



Queensland
Government

Office of the
Director of Public Prosecutions

Department of
Justice and Attorney-General



A/Director of Public Prosecutions – Michael Byrne QC

Name: Michael Byrne QC
Phone: 3239 6089
Our Ref:
Your Ref:

28 July 2015

Mr P Russo MP
Acting Chair
Parliamentary Crime and Corruption Commission
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Russo

Re: Submission Concerning the Review of the Crime and Corruption Commission.

I am writing in response to your letter dated 9 June 2015 and addressed to the former Director of Public Prosecutions which invited submissions concerning the review currently being undertaken by the PCCC.

I write in respect of one matter only and which is concerned with the practical implications of some aspects of the operation of section 49 of the *Crime and Corruption Act 2001* (“the Act”).

Similar issues to that which I raise herein were noted in a submission dated 4 April 2003 by the then Director General of the Department of Justice and Attorney-General, Dr Ken Levy, to the Three Yearly Review of the Crime and Misconduct Commission conducted by the Parliamentary Crime and Misconduct Committee. I note that the report of the PCMC resulting from that review, Report No. 64, contained recommendations numbered 14 – 16 that would likely have alleviated many of the concerns raised.

The Government declined to follow those recommendations. Whilst I respect the decision of the Government to not implement those recommendations, some recent decisions of the High Court of Australia have made it timely to again raise the concerns that were voiced in 2003 by way of submission to your committee’s review.

Section 49 of the Act is contained within the legislative division concerned with the Commission’s corruption function. The provision of briefs for consideration as to whether any prosecution proceedings are warranted is limited to those corruption investigations. Whilst I acknowledge that in the 2014/15 financial year the ODPP received only two such briefs, there were eleven the previous financial year. I do not know how many corruption investigations resulted in prosecutions which were not referred to the ODPP for consideration.

Level 5 State Law Building
50 Ann Street Brisbane
GPO Box 2403 Brisbane
Queensland 4001 Australia
DX 40170

Telephone +61 7 3239 6840
Facsimile +61 7 3220 0035
Website www.justice.qld.gov.au

ABN 13 846 673 994

As a matter of practice, senior legal staff are usually required to consider the brief and provide advice to the Director. As the former DPP, Mrs Leanne Clare (as her Honour then was) said the briefs can be complex and/or lengthy. Anecdotal evidence strongly suggests that all briefs are now at least lengthier, if not more complex since the earlier submission was made. The reality is that due to competing priorities, they regularly languish for months in the ODPP before a proper advice can be provided back to the Commission. The undesirability of the finalisation of a criminal investigation and/or prosecution being delayed for that period of time is obvious and affects the public confidence in the administration of the criminal justice system in general and in respect of the Commission in particular.

The referral of an investigation for advice prior to charging is a procedure not afforded to other investigative bodies in this State, other than in rare circumstances – see Director’s Guideline 26 issued under the *Director of Public Prosecutions Act 1984*. It has the effect of bridging the divide between the investigative function and the independent prosecutorial function. The Commission employs lawyers and has sworn police officers attached to it. They, amongst others employed there, have the experience to and are capable of providing appropriate advice as to whether charges should result from an investigation or not.

The ODPP is not specifically funded to undertake this work which, due to the sensitivity, size and sometime complexity of the material is usually time consuming. It is an undesirable impost on the finite budgetary resources of this Office.

The matters that I have mentioned thus far are in effect the same as those raised in 2003. More recently the High Court of Australia has delivered three judgments which create, from a practical perspective, further reasons why the power of referral under section 49 is undesirable.

The trilogy of decisions, namely *X7 v Australian Crime Commission* (2013) 248 CLR 93, *Lee v New South Wales Crime Commission* (2013) 248 CLR 196 and *Lee v The Queen* (2014) 88 ALJR 656, apply to investigations during which a defendant (whether charged at the time or later) is required to answer questions or otherwise provide evidence in the investigation. For present purposes, examples of that compulsion can be found in notices issued under section 74 of the Act and in the course of hearings conducted under Chapter 4 of the Act where the witness declines to answer questions and is directed to do so.

The decisions mean, from a practical perspective, that where a prosecution is commenced against a witness who was earlier compelled to provide evidence and the prosecution relates to the same subject matter about which the compelled evidence was obtained, the prosecution cannot proceed where there is to be any reliance on the compulsorily obtained evidence. Further and importantly for the purposes of this submission, it is very likely that the prosecution of any such person will not be permitted to proceed where any witness and/or any member of the prosecution team has been exposed to the compulsorily obtained evidence, even though that evidence is not to be relied upon in the prosecution.

The effect of these decisions on the manner in which briefs referred under section 49 of the Act are considered by this Office is considerable.

The Commission must, pursuant to section 49(4) of the Act, provide all relevant information that, *inter alia*, supports a charge and supports a defence. Practically, that means that the compulsorily obtained information must be provided to this Office. That in turn means that the senior staff member who provides the initial advice has been exposed to the material and cannot prosecute the matter, should that be the result of the advice provided. The creation of “Chinese walls” around the prosecution results in a double handling of a brief which is usually complex and lengthy and is a further impost on the finite budget resources of this Office.

It is submitted that legislative amendment to remove the availability of this procedure is desirable.

On a more general note, I am happy to report that the relations between this Office and the Commission continue to be professional and productive. I look forward to continuing to develop a mutually productive working relationship with the Commission in the future.

Yours sincerely



- Michael Byrne QC
Acting Director of Public Prosecutions (Qld)