Court of Appeal (SCA) justices found that:

*...neither the principle described in X7 and Lee (No 2) as the 'fundamental principle', nor the principle described in those cases as the 'companion principle', was infringed by the compulsory examination of a person reasonably suspected of crime by an agency with the power to prosecute that crime. ... Put more directly, the plurality rejected the appellants' fundamental proposition that their compulsory examination would effect a fundamental alteration to the process of criminal justice.*¹⁷⁴

The SCA found that:

*...the provision of the transcript of the applicant's examination before the Commission to those responsible for the applicant's prosecution does not involve any alteration of any fundamental principle of the common law, or of the criminal trial process, or abrogate any fundamental freedom, right or immunity which the applicant would otherwise have enjoyed.*¹⁷⁵

The SCA also found that even if provision of the transcript of the applicant's examination to the prosecutor had one or other of those effects claimed by the applicant it was legal as it was authorised by the CCM Act, and “[i]t follows that the applicant's application, insofar as it relies upon prosecutorial access to the transcript of the applicant's examination, must be dismissed.”¹⁷⁶

173 AustLII, *Corruption, Crime and Misconduct Act 2003 - Sect 145*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/ccama2003330/s145.html. Accessed on 24 October 2016.

174 Supreme Court of Western Australia, *A -v- MAUGHAN* [2016] WASCA 128, at [174], 15 July 2016. Available at: <http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/judgment.xsp?documentId=F1D1521E9F2048B74825804F000C2A44&action=openDocument>. Accessed on 24 October 2016.

175 Ibid at [102].

176 Ibid at [102].

Grounds 3: authority to prosecute

Prior to the enactment of the *Criminal Procedure Act 2004* (CP Act), any person, including the CCC, could institute criminal proceedings in Western Australia. As outlined above in Chapter 1, section 20(5) of the CP Act limited those who could commence a prosecution to those authorised in sections 80(2) and 182 of the Act.

The SCA focused on whether the CCC officer who laid the charges was ‘acting in the course of her duties’ when the charges were laid against the Applicant. While the officer had been made a special constable on 6 May 2013 in accordance with section 35 of the *Police Act 1892*, and was an employee of a public authority (section 20 of the CP Act), both Acts relied on her acting in the course of her Commission duties when she signed the relevant prosecution notices. The SCA found that:

*...it is clear that the Commission purported to authorise Ms Baker to commence the prosecutions against the applicant in the course of her duties as an officer of the Commission. Accordingly, no question of her personal authority arises. Rather, the critical question in this case is whether the powers and functions of the Commission include the prosecution of the applicant for offences against the Criminal Code. **The offences with which the applicant has been charged by Ms Baker have no connection with the Act, or the administration of the Act by the Commission.** The only connection between those offences and the Commission, and therefore with Ms Baker, is that the alleged offences were investigated by the Commission.¹⁷⁷ (emphasis added)*

The SCA also sought to confirm that the functions of the Commission under the CCM Act included the prosecution of offences it had investigated. It found that “there is no suggestion that any other written law has conferred upon the Commission the function of prosecuting offences investigated by it,” and that the critical question is whether that function is conferred by the CCM Act.¹⁷⁸

The SCA found that the laying of the charges against the Applicant was taken by the Commission exercising its misconduct function under section 18 of the CCM Act, but it found that:

1. section 18 identifies the functions conferred upon the Commission with respect to misconduct in “detailed and specific terms”;
2. no reference is made in section 18 to the Commission prosecuting offences investigated by the Commission in the exercise of the misconduct function;

¹⁷⁷ Ibid at [107].

¹⁷⁸ Ibid at [111].

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3. the functions specifically conferred by this section (such as the receipt of allegations of misconduct, the investigation of such allegations where appropriate, and reporting upon the outcome of those investigations) “are all generally anterior to the function of commencing criminal proceedings”; and
4. significantly, s 18(2)(h) specifically refers to prosecutions arising from investigations conducted by the Commission, however, “the Commission is limited to the assembly of evidence obtained in the course of the exercise of the misconduct function, and the provision of that evidence to an independent agency or another authority.”¹⁷⁹

The SCA found that the terms of section 18 of the CCC Act were inconsistent with the proposition that “the Commission has the function of prosecuting offences identified in the course of its investigations but which otherwise have no relevant connection with the Commission or the administration of the Act.”¹⁸⁰ It also found that:

*If it had been the intention of the legislature that the Commission itself undertake such prosecutions, specific reference to that function would be expected in s 18 of the Act including, in particular, in s 18(2)(h). The omission of any such reference tells strongly against the proposition that the Commission's functions extend to and include the prosecution of offences the subject of investigations conducted by it, but which have no other connection with the Commission or the administration of the Act.*¹⁸¹

The SCA again reflected on the intention of the Parliament in 2003 in giving the Commission the power to prosecute, that “there is every reason to expect that the Parliament would have said so given the provision in s 16 of the Act that the Commission's functions are those conferred by the Act or any other written law.”¹⁸²

The SCA was of the view that the functions of section 18, in respect to misconduct, limit the Commission to investigating and reporting allegations, and are reinforced by sections 43(1) and 43(5) of the CCM Act:

43 (1) The Commission may -

(a) make recommendations as to whether consideration should or should not be given to -

(i) the prosecution of particular persons;...

¹⁷⁹ Ibid at [115] to [118].

¹⁸⁰ Ibid at [119].

¹⁸¹ Ibid at [119].

¹⁸² Ibid at [121].

*(5) If the Commission gives an independent agency a recommendation that consideration should be given to the prosecution of a particular person, the Commission must also give the independent agency all materials in the Commission's possession that would be required for the purposes of sections 61 and 95 of the Criminal Procedure Act 2004 if that prosecution took place.*¹⁸³

The SCA also found that the terminology used in s 152(4) of the CCM Act “is entirely natural and apt to encompass a circumstance” in the Commission provides information to an independent agency or appropriate authority along with a recommendation for prosecution made pursuant to s 43 of the CCM Act. Section 43 identifies the agencies to which such recommendations might be made.¹⁸⁴

After summarising the arrangements for anti-corruption agencies in other Australian jurisdictions, the SCA found that:

*Because the Commission's functions do not include the prosecution of the applicant, Ms Baker cannot have been acting in the course of her duties as an officer of the Commission when she commenced the criminal proceedings against the applicant. It follows that she was not authorised to commence a prosecution by s 20(3) of the CPA, **and the proceedings which she commenced against the applicant are, and always have been, invalid.** It follows that those proceedings must be quashed, and this court should make an order to that effect.*¹⁸⁵
(emphasis added)

The SCA noted that other agencies, such as WA Police, have the authority under section 20 of the CP Act to commence proceedings in respect of the offences alleged to have been committed by the Applicant at the time the Commission had invalidly commenced proceedings, but “[w]hether or not such agencies commence proceedings against the applicant will be a matter for them to decide.”¹⁸⁶

The SCA found that the second charge faced by the Applicant, of unlawfully assaulting C occasioning him bodily harm, contrary to s 317(1) of the Code, is an ‘either way’ charge.¹⁸⁷ This means it is an indictable charge that may be tried either on indictment in the District Court or summarily in the Magistrates Court. At the time of finalising this report the Committee was not aware of further proceedings against the Applicant.

¹⁸³ Ibid at [123] to [124].

¹⁸⁴ Ibid at [128].

¹⁸⁵ Ibid at [135].

¹⁸⁶ Ibid at [136].

¹⁸⁷ Ibid at [158].

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Finding 33

On 15 July 2016 the Western Australian Court of Appeal found that the Corruption and Crime Commission's functions do not extend to the prosecution of offences the subject of investigations conducted by it, but which have no other connection with the CCC or the administration of its Act.

CCC's authority to prosecute in respect to matters related to the CCM Act

In his letter to the Committee after the Court of Appeal decision, Commissioner McKechnie said that "[r]espectfully, I entirely agree with the decision." He also said:

*The Court left open the question whether officers of the Commission have authority to commence proceedings related to the administration and the enforcement of the Legislation establishing the Commission. Although that question was expressly left open, having regard to the reasoning behind the decision, it is difficult to see how there could be such a power.*¹⁸⁸

The Commissioner restated his uncertainty as to the power of the Commission being able to charge in relation to the enforcement of the CCM Act during a public hearing with the Committee. He agreed that it needs to be put beyond doubt:

*I think it does because I do not particularly want to test it. One would rely on the incidental power to prosecute in respect of own offences, so to speak, but I do not want to test it and then find it was wrong. My own view is that it actually would be quite hard to justify in light of the other parts of the judgment of [A -v-] Maughan.*¹⁸⁹

The Chief Justice's reasons ask whether section 18 of the CCM Act gave the Commission the power to prosecute:

*The critical question remains the question of whether the functions of the Commission extend to and include the prosecution of offences the subject of investigations conducted by the Commission but which have no other connection with the Commission **or the administration of the Act.***¹⁹⁰ (emphasis added)

188 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 18 July 2016.

189 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 19 October 2016, p9.

190 Supreme Court of Western Australia, *A -v- MAUGHAN [2016] WASCA 128*, at [122], 15 July 2016. Available at:

The Chief Justice in his summary of the arguments as to the Commission's authority to prosecute in regard to the misconduct function conferred by section 18 of the CCM Act, said:

*...the function of prosecuting offences arising from investigations conducted by the Commission and which have no other connection with the Commission **or the administration of the Act** is not included within the section.*¹⁹¹ (emphasis added)

The SCA in *A -v- Maughan* made no other references in their judgment to the offences outlined in Parts 10 and 11 of the CCM Act, such as contempt, giving false testimony and destroying evidence.

Finding 34

The Court of Appeal left open the issue on whether the Corruption and Crime Commission has the power to prosecute its own charges in respect to matters which are related to the administration and enforcement of the *Corruption, Crime and Misconduct Act 2003*.

<http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/judgment.xsp?documentId=F1D1521E9F2048B74825804F000C2A44&action=openDocument>. Accessed on 24 October 2016.

191 Ibid at [134].

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The current process for laying charges flowing from CCC investigations

...if in the course of new investigations the CCC forms the view that an offence has been committed, the CCC will refer a prosecution brief to the State Solicitor for his consideration. If the State Solicitor forms the view that there is a prima facie case against the accused and that it is in the public interest to proceed, he will commence proceedings against the alleged offender. Where the alleged offence is a simple offence the prosecution will be conducted by the State Solicitor. Where the offence is an indictable offence, the proceedings may be taken over by the Director of Public Prosecutions at the committal stage. Hon Michael Mischin MLC, Attorney General.

Submission from the Attorney General

In his submission to the Committee (see Appendix 7), the Attorney General, Hon Michael Mischin MLC, confirmed that the Commissioner had made arrangements with the Director of Public Prosecutions (DPP) and the State Solicitor to deal with prosecutions arising from CCC investigations in anticipation of the judgment in *A -v- Maughan*.¹⁹²

The Attorney General advised that, unless the CCM Act is amended to allow the Commission to charge and prosecute individuals for offences uncovered in the course of its investigations, the following arrangements would apply to manage these prosecutions:

(a) prosecutions for indictable offences commenced by the CCC (or its officers) prior to 15 July 2016 have been referred to the Director of Public Prosecutions. Where the Director considers there is a prima facie case against the accused, he will continue with the prosecution;

(b) if a prosecution for a simple offence was commenced before 15 July 2016 and the limitation period within which proceedings for the relevant offence can be commenced has not expired, the prosecution has been referred to the State Solicitor. The State Solicitor will consider the case and where, in the exercise of his independent discretion, he considers it appropriate to do so, he will commence fresh proceedings in relation to the alleged offending;

192 Submission No. 22 from Hon Michael Mischin MLC, Attorney General, 30 September 2016, p2.

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(c) if in the course of new investigations the CCC forms the view that an offence has been committed, the CCC will refer a prosecution brief to the State Solicitor for his consideration. If the State Solicitor forms the view that there is a prima facie case against the accused and that it is in the public interest to proceed, he will commence proceedings against the alleged offender. Where the alleged offence is a simple offence the prosecution will be conducted by the State Solicitor. Where the offence is an indictable offence, the proceedings may be taken over by the Director of Public Prosecutions at the committal stage; and

(d) it remains open to the CCC to refer matters to the Police for investigation and charge in the usual way.¹⁹³

Finding 35

Following the judgment in *A -v- Maughan*, the Corruption and Crime Commission has made arrangements to refer matters to the State Solicitor, who will consider whether to commence prosecutions which will then be conducted by either the State Solicitor or the Director of Public Prosecutions.

Post-judgment response by the Commission

Commissioner McKechnie wrote to the Committee on 18 July 2016 providing it with a copy of the *A -v- Maughan* judgment. The Commissioner submitted that the inability to prosecute in summary cases also impacted the CCC's capacity to arrest or lay charges:

The Commission may arrest the person for a serious offence if the officer reasonably suspects the person has committed, is committing, or is just about to commit the offence. The arrest of a person engages a suite of rights and obligations. In essence, however, at the end of a certain period the arrested person must either be charged or released: Criminal Investigation Act, s142.

The word "charge" is defined in the Criminal Procedure Act and means as allegation in a prosecution notice or indictment that a person has committed an offence. A prosecution is commenced on the day on which a Prosecution Notice is signed by the Prosecutor or on the day in which it is lodged in the Court.

In 2003 it was probably assumed that Commission Officers had the power to charge suspected offenders. However, the subsequent passing of both the Criminal Investigation Act and the Criminal

¹⁹³ Ibid.

*Procedure Act makes it clear that the charge is now the commencement of a prosecution.*¹⁹⁴

The Commissioner described the operational impact that the inability to arrest and charge someone would have on the Commission's operations:

Already in my experience as Commissioner, there have been occasions when, in the course of a misconduct investigation, the Commission has uncovered continuing suspected or actual criminal behaviour which it has been able to act on immediately to arrest and charge the suspect. While theoretically possible for the Commission to arrest a suspect, on the present state of law it would be necessary for the Commission, at some stage during the time limit prescribed under the Criminal Investigation Act, to find an official who can authorise a prosecution and sign a Prosecution Notice, even if that official has very limited information about the alleged offence. In practice, this is unlikely to work.

*In my respectful view it is absolutely imperative that a legislative solution is found to allow Commission officers to arrest and charge as necessary.*¹⁹⁵

Finding 36

The Corruption and Crime Commission has the power to arrest but must thereafter liaise with an authorised person if charges are to be laid.

In a later public hearing with the Committee, the Commissioner said that immediately following the decision of *A -v- Maughan*, he met with the DPP and State Solicitor to arrange for them to take over cases that had been commenced by the Commission and were currently before the courts. The Commissioner provided, as an example of a prosecution that needed to be taken over by the DPP, the case of Mr Dacre Alcock, a former Shire of Dowerin CEO, who was charged by CCC officers and pled guilty to stealing \$599,879.¹⁹⁶

In terms of summary matters to be undertaken by the State Solicitor, the Commissioner told the Committee:

I have had discussions with the State Solicitor's Office and we have an arrangement with them. It is early days to say how effective that will be. They have slightly different standards in relation to what they

¹⁹⁴ Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 18 July 2016.

¹⁹⁵ Ibid.

¹⁹⁶ Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 19 October 2016, p6.

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*require for a prosecution, so we are working through those in a mutual way with some different understandings, but we are working through it and it is the system we have. The State Solicitor is empowered to take prosecutions and we are preparing briefs for prosecutions, where appropriate, and submitting them to the State Solicitor, but of course it is his decision, or in the appropriate case the Director of Public Prosecutions' decision, as to whether a prosecution commences or continues.*¹⁹⁷

In a public hearing with the Committee on 19 October 2016, the Commissioner said that he was “personally quite relaxed about the Commission not having the power to prosecute, believing, because of my background, that an independent authority should exercise that [power].” He described his preference for the DPP to handle all of the CCC charges and prosecutions:

*The DPP has the legal power to take over all of the matters. It is a policy and I do not wish to comment or criticise the DPP on the policy because I am sure it is partly to do with resources. The DPP is stretched in relation to, as it were, its general work, but it is less than satisfactory for us to go shopping for a prosecutor, to be blunt. We would prefer it if the DPP was the one stop where we would simply prepare briefs and give them to the DPP and what decision is made, is made. ... But it is a less than satisfactory situation.*¹⁹⁸

Finding 37

The Corruption and Crime Commissioner would prefer if the Director of Public Prosecutions conducted all prosecutions arising from the Commission's investigations.

Evidence from the State Solicitor on dealing with summary offences

The State Solicitor,¹⁹⁹ Mr Paul Evans, attended a closed hearing with the Committee on 21 October 2016 to detail the current process for dealing with summary matters flowing from CCC investigations. He confirmed that in relation to simple offences, and

¹⁹⁷ Ibid.

¹⁹⁸ Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 19 October 2016, p6.

¹⁹⁹ The SSO is part of the Department of the Attorney General and during 2014-15 it provided advice and representation to 85 departments and agencies in terms of contracts and legal matters, assessing or undertaking 467 prosecutions, representing agencies in 89 coronial inquests, appearing in more than 140 argued superior court hearings for which judgements were published during the year, and supporting the State in 81 industrial relations matters. Department of the Attorney General, *Annual Report 2014/15*, 18 September 2015, p37. Available at: www.department.dotag.wa.gov.au/files/DotAG_Annual_Report_2014_2015.pdf. Accessed on 25 October 2016.

potentially ‘either way’ offences as well, his office would act as the prosecutorial authority in relation to charges referred by the Commission. He said:

*That is a function we perform for many government departments, and have for many years. For example, we prosecute for Fisheries, Environment and the Department of Mines and Petroleum in relation to injuries and deaths, and we prosecute police officers for the police department. So it was an increment to our existing prosecutorial workload.*²⁰⁰

Finding 38

It is a normal function of the State Solicitor to commence and conduct prosecutions arising from investigations conducted by many government departments.

Mr Evans said that to date his office had only one matter referred to it from the Commission where there had been some charges that had previously been preferred that were invalidated as a result of the decision in *A -v- Maughan*. He described the process to the Committee as:

*The brief in relation to those matters, or at least an outline of the brief, was referred to my office for review. My officers attended on the Commission to consider, with the Commission’s investigative staff, the basis for those charges. That led to them generating a report to me that satisfied me that the charges should be re-presented, and I signed prosecution notices in relation to those re-presented charges.*²⁰¹

Mr Evans described the work of the SSO in the past financial year as assessing or issuing 679 prosecutions,²⁰² “from the very minor noise abatement issues for jetskis on the Swan River, through to people who have died in mine site accidents.” He described the CCC case that his office took over since the *A -v- Maughan* judgment:

*...as if they are somewhere in the middle at this stage. They are not only simple contraventions. The one we have had so far is relatively paper-heavy, so one has get into a fair bit of documentary work in relation to getting the brief together, but it is not up at the level of complexity of the DMP [Department of Mines and Petroleum] prosecutions.*²⁰³

As part of the single matter taken over from the CCC this year, Mr Evans confirmed that he had also signed an indictment for an ‘either way’ offence in relation to one matter.

200 Mr Paul Evans, State Solicitor, *Closed Hearing, Transcript of Evidence*, 21 October 2016.

201 Ibid.

202 Mr Paul Evans, State Solicitor, Letter, 31 October 2016.

203 Mr Paul Evans, State Solicitor, *Closed Hearing, Transcript of Evidence*, 21 October 2016.

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While the manner in which this matter would be prosecuted had not yet been determined, Mr Evans said:

*I have had some discussions with Mr McGrath [DPP] about how those matters will be dealt with. It is possible that it will be more efficient for us to prepare up to committal stage and then hand it over to the DPP at the committal stage. But at this stage we have only got one of them, so we are still testing the waters. The DPP will be the prosecutorial authority for the purposes of the conduct of the trial of an indictable offence.*²⁰⁴

During a public hearing with the Committee, the CCC Commissioner gave the example of the arrest and charging of the ex-CEO of the Dowerin Shire prior to *A -v- Maughan* as an example of the ability of the Commission to speedily act when someone admitted to breaking the law:

*He was very cooperative and admitted that he had stolen and was arrested and charged on the spot, and removed from Dowerin and any further damage that might be done. We could not do that now unless the State Solicitor was prepared to sign a prosecution notice on inadequate information for a full brief but sufficient to charge.*²⁰⁵

Commissioner McKechnie said that the Commission has had no need to immediately charge and arrest someone since the *A -v- Maughan* judgment, however, it is:

*...a significant problem and to my mind the solution we have proposed is a workable solution; namely, that we have the power to charge, to commence a prosecution, but that at an early stage the continuation of the prosecution is handed to another agency.*²⁰⁶

In terms of the Commissioner's concerns about the timeliness of having some offenders arrested and charged, now the Commission does not have that power, Mr Evans said that he did not know how many of the CCC's previous investigations had involved immediately arresting somebody who posed a high risk to the community:

...from the interaction between the Criminal Procedure Act and the Criminal Investigation Act, the Commissioner has the power to designate any of his officers as a public officer with the authority to arrest. One may arrest for the purpose of investigating or one may arrest for the purpose, ultimately, of charging. One does not need to

204 Ibid.

205 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 19 October 2016, p7.

206 Ibid.

charge in order to arrest. At the end of the arrest period, in most cases—even those arrested by the Police—they will be discharged unconditionally and may be charged on summons or indictment thereafter. The decision to remand, which is associated with a charge, is a decision based upon the risk to the community.

While Mr Evans had not explored this matter with the Commissioner, he offered three solutions which the Commission could consider:

- i. it could urgently contact the SSO's Head of Prosecution for assistance with laying charges;
- ii. include a police officer on the Commission's operation; and
- iii. release an offender unconditionally to a police officer, who can then rearrest and charge them.²⁰⁷

Mr Evans recounted one previous operation, where the Department of Fisheries (DoF) required assistance for an undercover operation. In this matter the SSO undertook a prosecution based on a summons. For these other agencies, Mr Evans said that "as a matter of practice, they do not generally charge" and many issue an infringement notice on the spot if it is an infringement notice matter. Where departments do charge in relation to low-level offences, they do so:

*...where there is no real prospect of the offender defending the charge and putting us to a contested hearing. In those cases we will sometimes pick up the charge if it goes wrong and in fact the defendant does choose to contest. We will have to reconsider the brief and whether the charge was properly brought, or whether it should be proceeded with as an independent decision at that point. But that is a relatively rare circumstance, as I understand it.*²⁰⁸

Mr Evans told the Committee that he preferred that the SSO laid the charges for these departments, because "we prefer not to reassess and possibly determine not to proceed... We prefer to be briefed in the first instance and to make the decision to proceed, so that there is only one charging decision rather than two." He confirmed that the SSO do decide not to proceed with charges, or with all the charges that have been suggested in the referral by a department, but the proportion that weren't proceeded with vary from agency to agency, and by matter to matter. He confirmed that "[w]e make the decision to prosecute; I have to emphasise that."²⁰⁹

207 Mr Paul Evans, State Solicitor, *Closed Hearing, Transcript of Evidence*, 21 October 2016.

208 Ibid.

209 Ibid.

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Finding 39

The State Solicitor's preference for all agencies is to be briefed prior to a prosecution being commenced.

Mr Evans said that currently while the process with the CCC was new, he was signing any indictable and simple charges, but if he was on leave for a long period, he would "appoint an acting State Solicitor who will then have the functions automatically" to ensure there was no untimely delays in having charges signed. He said:

*The view which we have taken is that it is better that I do it. All my lawyers are public officers who have, as one of their functions, the bringing of criminal proceedings in inferior courts; that is actually part of their job description. So, it is actually likely that they could all charge in relation to simple offences, but we have taken the view that it is better that I do it, at least while we are bedding this process down.*²¹⁰

Finding 40

The State Solicitor has established arrangements to ensure there are no untimely delays in having prosecutions commenced.

Mr Evans said that he did not anticipate there would be a significant volume of CCC matters each year, and that in his initial discussions with the Commissioner, Mr McKechnie indicated that the SSO might "have three or four a year in total, both indictable and summary matters." Mr Evans said that the SSO and the CCC did not have a MOU to provide a framework for their cooperation, and given the nature of the likely work load, it was probably unnecessary.²¹¹

Finding 41

The likely number of summary and 'either way' matters provided each year by the Corruption and Crime Commission to the State Solicitor's Office (SSO) to prosecute will be a small part of the total number of prosecutions being conducted by the SSO.

²¹⁰ Ibid.

²¹¹ Ibid.

In terms of the CCC Commissioner's desire for one agency, the DPP, to manage both simple and indictable matters, Mr Evans said:

*That is partly a policy question, it is partly an efficiency question and it is partly a resourcing question. The [DPP] Director does do summary matters, but as I understand it does not do many of them. We do quite a few of them. So, from a policy perspective, no comment; from a resourcing question, we probably, frankly, have more resources available than the Director does at the moment given, I understand, the constraints of his office.*²¹²

In light of the new process put in place between the CCC and the State Solicitor's Office following the *A -v- Maughan* decision, the Committee is of the view that there should be a review undertaken at the conclusion of 12 months, and reported to Parliament, on its effectiveness.

Recommendation 1

The Corruption and Crime Commission include a specific update, on the efficiency and effectiveness of its arrangements with the State Solicitor for the commencement and conduct of prosecutions, in its Annual Report for 2016-17.

Evidence from the DPP on dealing with indictable offences

The Director of Public Prosecutions, Mr Joseph McGrath SC, provided a submission to the Committee's inquiry (see Appendix 8), but in it he did not comment on the current process following *A -v- Maughan* of the CCC pursuing indictable matters through the State's courts. The Director did say in his submission though, that it was appropriate that historically, the CCC, similar to WA Police, had charged people without seeking advice or the concurrence of the ODPP, as "the ODPP is not an agency that should ordinarily exercise a charging power."²¹³

The Director attended a closed hearing with the Committee on 21 October 2016. In terms of the DPP reviewing CCC cases before an indictment is laid, Mr McGrath compared the process to the other matters it handles each year:

Last year we received approximately 2,700 indictable matters, virtually all from the Western Australia Police. As you know, the Police make the decision to arrest and charge a citizen and they conduct the investigation, after the arrest often, and the matter runs through the summary courts for many, many months while the investigation is

²¹² Ibid.

²¹³ Submission No. 21 from Mr Joseph McGrath SC, Director of Public Prosecutions, 27 September 2016, p3.

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*continuing. The Police prosecutors appear, they are formulating the brief and then it would come to us at that later stage. It is invariably the way the justice system operates.*²¹⁴

In other cases where this process was not used:

*There are on occasions matters which are so complex and do not require an immediate charging where advice is sought. It may involve a public official, for example, but the vast majority flow through the very description that you have asked the question in respect to. So there is, I would have thought, no great benefit overall to have the ODPP at an early stage; indeed, there would be a paucity of evidence upon which an exercise of judgment or discretion could be made by the Director.*²¹⁵

Section 11(1)(b) of the *Director of Public Prosecutions Act 1991* provides the DPP the power “at any stage of the proceedings, to take over a prosecution commenced by another person of an offence, whether indictable or not, and whether on indictment or not.”²¹⁶ The Director explained a difficulty he faced with CCC prosecutions that were on-foot when the *A -v- Maughan* judgment was delivered:

*...we had three [CCC] indictable matters near the committal stage. The prosecution notices had been signed by a Commission officer. I had a choice between—do I just maintain those prosecution notices and then do an indictment? I decided that the very cautious approach is I personally then sign prosecution notices so there is no allegation of ultra vires. But we had the Commission having investigated, having charged, doing virtually full disclosure, and it was at that pre-committal stage. That is why I did it. I know of no other example in Western Australian history where a director has signed [prosecution notices].*²¹⁷

Asked about his view of the current model for handling CCC matters since the *A -v- Maughan* judgment, the Director said:

I am content with the general model given that the State Solicitor is a very professional and very able organisation with great ability and

214 Mr Joseph McGrath SC, Director of Public Prosecutions, *Closed Hearing, Transcript of Evidence*, 21 October 2016.

215 Ibid.

216 AustLII, *Director of Public Prosecutions Act 1991 - Sect 11*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/doppa1991343/s11.html. Accessed on 31 October 2016.

217 Ibid.

*they have ability and experience in respect to prosecutions and preparations of briefs. In that respect, I have no difficulties with that approach. We have maintained, as I do, lines of communication with the State Solicitor in respect to matters. So I have no difficulties with that particular model.*²¹⁸

The Director also told the Committee of moves to bring summary matters under the jurisdiction of the DPP:

*Over 50 years, throughout Australia, there have been various attempts by most States and Territories to move summary prosecutions towards the independent prosecutor, and since the mid-80s, at the commencement of the Director of Public Prosecutions, there have been attempts [in WA]. Rarely has it succeeded. Undermining it is, ultimately, resource issues and in this State, one of the great provinces of the world, the Police are required to appear in the regional courts because they are the only group that has a presence within there. So necessarily it would be an enormous resource shift undermining that sort of policy change.*²¹⁹

Mr McGrath concluded his evidence by estimating that the ODPP would receive “two to three matters, which are ordinarily well-prepared” from the Commission out of his total of approximately 2,700 indictable matters a year, and that “I should say, that on the matters I have dealt with the CCC, I have received full disclosure and I have had excellent working relationships with the Commissioners and, in particular, Mr McKechnie.”²²⁰

Finding 42

The likely number of indictable matters provided each year by the Corruption and Crime Commission to the Director of Public Prosecutions (DPP) through the State Solicitor will be a small part of the total number of indictable matters received by the DPP.

218 Ibid.

219 Ibid.

220 Ibid.

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Submissions for changes to the CCM Act

I have observed no compelling reason during my term as Parliamentary Inspector, either in the conduct of the Commission or in the conduct of the public service investigated by the Commission, which suggests that these vital protections should be discarded in favour of another statutory model which authorises the Commission to commence or prosecute criminal charges. Hon Michael Murray QC, Parliamentary Inspector.

Introduction

In his submission to this Inquiry, the Director of Public Prosecutions, Mr Joseph McGrath SC, said that the consequence of the judgment in *A -v- Maughan* is that the CCC is unable to prefer charges and is unable to conduct prosecutions, “[o]therwise, there are no other practical consequences for the criminal justice system in Western Australia.”²²¹ This chapter considers these two matters and weighs the evidence the Committee has collected from its submissions and hearings as to whether the CCC should be able to charge and prosecute matters arising from their investigations.

The ability of the CCC to prosecute

Commission’s submission

In its submission to this Inquiry, the Commission states that following the “recent Court of Appeal decision of *A -v- Maughan*, the Commission's functions do not extend to commencing a prosecution. This means that the Commission does not have the power to commence prosecutions.”²²²

Whilst there is no express function for the CCC to prosecute under the CCM Act, it is the Commission’s function to ensure that serious misconduct is dealt with in an appropriate way. The Commission submits that section 18(2)(g) of the CCM Act permits it to perform ancillary functions such as cooperating and exchanging information with specified agencies while sections 18(2)(h) and 152(4)(b) allow it to furnish evidence to

221 Submission No. 21 from Mr Joseph McGrath SC, Director of Public Prosecutions, 27 September 2016, p1.

222 Submission No. 18 from Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, 19 September 2016, p11.

Chapter 6

appropriate agencies or authorities, such as the ODPP and SSO, for the purpose of a prosecution.²²³

The Commission contends that the “position in relation to the prosecution of the offences of contempt under Part 10 of the CCM Act, has not been affected by the decision of *A -v- Maughan*.”²²⁴ The prosecution of a charge of contempt of the Commission requires that it present a certificate to the Supreme Court setting out the details of the alleged contempt in accordance with section 163(1) of the CCM Act. The procedural requirements for dealing with this proceeding are set out in Order 55 of the *Rules of the Supreme Court 1971*.²²⁵

The Commission’s submission states that Part 10 of the CCM Act provides the following circumstances which may constitute a contempt of the Commission:

- (a) failing to comply with a notice given under section 94 or 95 – section 158;*
- (b) failing to obey a summons issued under section 196 - section 159;*
- (c) failing to be sworn or to give evidence when summonsed - section 160;*
- (d) hindering the execution of search warrants - section 161; and*
- (e) certain conduct during or at the place of a Commission examination - section 162.*²²⁶

In its response to a question taken on notice at a public hearing on 19 October 2016, the Commissioner said that the certificate prepared by the Commission confers jurisdiction upon the Supreme Court to hear the contempt matter, but also provides *prima facie* evidence of the matters it asserts.²²⁷

Finding 43

The Corruption and Crime Commission is satisfied that its power to commence and conduct the prosecution of the offence of contempt under Part 10 of the *Corruption, Crime and Misconduct Act 2003* has not been affected by the decision of *A -v- Maughan*.

223 Ibid.

224 Ibid, p13.

225 Ibid.

226 Ibid, pp13-14.

227 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 31 October 2016.

Submission from the Attorney General

The Attorney General submitted to the Committee (see Appendix 7) that “[s]trictly speaking, no amendments to the CC&M Act are required as a result of the decision of the Court of Appeal in *A -v- Maughan*”, as the Court of Appeal had made it clear that:

...contrary to a view until then widely held (by the CCC, its Inspectors, the Courts, and defence counsel involved in previous proceedings), the CCC and its officers did not have the power to prosecute for offences arising outside of the CC&M Act which it had identified in the course of investigations conducted under Act. The manner in which such prosecutions can be commenced and conducted is set out above. That can continue to be the case into the future even if no amendments are made to the CC&M Act.

If it be thought either necessary or desirable to amend the CC&M Act to facilitate the prosecution of such offences by the CCC, that can be done, the primary amendment needed being, in my view, an amendment to the functions of the CCC as set out in section 18 of the CC&M Act.

I would need to be persuaded that it is desirable for the CCC to be given the power to prosecute offences which are not offences arising under the CC&M Act, given that:

(a) there are already persons who have authority to commence prosecutions in circumstances where an alleged offence has come to light as a result of an investigation by the CCC; and

(b) it is not the usual practice throughout Australia to allow such integrity bodies to act as investigator and prosecutor.

*That said, I do not have a concluded view on the matter and will be assisted in coming to such a view by the Committee's inquiry, report and recommendations.*²²⁸

Submission from the Parliamentary Inspector

The Parliamentary Inspector's opinion is that “the Commission should not be granted the function or power to commence criminal charges, or to prosecute those charges”, as:

These considerations effect the important balance achieved by the legislation [CCM Act] between, on the one hand, manifesting

228 Submission No. 22 from Hon Michael Mischin MLC, Attorney General, 30 September 2016, p6.

Chapter 6

Parliament's intention to establish an integrity agency in this State, and on the other hand to leave in the hands of the Director of Public Prosecutions, or a law enforcement agency such as the Police, the decision whether a Commission misconduct investigation has found sufficient admissible evidence to justify the commencement of criminal proceedings against an individual.

I have observed no compelling reason during my term as Parliamentary Inspector, either in the conduct of the Commission or in the conduct of the public service investigated by the Commission, which suggests that these vital protections should be discarded in favour of another statutory model which authorises the Commission to commence or prosecute criminal charges.²²⁹

The Parliamentary Inspector stated that the benefit offered by more specialised and traditional prosecutorial bodies to the proper operation of the State's statutory misconduct framework are that it:

- 1. maintains the existence of an objective assessment of the admissible evidence produced by a Commission investigation by organisations that are bound by legislation and guidelines for commencing or continuing prosecutions for criminal offences;*
- 2. increases the likelihood that a person is not prosecuted for a criminal offence without justification; and*
- 3. provides no impediment to the charging and prosecution of a person where the evidence justifies it. All relevant evidentiary material is to be passed on to the appropriate prosecuting agency.²³⁰*

In terms of the Commission's desire not to have its processes slowed by having other agencies charge and prosecute summary matters, the Parliamentary Inspector said:

I do not accept the view that these important safeguards should be discarded on the basis that the progression of any particular brief of evidence produced by the Commission through the criminal justice system should not be delayed. No Act of Parliament suggests that the Commission should expect to enjoy such an advantage.²³¹

229 Submission No. 15 from Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, 15 September 2016, p2.

230 Ibid.

231 Ibid.

Finding 44

The Parliamentary Inspector does not support empowering the Corruption and Crime Commission to commence and conduct prosecutions for offences arising outside of the *Corruption, Crime and Misconduct Act 2003*.

Legislative debate over DPP prosecuting cases for the Anti-Corruption Commission

During the debate over the *Corruption and Crime Commission Bill* in 2003, Dr Elizabeth Constable MLA, a member of the Joint Standing Committee on the Anti-Corruption Commission since its inception in 1996, offered the observation that there have been inordinate delays in the Office of the Director of Public Prosecutions relating to briefs received from the Anti-Corruption Commission, which “I am sure that on occasions that has been a great hindrance to the work of the Anti-Corruption Commission.”²³²

Mr John Quigley MLA countered Dr Constable’s proposition:

*I strongly disagree. The ACC was unable to properly investigate matters and to prepare a decent criminal brief. I have some intimate experience with the ACC, as members will know. It is not that briefs did not get through to the Director of Public Prosecutions, but rather that they got through in such a shoddy form that the DPP was required to return them to the ACC for further work. ... and might not have heard from the ACC for six months.*²³³

Other submissions

Overwhelmingly, the Committee received submissions that did not support the Commission having the power to prosecute, other than for breaches of its own Act. Four individuals affected by the Commission’s investigation into the Smiths Beach matter²³⁴ were strongly opposed to the Commission having this power. Mr Julian Grill said “that the CCC should not have the power to initiate criminal prosecutions and that it is better for our society if it continues as a competent, high powered investigative body.”²³⁵ Similarly, Mr David McKenzie submitted “that it has already been demonstrated that the potential for substantial injustice in the current CCC processes is

232 Dr Elizabeth Constable MLA, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 June 2003, p8068.

233 Mr John Quigley MLA, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 June 2003, p8169.

234 Corruption and Crime Commission, *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup*, 5 October 2007. Available at: www.ccc.wa.gov.au/sites/default/files/Report%20on%20the%20Investigation%20of%20Alleged%20Public%20Sector%20Misconduct%20Linked%20to%20the%20Smiths%20Beach%20Development%20at%20Yallingup%20%28see%20Supplementary%20Report%20table%20in%20the%20Parliament%20on%2027%20August%202009%29.pdf. Accessed on 26 October 2016.

235 Submission No. 5 from Mr Julian Grill, 25 August 2016, p1.

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very significant indeed and to add to that potential the ability for the CCC to prosecute its own cases extends that potential for injustice far too far.”²³⁶

The Criminal Lawyers’ Association of Western Australia (CLAWA) said that:

*...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.*²³⁷

The CLAWA agreed that some intelligence gathering and investigative agencies also prosecute offences but noted 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.*²³⁸

A previous CCC Commissioner, Mr Roger Macknay QC, offered a less-restrictive view on this matter and noted “[p]rosecutions on indictment in the Supreme or District Court have always been initiated and carried out by the DPP, and I can see no reason to disturb that, so that part of the question necessarily relates only to prosecutions before a Magistrate.”²³⁹ Explaining why there might be a case for the Commission to

236 Submission No. 4 from Mr David McKenzie, 25 August 2016, p3.

237 Submission No. 13 from Ms Genevieve Cleary, President, Criminal Lawyers Association of Western Australia, 13 September 2016, p1.

238 Ibid, p2.

239 Submission No. 12 from Mr Roger Macknay QC, 13 August 2016, p1.

prosecute summary cases, particularly regarding police officers, Mr Macknay said that anti-corruption agencies such as the CCC:

...are novel state institutions, with little in the way of historic precedent for them in the common law world bar royal commissions and grand juries. As such they are bound to evolve in ways that reflect the needs and culture of their own particular environment.

The Commission in this State was set up specifically as a response to the findings of a Royal Commission into WA Police, and oversight of Police remains in my view its most important function. Independence is of fundamental importance in that task, and with great respect I don't entirely agree with the Chief Justice when he says the Police are adequately equipped to prosecute their own.

*There seems something odd to me about a state of affairs where the Commission could investigate an officer, make a finding of serious misconduct, which related to a breach of the law, and then be obliged to hand the matter to Police to decide whether to charge. Public differences of opinion of that kind can cause a public loss of confidence in both organizations.*²⁴⁰

If the Commission is unable to prosecute matters in the Magistrates Court, then this role must be undertaken by the State Solicitor's Office. WA Police submitted that they were also not prepared to undertake "prosecutions on behalf of, or upon a recommendation from, the Corruption and Crime Commission" as:

*WA Police are of the view that its officers are not the appropriate prosecuting authority for matters arising under the CCC Act or matters which the CCC would otherwise consider warranted prosecution.*²⁴¹

The WA Police Union's submission to this Inquiry states that, prior to the *A -v- Maughan* judgment, some charges for CCC criminal matters that were not indictable were prosecuted by WAPOL, but "if the charges were laid against a police officer, it [CCC] conducted the entirety of the prosecutions itself."²⁴²

WAPU's submission also provided a case where the DPP conducted a summary matter on behalf of the Commission. In its final report into the use of tasers by WAPOL officers involved in the detention of Mr Kevin Spratt in the Perth Watch House on 31 August

240 Ibid.

241 Submission No. 1 from Mr Stephen Brown APM, Acting Commissioner of Police, 4 August 2016, p1.

242 Submission No. 17 from Mr George Tilbury, President, WA Police Union, 16 September 2016, p9.

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2008, the CCC recommended the DPP investigate the laying of charges against some officers. WAPU says that:

41. As a consequence of that recommendation, the DPP provided legal advice to WA Police in relation to the prosecution of two police officers for common assault. Subsequently, WA Police laid charges of common assault against those two serving police officers.

*42. Even though charges of common assault are not indictable and are dealt with summarily in the Magistrates Court, after the laying of charges by the WA Police Internal Affairs Unit, the conduct of the prosecution was managed by the DPP from the first court appearance until trial.*²⁴³

Finding 45

The overwhelming majority of submissions to this Inquiry support an ongoing separation between the Corruption and Crime Commission's investigative function and an independent agency's prosecution function.

The ability of the CCC to lay charges

The CCC Commissioner wrote to the Committee soon after the *A -v- Maughan* judgment and noted that "[i]t is for this reason if the Commission lacks the power to prosecute, it lacks the power to charge."²⁴⁴

The Commissioner's position was supported as the appropriate interpretation of section of the CP Act by the State Solicitor in a closed hearing with the Committee:

*Ultimately, my philosophy is that person who signs the prosecution notice must stand by the prosecution notice, and must be prepared to present the case upon which the prosecution notice is drawn. If we are satisfied that it meets the threshold for prosecution, we will issue a prosecution notice accordingly.*²⁴⁵

The DPP confirmed in a closed hearing with the Committee that in the past for summary matters:

...the Commission investigates, as do the police, and as the investigator, they make the decision whether to charge a citizen, and, upon the charging, they become the prosecutor for the purposes of its

243 Ibid, p10.

244 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 18 July 2016, p3.

245 Mr Paul Evans, State Solicitor, *Closed Hearing, Transcript of Evidence*, 21 October 2016.

*summary jurisdiction as it moves towards the indictable. As such, they have reposed upon them the requirement that they disclose all material.*²⁴⁶

For the DPP, the matter of taking responsibility for the disclosure of relevant information is critical and if the Commission was to have the power to charge they:

...become the prosecutor for the purposes of the Criminal Procedure Act and have reposed upon them the obligations to investigate, to disclose and to sign a disclosure certificate, and that is the central aspect about maintaining the integrity of the criminal justice system—it protects citizens. If you permit an officer to charge and walk away, it would undermine the integrity of the system. The person who charges has to then undertake the role of prosecutor as defined under the Act, and the obligations to disclose. ...

*I have made the point that whichever way you go, **it would be untenable to give the CCC the power to charge and then they can just walk away and the battle begins to ensure that there is proper disclosure.***²⁴⁷ (emphasis added)

The Director was asked why the process in Western Australia was different to that in other jurisdictions (such as NSW where ICAC was required to obtain the approval of the DPP before laying charges):

*There are on occasions matters which are so complex and do not require an immediate charging where advice is sought. It may involve a public official, for example, ... So there is, I would have thought, no great benefit overall to have the ODPP at an early stage; indeed, there would be a paucity of evidence upon which an exercise of judgment or discretion could be made by the Director.*²⁴⁸

An ‘inquisitorial’ versus an ‘adversarial’ approach to evidence gathering

In his submission, Mr Noel Crichton-Brown provided the Committee with an article written by Mr Nicholas Cowdery AM, QC, BA, LLB, HonLLD, FAAL, who was the Director of Public Prosecutions for NSW from 1994 to 2011. In this article Mr Cowdery described how the Australian criminal justice system is founded upon a strict division between the powers of investigation and of prosecution:

246 Mr Joseph McGrath SC, Director of Public Prosecutions, *Closed Hearing, Transcript of Evidence*, 21 October 2016.

247 Ibid.

248 Ibid.

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Investigators (including the ICAC) work on information and material of all kinds obtained by a variety of means and invest a lot of themselves in the process. That necessarily shapes their views, attitudes, approaches and decisions.

The ICAC's primary task is to uncover corruption. All that material can be used in that pursuit and the ICAC should stick to that role, leaving criminal prosecution to the experts.

A prosecutor, by contrast, acts independently of any political policy objective or personal stake and is constrained by the criminal law, the prosecution guidelines, the provable facts and the requirement that any evidence relied upon be legally admissible in a court. Admissibility can be affected by the nature of the evidence, its source, the way it has been handled and the attitude of the defendant. That hurdle must be crossed before a charge is laid, because charging someone with a criminal offence, regardless of the outcome of proceedings, can have a serious effect on reputation and the finances and wellbeing of that person and others.²⁴⁹

The State Solicitor was invited to comment as to the Commission being a form of special investigator because of its unique powers to compel people to provide information, that it is largely an 'inquisitorial' agency and that its evidence gathering processes may be distinct from those required for the 'adversarial' nature of the criminal justice system, and replied:

I could not disagree with that, but I do not know that that is—the function we perform in relation to other agencies is to drive the independent review of the investigation and the quality of the evidence sustaining the prosecution in order to make a decision to prosecute. There are other agencies that have, to differing degrees, layers of inquisitorial or extraordinary powers to obtain material; the State Revenue Office does in relation to some of the things it does. Fisheries have some quite interesting powers to investigate.

There is a spectrum in relation to investigative powers, and there is, obviously in relation to each agency that conducts investigations, a mandate question. The agency exists for a purpose—Fisheries to protect fisheries; Environment is to protect the environment; and the

249 Mr Nicholas Cowdery, *Sydney Morning Herald*, 'The Independent Commission Against Corruption should leave prosecutions to the experts', 5 November 2015. Available at: www.smh.com.au/comment/the-icac-should-leave-prosecutions-to-the-experts-20151105-gkrszd.html. Accessed on 28 October 2016.

Corruption and Crime Commission is to protect the public sector against corruption. One investigates for the purpose of discharging your mandate.

*Is that to say that it taints the decision to prosecute? It should not. But it may help to have somebody else have a look at your prosecution brief before you prosecute.*²⁵⁰

The ICAC Commissioner, Hon Megan Latham, told the Committee that the other difference between integrity agencies and prosecution bodies was that they gathered information to different standards of proof. Police and prosecution agencies required evidence to prove charges ‘beyond reasonable doubt’ while integrity agencies collected evidence to make a recommendation based on the ‘balance of probabilities’.²⁵¹

In a public hearing with the Committee, Commissioner McKechnie agreed that he did “not decide or form opinions on serious misconduct beyond reasonable doubt”, and explained:

*When our investigators are collecting evidence, they do so on the basis that there may be a prosecution, so evidence chains and things are kept in mind. The best we can do is build in a series of checks and balances, which we do, into the system. ... Lawyers are involved in the process, in a sense as a buffer between the investigator and me to ensure that things proceed according to law and fairness. But, yes, there is a different standard ultimately from a prosecution.*²⁵²

Finding 46

Investigations undertaken by the Corruption and Crime Commission gather evidence which can result in opinions of serious misconduct. The standard of proof required to form those opinions is at a lesser standard than required in prosecutions for criminal offences.

WA Police Union’s submission

In its submission, the WA Police Union of Workers (WAPU) says the decision in *A -v- Maughan* undermines all of the previous prosecutions of police officers (regardless of the outcome) and “amply demonstrates a deep-seated concern about

250 Mr Paul Evans, State Solicitor, *Closed Hearing, Transcript of Evidence*, 21 October 2016.

251 Hon Megan Latham, Commissioner, Independent Commission Against Corruption, *Briefing*, 4 October 2016.

252 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 19 October 2016, p8.

Chapter 6

the merits of an oversight body being vested with additional prosecutorial powers outside the ambit of offences under its own Act.”²⁵³

WAPU acknowledged in its submission that the CCC has the power to prosecute its own charges in respect to matters which are related to the administration and enforcement of the CCM Act.²⁵⁴

Finding 47

The WA Police Union acknowledges that the Corruption and Crime Commission has the power to prosecute its own charges in respect to matters which are related to the administration and enforcement of the *Corruption, Crime and Misconduct Act 2003*.

The WAPU submission also acknowledged that “WA Police is both an investigating and prosecuting agency.” It explained that, in contrast to the CCC prior to the *A -v- Maughan* judgment:

*WA Police separates its investigatory and prosecutorial functions by having a separate Police Prosecutions Branch, headed by a consultant Senior State Prosecutor seconded from the DPP. The Police Prosecutions Branch includes both sworn officers and civilian lawyers who have no role in either the investigation of offences or the laying of charges. They do have a role in the continuation and discontinuance of charges.*²⁵⁵

In terms of the operation of the current system, WAPU recommended that:

*The operation of the State's prosecution system in relation to the prosecution of criminal offences associated with or arising from an investigation by the CCC into corrupt conduct or misconduct (but unrelated to the administration and enforcement of the CCC Act (sic)) should continue to be conducted by WA Police and/or the DPP.*²⁵⁶

Proposals for legislative change

In his submission to this Inquiry, the Attorney General, Hon Michael Mischin MLC, said that he did not have a concluded view on the need for legislative change as:

Strictly speaking, no amendments to the CC&M Act are required as a result of the decision of the Court of Appeal in A -v- Maughan. ...The manner in which such prosecutions can be commenced and conducted

253 Submission No. 17 from Mr George Tilbury, President, WA Police Union, 16 September 2016, p5.

254 Ibid, p6.

255 Ibid, p7.

256 Ibid, p11.

*is set out above. That can continue to be the case into the future even if no amendments are made to the CC&M Act.*²⁵⁷

The Attorney General said that he would need to be persuaded that it is desirable for the CCC to be given the power to prosecute offences which are not offences arising under the CCM Act, given that:

(a) there are already persons who have authority to commence prosecutions in circumstances where an alleged offence has come to light as a result of an investigation by the CCC; and

*(b) it is not the usual practice throughout Australia to allow such integrity bodies to act as investigator and prosecutor.*²⁵⁸

Only two submissions to this Inquiry made recommendations for specific legislative changes- the WAPU and the CCC.

WA Police Union

WAPU submits that the CCC's compulsory powers already "constitute a significant statutory erosion of the fundamental principles of the criminal justice system." WAPU's submission concluded with the following four recommendations for legislative change:

116.1. No amendment should be made to the CCC Act (sic) to expand the power of the CCC to include a statutory power to prosecute offences under the criminal laws of Western Australia.

116.2. No amendment should be made to the CCC Act (sic) to retrospectively validate prosecutions of criminal offences commenced and conducted by the CCC, irrespective of the outcome of those prosecutions.

116.3. The CCC Act (sic) should be amended as follows:

116.3.1. To prohibit disclosure of the transcript of any evidence given by a person compulsorily examined by the CCC to any prosecuting authority or agency in the event that person is subsequently charged with a criminal offence; and

116.3.2. To prohibit disclosure of any record of a voluntary interview conducted between CCC officers and a person suspected of committing a criminal offence to any prosecuting

257 Submission No. 22 from Hon Michael Misichin MLC, Attorney General, 30 September 2016, p6.

258 Ibid.

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*authority or agency for the purposes of a criminal prosecution of the person interviewed or any other person.*²⁵⁹

Corruption and Crime Commission

At the conclusion to its submission, the Commission proposed the following legislative amendments:

(a) amend the CCM Act to extend the functions of the Commission to the prosecution of offences arising out of a Commission investigation;

(b) amend the CCM Act to provide an express power to prosecute offences under the CCM Act;

(c) amend the CCM Act and CPA to authorise specific Commission officers (e.g. authorised officers under section 184 of the CCM Act and Commissioner) to commence prosecutions on behalf of the Commission; and

*(d) amend the CPA to provide that any prosecution commenced by the Commission must be referred to the DPP or SSO after the first court date and may continue only if the DPP or SSO have advised the Commission in writing that the proceedings should not be discontinued.*²⁶⁰

The Committee's view

The evidence obtained by the Committee overwhelmingly supports the maintenance of a separation between the investigation of serious misconduct and the prosecution of criminal offences. The Committee has had regard to the preferred principles of separation and independence. It has also considered the approach taken by interstate and international anti-corruption agencies.

The Committee has also weighed the extraordinary investigative powers available to the Corruption and Crime Commission together with its inquisitorial form of examinations. Lastly, the Committee has had regard for the lower standard of proof which drives Commission investigations into serious misconduct. At the present time, the Committee is not persuaded that it is either necessary or desirable for the CCC to be empowered to commence or conduct prosecutions for offences unrelated to the administration and enforcement of the *Corruption, Crime and Misconduct Act 2003*.

259 Submission No. 17 from Mr George Tilbury, President, WA Police Union, 16 September 2016, p24.

260 Submission No. 18 from Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, 19 September 2016, p22.

Finding 48

No compelling case has been presently made out to justify empowering the Corruption and Crime Commission to either commence or conduct prosecutions.

Chief Justice's submission

The Chief Justice, Hon Wayne Martin AC QC, was invited to make a submission to this inquiry but declined as he thought it inappropriate to comment upon matters of broader general policy under consideration by a Parliamentary Committee. He did say, however, that "if the relevant legislation clearly identifies the agencies or officials who have that authority [to prosecute], issues of the kind raised and resolved in *A -v- Maughan* are unlikely to arise."²⁶¹

Recommendation 2

The Attorney General 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 2016-17.

A handwritten signature in blue ink, consisting of a stylized 'N' and 'G' with a horizontal line crossing through the middle.

HON NICK GOIRAN, MLC
CHAIRMAN

261 Submission No. 10 from Hon Wayne Martin AC, QC, Chief Justice of Western Australia, 8 September 2016, pp1-2.

Appendix One

Inquiry Terms of Reference

The Committee will enquire into:

- d) 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 128;
- e) arrangements for the prosecution of offences associated with corrupt conduct and misconduct in other jurisdictions; and
- f) 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 128.

Appendix Two

Hearings held

Date	Name	Position	Organisation
21 September 2016	Hon Michael Murray AM, QC	Parliamentary Inspector	Parliamentary Inspector of the Corruption and Crime Commission of Western Australia
19 October 2016	Hon John McKechnie QC	Commissioner	Corruption and Crime Commission
21 October 2016	Mr Paul Evans	State Solicitor	
	Mr Joseph McGrath SC	Director of Public Prosecutions	

Appendix Three

Briefings held

Date	Name	Position	Organisation
4 November 2014	Mr Simon O'Brien	Chairman	Garda Síochána Ombudsman Commission
	Ms Carmel Foley	Commissioner	
	Mr Kieran FitzGerald	Commissioner	
5 November 2014	Dr Michael Maguire	Ombudsman	Police Ombudsman of Northern Ireland
	Mr Adrian McAllister	Executive Officer	
7 November 2014	Dame Anne Owers DBE	Chair	Independent Police Complaints Commission (UK)
	Mr Nick Hawkins	Chief Operating Officer	
	Ms Thea Walton	Head of Oversight	
	Mr Steve Oakley	Head of Policy and Public Affairs	
4 October 2016	Hon Megan Latham	Commissioner	Independent Commission Against Corruption (NSW)
	Mr Roy Waldon	Solicitor to the Commission and Executive Director, Legal Division	
	Hon David Levine AO, RFD, QC	Inspector	Office of the Inspector of ICAC
	Ms Susan Raice	Executive Officer	
	Mr Lloyd Babb SC	Director of Public Prosecutions	
6 October 2016	Sir David Carruthers KNZM	Chair	Independent Police Conduct Authority (NZ)
	Dr Warren Young	General Manager	
	Mr Kanwaljit Singh Bakshi MP	Chairperson	Law and Order Committee, New Zealand Parliament
7 October 2016	Mr Robin Brett QC	Inspector	Victorian Inspectorate
	Mr John Lynch PSM	General Counsel	Independent Broad- based Anti- corruption Commission (VIC)
	Ms Joanna Austin	Principal Lawyer	

Appendix Four

Submissions received

Number	Name	Position	Organisation
1	Mr Stephen Brown APM	Acting Commissioner	WA Police
2	Mr Mike Allen		
3	Ms Bernadine Tucker		
4	Mr David McKenzie		
5	Mr Julian Grill LLB, JP		
6	Sir David Carruthers KNZM	Chair	Independent Police Conduct Authority (NZ)
7	Hon Megan Latham	Commissioner	Independent Commission Against Corruption (NSW)
8	Mr Stephen O'Bryan QC	Commissioner	Independent Broad-based Anti-corruption Commission (VIC)
9	Hon Bruce Lander QC	Commissioner	Independent Commissioner Against Corruption (SA)
10	Hon Wayne Martin AC, QC	Chief Justice	Supreme Court of Western Australia
11	Hon David Levine AO, RFD, QC	Inspector	Inspector of the Independent Commission Against Corruption (NSW)
12	Mr Roger Macknay QC		
13	Ms Genevieve Cleary	President	Criminal Lawyers' Association Inc (WA)
14	Mr A. J. MacSporran QC	Chairperson	Crime and Corruption Commission (QLD)
15	Hon Michael Murray AM, QC	Parliamentary Inspector	Parliamentary Inspector of the Corruption and Crime Commission of Western Australia
16	Mr Robin Brett QC	Inspector	Victorian Inspectorate
17	Mr George Tilbury	President	WA Police Union
18	Hon John McKechnie QC	Commissioner	Corruption and Crime Commission

Appendix Four

19	Mr Michael Griffin AM	Integrity Commissioner	Australian Commission for Law Enforcement Integrity
20	Ms Michelle O'Brien	Assistant Commissioner	Police Integrity Commission (NSW)
21	Mr Joseph McGrath SC	Director of Public Prosecutions	
22	Hon Michael Mischin MLC	Attorney General	
23	Mr Gavin Silbert QC	Acting Director	Director of Public Prosecutions (VIC)
24	Mr Noel Crichton-Browne		

Appendix Five

Summary offences commenced and prosecuted by the CCC²⁶²

TYPE OF OFFENCE	SECTION / REGULATION	RELEVANT ACT / REGULATION
Criminal Code offences		
False statutory declaration*	s.170 [#]	Criminal Code (WA)
Unauthorised use of restricted access computer*	s. 440A	Criminal Code (WA)
Make false declaration*	s.169(2)	Criminal Code (WA)
Stealing as a servant*	s. 378(7)	Criminal Code (WA)
Fraud*	s. 409(1)(a)	Criminal Code (WA)
Receiving stolen property*	s. 414	Criminal Code (WA)
Possess stolen or unlawfully obtained property*	s. 428	Criminal Code (WA)
Common Assault	s. 313	Criminal Code (WA)
Assault occasioning bodily harm*	s. 317	Criminal Code (WA)
Attempt / Conspiring to pervert the course of justice	s. 143 & s.135	Criminal Code (WA)
Forgery*	s. 473(1)(a)	Criminal Code (WA)
Utter a forged record*	s. 473(1)(b)	Criminal Code (WA)
Local Government offences		
Procure another to take custody of a postal vote	s.4.92(c)	Local Government Act 1995 (WA)
Cause another to utter / forge signature of an elector on a postal vote	s.4.92(d)	Local Government Act 1995 (WA)
Failing to disclose gifts received by a candidate in a local government election	r.30B	Local Government (Elections) Regulations 1997 (WA)
Failing to disclose gifts received by a candidate in a local government election to the Chief Executive Officer in the manner and within the time set	r.30B(2)	Local Government (Elections) Regulations 1997 (WA)
Criminal Investigation Act offences		
Play restricted interview to unauthorised person	s.120(3)	Criminal Investigation Act 2006 (WA)
Commonwealth offences		
Open account with cash dealer in false name	s.24(1)	Financial Transaction Reports Act 1988 (Cth)
Communicate interception warrant information to another*	s.63(2)(a) & s.105(2)	Telecommunications (Interception and Access) Act 1979 (Cth)

²⁶² Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 18 October 2016.

Appendix Six

Indictable or 'either way' offences that have been referred to the DPP or CDPP for prosecution²⁶³

TYPE OF OFFENCE	SECTION	RELEVANT ACT
Criminal Code (WA) offences		
Disclose official secrets*	s. 81	Criminal Code (WA)
Bribery / Attempted bribery	s.82	Criminal Code (WA)
Corruption	s.83	Criminal Code (WA)
Aid in commission of corruption	s.83(c) & s.7(b)	Criminal Code (WA)
Fabricating evidence	s.129	Criminal Code (WA)
Knowingly destroy evidence	s.132	Criminal Code (WA)
Commence false prosecution	s.133A	Criminal Code (WA)
Attempt / Conspiring to pervert the course of justice	s. 143 & s.135	Criminal Code (WA)
Make false statutory declaration*	s.170 [#]	Criminal Code (WA)
Stealing as a servant*	s.378(7)	Criminal Code (WA)
Fraud*	s.409(1)	Criminal Code (WA)
Property Laundering	s.563A(1)(a)	Criminal Code (WA)
Commonwealth Criminal Code Act 1995 offences		
Use carriage service to access child pornography	s.474.19 [#]	Criminal Code Act 1995 (Cth)
Firearms offences		
Possession of unlicensed firearm*	s. 19(1ac),(c) or (d)	Firearms Act 1973 (WA)
Possession of unlicensed ammunition*	s. 19(1)(c)	Firearms Act 1973 (WA)
Drug offences		
Possession of prohibited drug with intent to sell or supply	s.6(1)(a)	Misuse of Drugs Act 1981 (WA)
Corruption and Crime Commission Act offences		
Make false report*	s.25(5)	CCC Act
Give false testimony*	s.168	CCC Act
<p>* Denotes offences that are either way offences which have been referred to DPP or CDPP for prosecution.</p> <p>[#] Denotes provisions that have subsequently been amended.</p>		

²⁶³ Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 18 October 2016.

Appendix Seven

Submission from the Attorney General, Hon Michael Mischin MLC



ATTORNEY GENERAL; MINISTER FOR COMMERCE

Our Ref: 44-23507

Hon. Nick Goiran MLC
Chairman
Joint Standing Committee on the Corruption and Crime Commission
Parliament of Western Australia
Parliament House
PERTH WA 6000

Dear Chairman

INVITATION TO MAKE SUBMISSION TO INQUIRY: CORRUPTION AND CRIME COMMISSION'S POWER TO PROSECUTE

I refer to your letter dated 18 August 2016.

Thank you for inviting me to make a submission to the Joint Standing Committee on the Corruption and Crime Commission (JSC) which, you inform me, has recommenced its inquiry into the Corruption and Crime Commission (CCC) being able to "prosecute its own charges".

You have invited me to make submissions regarding three matters:

1. 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 128;
2. Arrangements for the prosecution of offences associated with corrupt conduct and misconduct in other jurisdictions; and
3. Any amendment required to the *Corruption, Crime and Misconduct Act 2003* (WA) (CC&M Act) following the Court of Appeal decision in the case of *A v Maughan* [2016] WASCA 128.

With respect to these, I make the following observations:

1. **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 128**

The issue of whether the CCC has authority to prosecute for offences only arose after the commencement of the *Criminal Procedure Act 2004* (WA). Before then, there were no constraints upon the capacity of any person to institute criminal proceedings.

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In anticipation of the decision in *A v Maughan* (which was delivered on 15 July 2016), the Corruption and Crime Commissioner made arrangements with the Director of Public Prosecutions and the State Solicitor to deal with prosecutions arising from CCC investigations. Unless the CC&M Act is amended to allow the CCC to charge and prosecute individuals for offences uncovered in the course of its investigations, the following arrangements will apply:

- (a) prosecutions for indictable offences commenced by the CCC (or its officers) prior to 15 July 2016 have been referred to the Director of Public Prosecutions. Where the Director considers there is a *prima facie* case against the accused, he will continue with the prosecution;
- (b) if a prosecution for a simple offence was commenced before 15 July 2016 and the limitation period within which proceedings for the relevant offence can be commenced has not expired, the prosecution has been referred to the State Solicitor. The State Solicitor will consider the case and where, in the exercise of his independent discretion, he considers it appropriate to do so, he will commence fresh proceedings in relation to the alleged offending;
- (c) if in the course of new investigations the CCC forms the view that an offence has been committed, the CCC will refer a prosecution brief to the State Solicitor for his consideration. If the State Solicitor forms the view that there is a *prima facie* case against the accused and that it is in the public interest to proceed, he will commence proceedings against the alleged offender. Where the alleged offence is a simple offence the prosecution will be conducted by the State Solicitor. Where the offence is an indictable offence, the proceedings may be taken over by the Director of Public Prosecutions at the committal stage; and
- (d) it remains open to the CCC to refer matters to the police for investigation and charge in the usual way.

2. Arrangements for the prosecution of offences associated with corrupt conduct and misconduct in other jurisdictions

At paragraph [133] of his judgment in *A v Maughan*, the Chief Justice sets out the position with respect to bodies in other Australian jurisdictions with functions analogous to those of the CCC. He notes that the legislation governing the following integrity agencies empower the relevant agency to refer matters investigated and information gathered in the course of the investigations to other agencies, including prosecution agencies:

- (a) Australian Crime Commission;
- (b) Australian Commission for Law Enforcement Integrity;
- (c) New South Wales Crime Commission;
- (d) Independent Commission Against Corruption (NSW);
- (e) Police Integrity Commission (NSW);
- (f) Crime and Corruption Commission (Qld);
- (g) Integrity Commission (Tas); and

(h) Independent Commissioner Against Corruption (SA).

He observes that none of those Acts establishing those bodies confer upon them the power to prosecute matters arising from their investigations.

In the same paragraph His Honour notes that the legislation establishing both the Independent Commission Against Corruption (NSW) (ICAC) and the Police Integrity Commission (NSW) expressly provides that officers of those agencies do not have the authority to prosecute offences against the law of NSW, with the exception that an officer of the ICAC may commence a prosecution if the Director of Public Prosecutions (NSW) consents in writing.

The Chief Justice also notes that by section 190 of the *Independent Broad-based Anti-Corruption Act 2011* (Vic), the Independent Broad-based Anti-corruption Commission (IBAC) has been given the express power to prosecute matters arising from its investigations and that it seems to be the only body in Australia with functions analogous to those of the CCC which has expressly been given the power to prosecute matters arising from its investigations.

You have asked what arrangements are in place in other Australian jurisdictions for the prosecution of offences identified in the course of an investigation by an integrity body.

I understand that you are travelling to New Zealand and to other Australian States in part to discuss the arrangements for the prosecution of offences associated with corrupt and misconduct in other jurisdictions. I have nevertheless made inquiries about this issue from other Australian jurisdictions and am able to provide the following, conveyed by officers from the relevant jurisdictions:

(a) NSW

The ICAC established under the *Independent Commission Against Corruption Act 1988* (NSW) publishes a report to Parliament following an inquiry or an investigation. Such a report may include a recommendation that the advice of the Office of the Director of Public Prosecutions (ODPP) be sought as to prosecutions: section 74A *Independent Commission Against Corruption Act 1988* (NSW).

A Memorandum of Understanding (MOU) between the ICAC and the ODPP was signed on December 2007. The MOU deals with the referral of matters from ICAC to the ODPP. Pursuant to the MOU, ICAC will provide a brief of evidence on potential charges arising out of an ICAC investigation to a particular prosecution team at the ODPP. The ODPP then provides ICAC with advice regarding what, if any, charges are appropriate to be laid, the sufficiency of evidence, and the prospects of success.

ICAC has the authority to commence proceedings for statutory offences (but possibly not common law offences) as a result of the application of sections 14, 48 and 173 of the *Criminal Procedure Act 1986* (NSW), the definition of "public officer" in section 3(1) of the *Criminal Procedure Act* (NSW), and clause 101 of the *Criminal Procedure Regulations 2010* (NSW).

The Director of Public Prosecutions has the authority to institute and conduct proceedings in relation to indictable offences in NSW.

As a matter of practice, however, ICAC only prosecutes offences arising under the *Independent Commission Against Corruption Act 1988*.

(b) Northern Territory

The Northern Territory does not have an integrity agency akin to an ICAC or a CCC. The establishment of such an organisation is a policy of the new Territory Government. The Martin Report, which considered the structure of such an integrity body, has recommended that the body not have the power to prosecute (see [452]-[455] of the report published at <https://acimcinquiry.nt.gov.au/>).

(c) South Australia

The South Australian Independent Commissioner Against Corruption (**SA ICAC**) does not have a function or power to prosecute offences arising under either the *Independent Commissioner Against Corruption Act 2012* (SA) (**ICAC Act**) itself or other legislation. Section 7 of the ICAC Act empowers the SA ICAC to refer matters for prosecution. While this can include referral to police, in practice all matters for prosecution are referred to the Director of Public Prosecutions, and the decision to prosecute is entirely one for the Director of Public Prosecutions. As a rule, the Director lays the charge and conducts the resulting prosecution. There may be occasions where a person is charged following an arrest and the prosecution is then referred to the Director of Public Prosecutions.

(d) Tasmania

The Tasmanian Integrity Commission was established by the *Integrity Commission Act 2009* (Tas). The Commission does not have the power to prosecute in its own right but may refer matters to the Commissioner of Police, the Director of Public Prosecutions, or to any other person that the Integrity Commission considers appropriate.

(e) Australian Capital Territory

The Australian Capital Territory does not have an integrity body established by statute law. The establishment of such a body is a policy which the Liberal Opposition are taking to the ACT election on 15 October 2016.

(f) Victoria

In Victoria, the IBAC has the authority to bring criminal proceedings in relation to any matter: section 190 *Independent Commission Against Corruption Act 1988* (Vic).

That notwithstanding, there is in place a MOU between the IBAC and the Office of Public Prosecutions (**OPP**) as to how prosecutions arising from investigations conducted by IBAC are to be dealt with. It provides that in the case of indictable matters, the IBAC will provide the OPP with a brief of evidence and the informant and the OPP will take carriage of the prosecution from the committal stage. By contrast, in the case of summary offences the MOU provides that the matters will be dealt with by the IBAC, which is able to seek assistance from the OPP if it be thought necessary. The OPP can refuse to provide such assistance.

(g) Queensland

There is nothing in the *Crime and Corruption Act 2001* (Qld) (**CC Act**) which contemplates the Crime and Corruption Commission (**Qld CCC**) prosecuting criminal offences in its own right. The scheme of the Act is that anything that emerges from a Qld CCC investigation is prosecuted as either:

- (i) an offence against the general criminal law in the ordinary way under its *Justices Act 1886* and *Criminal Code*; or
- (ii) a disciplinary matter under the relevant statutory scheme for the agency involved.

Chapter 2, Part 3, Division 5 of the CC Act deals with action following Qld CCC investigations in that way. However, only section 49(2)(a) deals directly with criminal prosecutions: it provides that the Qld CCC may report on an investigation to the Director of Public Prosecutions or other prosecuting authority for any prosecution proceedings the Director or other authority considers warranted. Otherwise, the Act is silent on the subject. (Despite the heading, section 50 is concerned only with the Qld CCC 'prosecuting' disciplinary proceedings for corruption in the Queensland Civil and Administrative Tribunal.)

Against that statutory background, the practice is that where the Qld CCC considers that a prosecution should be considered, the matter is referred to the Director of Public Prosecutions or police prosecutors as section 49(2)(a) contemplates. In some cases, the offender will be charged by a police officer seconded to the CCC, but that is only in the exercise of the officer's ordinary functions and powers under the *Police Powers and Responsibilities Act 2000*, not by virtue of any statutory function or power of the CCC.

The charge would ordinarily be laid by a police officer, whether on ordinary duties or on secondment to the Qld CCC. (In an exceptional case, the Director of Public Prosecutions or the Attorney-General may present an *ex officio* indictment, but that is rare.) The proceedings may be commenced in one of the following ways:

- (i) by notice to appear issued by the police officer under the *Police Powers and Responsibilities Act*;
- (ii) by complaint and summons under the *Justices Act* (complaint made by the officer to a Justice of the Peace, and summons issued by the JP to the defendant);
- (iii) arrest and charge under the *Criminal Code*.

While there are exceptions depending on the locality and nature of offence, once the proceeding is commenced the case is then prosecuted as follows:

- (i) in the case of a simple offence, the Police Prosecution Corps (**PPC**) would take the matter to its conclusion in the Magistrates Court;
- (ii) in the case of an indictable offence dealt with summarily, the PPC would take the matter to its conclusion in the Magistrates Court;
- (iii) otherwise, in the case of an indictable offence:

- the PPC would manage the case to committal in the Magistrates Court; and
- the Director of Public Prosecutions would present the indictment in the District or Supreme Court and prosecute the case to verdict and sentence (and appeal where relevant).

3. **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 128**

Strictly speaking, no amendments to the CC&M Act are required as a result of the decision of the Court of Appeal in *A v Maughan*. The Court of Appeal made it clear that, contrary to a view until then widely held (by the CCC, its Inspectors, the Courts, and defence counsel involved in previous proceedings), the CCC and its officers did not have the power to prosecute for offences arising outside of the CC&M Act which it had identified in the course of investigations conducted under Act. The manner in which such prosecutions can be commenced and conducted is set out above. That can continue to be the case into the future even if no amendments are made to the CC&M Act.

If it be thought either necessary or desirable to amend the CC&M Act to facilitate the prosecution of such offences by the CCC, that can be done, the primary amendment needed being, in my view, an amendment to the functions of the CCC as set out in section 18 of the CC&M Act.

I would need to be persuaded that it is desirable for the CCC to be given the power to prosecute offences which are not offences arising under the CC&M Act, given that:

- (a) there are already persons who have authority to commence prosecutions in circumstances where an alleged offence has come to light as a result of an investigation by the CCC; and
- (b) it is not the usual practice throughout Australia to allow such integrity bodies to act as investigator and prosecutor.

That said, I do not have a concluded view on the matter and will be assisted in coming to such a view by the Committee's inquiry, report and recommendations.

Yours sincerely



Hon. Michael Mischin MLC
ATTORNEY GENERAL; MINISTER FOR COMMERCE

30 SEP 2016

Appendix Eight

Submission from the DPP, Mr Joseph McGrath SC



DIRECTOR OF PUBLIC PROSECUTIONS
for WESTERN AUSTRALIA

Level 1, 26 St Georges Terrace, PERTH WA 6000

Office of the Director

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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*.

Appendix Nine

Schedule of opinions and advice on the Commission's power to prosecute (as provided by the CCC)

SCHEDULE OF LEGAL OPINIONS, ADVICE AND ISSUES PAPERS PROVIDED TO THE COMMISSION REGARDING THE POWER TO PROSECUTE

The Commission has given considered attention to the issue of whether it may commence a prosecution since its inception in 2004. The careful consideration of this issue is evidenced by the opinions or advice (whether informal or formal) and statements of legal position summarised in the table below.

* Denotes advice provided for operational purposes.

Denotes internal memoranda or correspondence.

Date	Author	Summary
20 December 1999	George Tannin (Acting Crown Counsel)	The Anti-Corruption Commission does not have any express power to prosecute or to lay charges under the <i>Anti-Corruption Commission Act 1988</i> , although its members may do so, in a private capacity, just as any person could (at the time) commence a prosecution by the laying of a complaint of a summary offence (or an indictable offence with leave of the Supreme Court). A Special Constable may also lay a charge but not on behalf of the ACC.
21 August 2004	Michael Cashman (Director Legal Services)	Internal memorandum. CCC officers, exercising the powers of a special constable, can lay criminal charges without seeking prior advice from the DPP. Suggests legislative amendment would be necessary to put this matter beyond doubt.
3 July 2006*	Phillip Greenwood SC	The Commission has powers that include the authority to lay charges pursuant to section 184 of the <i>Corruption and Crime Commission Act 2003</i> ("CCC Act").
7 July 2006*	Jeremy Gormly SC and Peter Quinlan	Joint advice that the power of the Commission to prosecute "is not a primary power or function of the Commission... but is an incidental power".
21 July 2006#	Brett Tooker (Commission lawyer)	Internal memorandum. States that both the Commission and a Commission employee are capable of commencing a prosecution as an 'authorised officer' pursuant to section 20(3)(a)(i) of the <i>Criminal Procedure Act 2004</i> ("CPA") which includes 'a public authority or an employee of a public authority'.
6 March 2007#	Christopher Shanahan SC (Acting Commissioner)	Internal memorandum. There is no concluded position expressed however this memorandum raises issues for consideration by the Commissioner as to the Commission's functions as an investigative agency and recommends formal independent advice be obtained on this issue.

Date	Author	Summary
13 March 2007#	Kevin Hammond (Commissioner)	Internal memorandum. There is no doubt that the Commission has the ability to initiate a prosecution.
15 March 2007	George Tannin, SC (State Counsel)	It is abundantly clear that an officer of the Commission who has been appointed as an "authorised officer" under section 184(2) of the CCC Act may commence a prosecution for an offence pursuant to section 20(3)(a)(iii) of the CPA.
16 March 2007#	Christopher Shanahan SC (Acting Commissioner)	Internal memorandum. There is no concluded position expressed, however this memorandum raises issues of statutory construction of section 20 of the CPA and whether section 184 of the CCC Act confers a power to prosecute on a Special Constable or Authorised Officer.
16 March 2007#	Neil McKerracher QC (Acting Commissioner)	Internal memorandum. Identifies some issues regarding whether an authorised officer (under section 184) is endowed with the functions and powers of a police officer, whether section 20(2) of the CPA limits the CCC Act (as it does not do so expressly) and the statutory construction of the CCC Act. There is no concluded opinion expressed.
16 March 2007#	Kevin Hammond (Commissioner)	Internal memorandum. Endorses the advice of the State Solicitor George Tannin that the Commission has the power to prosecute.
20 March 2007	Malcolm McCusker QC (Parliamentary Inspector)	Affirms the opinion of State Solicitor George Tannin SC that the Commission does have the power to prosecute. He also states that the authorised officer (under the CCC Act) has the powers and functions of a police officer (because of section 5 <i>Interpretation Act</i> definition of special constable) which includes the power to prosecute under section 20(3) of the CPA.
22 March 2007	George Tannin SC (State Solicitor)	Has firm view that "an authorised officer of the Commission can commence a prosecution pursuant to the CCC Act." He also states that "there is no basis for the construction of the CCC Act which would effectively curtail the functions of the Commission to exclude the power to commence a prosecution given the clear and far reaching scope of its investigative powers and its specific purpose[s]".
22 March 2007#	Kevin Hammond (Commissioner)	Internal memorandum. Endorses the continuation of the Commission's existing policy regarding commencing proceedings as and when appropriate.

Appendix Ten

Committee's functions and powers

On 21 May 2013 the Legislative Assembly received and read a message from the Legislative Council concurring with a resolution of the Legislative Assembly to establish the Joint Standing Committee on the Corruption and Crime Commission.

The Joint Standing Committee's functions and powers are defined in the Legislative Assembly's Standing Orders 289-293 and other Assembly Standing Orders relating to standing and select committees, as far as they can be applied. Certain standing orders of the Legislative Council also apply.

It is the function of the Joint Standing Committee to -

- a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission;
- b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and
- c) carry out any other functions conferred on the Committee under the *Corruption, Crime and Misconduct Act 2003*.

The Committee consists of four members, two from the Legislative Assembly and two from the Legislative Council.
