

**A COMPLAINT OF MISCONDUCT AGAINST  
THE CORRUPTION AND CRIME COMMISSION  
BY  
MR BRIAN BURKE**

Sections 199 and 201 of the *Corruption, Crime and Misconduct Act 2003 (WA)*

28 June 2017

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## 1. MR BURKE'S COMPLAINT

In July 2016 Mr Brian Burke complained to me that the Corruption and Crime Commission and its officers committed misconduct by commencing criminal proceedings against him, all on 6 November 2008, and prosecuting those proceedings.

Mr Burke relied on the judgement of the Court of Appeal in *A - v - Maughan* [2016] WASCA 128, delivered on 15 July 2016, which held, *inter alia*, that the Commission does not have, nor has it ever had, the function or power to commence and prosecute criminal proceedings against any person.

## 2. THE CRIMINAL PROCEEDINGS

On 6 November 2008 the Commission commenced criminal proceedings against Mr Burke as a consequence of certain misconduct investigations, the first of which is known as the 'Smiths Beach investigation'.<sup>1</sup>

The Commission's second misconduct investigation related to the rezoning of land at Whitby.<sup>2</sup>

The Commission's third misconduct investigation related to the alleged unlawful disclosure of official information believed by the Commission to have been contained in a pearl oyster hatchery policy document.<sup>3</sup>

The criminal proceedings commenced by the Commission against Mr Burke in response to the Smiths Beach investigation consisted of five charges of giving false testimony during a Commission examination. These charges were laid under s 168 of the *Corruption and Crime Commission Act 2003 (WA)* (Act).

A prosecutor from the Office of the Director of Public Prosecutions conducted the trial in the Magistrates Court, and on 1 April 2010 Mr Burke was acquitted of four of the charges and convicted of one. That conviction was subsequently upheld by the Supreme Court on 22 October 2010, and Mr Burke was fined \$25,000.

The criminal proceedings commenced by the Commission against Mr Burke in response to its investigation of the rezoning of land at Whitby consisted of one charge of disclosing an official secret laid under ss 81(2) and 7(d) of the *Criminal Code*, the latter provision being concerned with the commission of the offence by counselling or procuring its commission by another.

A prosecutor from the Office of the Director of Public Prosecutions conducted the trial in the Magistrates Court, and on 3 December 2012 Mr Burke was acquitted.

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<sup>1</sup> See the Commission's Report titled *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup*, dated 5 October 2007.

<sup>2</sup> See the Commission's Report titled *Report on the Investigation of Alleged Misconduct Concerning Rezoning of Land at Whitby*, dated 3 October 2008.

<sup>3</sup> The Commission did not publish a report into this investigation.

The criminal proceedings commenced by the Commission against Mr Burke in response to its investigation of the alleged unlawful disclosure of official information contained in a pearl oyster hatchery policy consisted of one charge of disclosing an official secret laid under ss 81(2) and 7(d) of the *Criminal Code*, and one charge of corruption laid under ss 83(c) and 7(d) of the Code.

A prosecutor from the Office of the Director of Public Prosecutions conducted the trial before me, a trial by judge alone, in the Supreme Court, and on 10 May 2010 Mr Burke was acquitted of both charges when I accepted defence submissions that he had no case to answer.

I should say that I have considered whether my involvement in those matters in that way should cause me to declare myself unable to act in the matter of Mr Burke's complaint to me, under s 195(3) of the Act, 'by reason of an actual or potential conflict of interest'. I concluded that I am not required or entitled to take that course in the circumstances of the case.

On 14 September 2011 the Court of Appeal upheld an appeal by the State against the acquittals, but on 2 February 2012 the Director of Public Prosecutions discontinued the prosecution against Mr Burke on the ground that it was not in the public interest to conduct a new trial. In the final result, therefore, the acquittals remained in effect.

### **3. THE JUDGMENT IN *MAUGHAN***

The judgment of the Court of Appeal in *Maughan* is significant because it confirmed that the Commission has never had the function or power to commence criminal proceedings (in every case by a prosecution notice signed by an officer of the Commission as an authorised person) for offences under the *Criminal Code*, or generally for criminal offences, subject to an issue which did not arise in that case and was therefore not dealt with by the Court.

The Court quashed the prosecution notices issued by the Commission against the applicant, and quashed the proceedings commenced against the applicant in the Magistrates Court. The charges laid by the Commission were against a Police officer for the offence of assault under s 313(1) of the *Criminal Code* and for the offence of assault occasioning bodily harm under s 317(1) of the Code.

The essence of the decision in *Maughan*, insofar as it related to the scope of the Commission's misconduct jurisdiction, is that the Commission only has the functions expressly granted to it by Parliament. The question of law not dealt with by the Court was whether the Commission, or its officers, have the function or power to commence criminal proceedings against a person which related to 'the administration and enforcement of the legislation establishing the Commission'.<sup>4</sup>

As this question remains underdetermined by the Court, it is undesirable for me to

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<sup>4</sup> *Maughan*, 5, fn 3. A variety of criminal offences which principally stem from various stages in the Commission's fulfilment of its misconduct or organised crime functions are created in Part 11 of the Act.

assess whether the Commission or its officers committed misconduct under s 4 of the Act by commencing the criminal charges against Mr Burke under s 168 of the Act in respect of the Smiths Beach investigation because such charges could potentially be regarded as being related to the 'administration and enforcement' of the Act.

For these reasons my assessment of Mr Burke's complaint to me does not extend to the criminal charges laid by the Commission as a result of its misconduct investigations. What is certain from the judgment in *Maughan* is that the Commission, by its authorised officer in each case, did not have the function or power to commence the criminal proceedings against Mr Burke on 6 November 2008 for the offences under the *Criminal Code*, and those proceedings were therefore invalid.

#### **4. THE COMMISSION'S DECISION TO COMMENCE AND PROSECUTE THE CRIMINAL PROCEEDINGS**

##### *The Commission's legal and other advice*

Commission documents obtained during my investigation of Mr Burke's complaint included legal advice the Commission had sought, opinions it had been given, and views expressed within the Commission between 2004 and 2007, as to whether the Commission had the legal authority to commence and prosecute criminal proceedings against an individual, whether a public officer or not.

The sources of the legal advice were from within and outside the Commission, and included the State Solicitor's Office, two Acting Commissioners in the Commission, the then Parliamentary Inspector and a senior Queen's Counsel.

The Commission's documents establish that at various times throughout the Commission's history its executive was faced with conflicting views as to whether the Commission was empowered to commence and prosecute criminal proceedings.<sup>5</sup>

The documents establish that the issue was first raised by the Commission's Director Operations with the Director Legal Services on 16 August 2004. The latter's legal advice was provided to the Director Operations, Commissioner Hammond and the Executive Director five days later. It was that:

1. the Commission has power to lay criminal charges without seeking prior advice from the Director of Public Prosecutions;
2. the Act does not expressly give the Commission the power to institute criminal proceedings in respect of misconduct, and that legislative amendment would be desirable to put the matter beyond doubt;
3. Commission officers who are authorised officers under s 184(2) of the Act who exercise the powers of a special constable can lay criminal

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<sup>5</sup> The Commission's predecessor, the Anti-Corruption Commission, had also sought, in 1999, legal advice from the Crown Solicitor's Office about the same question of law in respect of its enabling legislation.

charges, and this ability is not incongruent with the Commission's misconduct function;

4. the Commission's predecessor, the Anti-Corruption Commission, would refer to the Director of Public Prosecutions all cases in which it was decided that a prosecution should be considered;
5. if the Commission were to use its authorised officers to lay criminal charges it would not equate to taking-over a prosecutorial role. If the suspected offence was serious – involving politicians, judges or prominent people – and the Commission thought it necessary to exercise prosecutorial discretion, it could consider referring the matter to the Director of Public Prosecutions, and
6. the primary responsibility for investigating and charging criminal offences resides in investigative agencies such as the Police.

On 6 July 2006, in response to a request for legal advice sought by the Commission about, *inter alia*, the possible conflicts which might be created if the Commission commenced criminal proceedings against a member of Parliament whilst it continued conducting misconduct investigations into the same subject-matter,<sup>6</sup> senior counsel external to the Commission made a number of observations:

1. the Commission's legal authority to commence criminal proceedings is granted by s 184 of the Act;
2. advice received by the Commission from the Director of Public Prosecutions that an individual could or could not be charged by the Commission was not binding on the Commission, and
3. the Commission should take great care when considering charging a person who may still be part of ongoing misconduct investigations because of the possibility that the criminal proceedings could be prejudiced by those investigations.

On the following day another senior counsel and a barrister external to the Commission provided a joint opinion on the advice provided to the Commission by senior counsel on 6 July 2006. They said:

1. they substantially agreed with the content of the advice;
2. the principal role of the Commission is to investigate and report upon issues and allegations of possible misconduct;
3. a real doubt hangs over the question whether the Commission has the legal authority to commence and prosecute criminal proceedings, but if it does have that authority it is an incidental power, and

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<sup>6</sup> Upon the assumption that the Commission has the legal authority to commence and prosecute such proceedings.

4. if the member of Parliament was prosecuted for a criminal offence it would be expected that the prosecution would be conducted by the Director of Public Prosecutions rather than by an investigative body such as the Commission.

The issue was raised again by a senior lawyer employed in the Commission with the Director Legal Services, the Commissioner and the Executive Director on 21 July 2006 because the *Criminal Procedure Act 2004 (WA)* (CPA) had come into effect on 2 May 2005. The senior lawyer said that, in his view:

1. s 20 of the CPA gives power to an officer of the Commissioner who is an authorised officer to commence and conduct criminal proceedings;
2. an officer of the Commissioner must be acting in the course of his or her duties when commencing and conducting criminal proceedings, and
3. while the Act does not expressly contemplate the Commission performing a prosecutorial role, and despite s 43 restricting the Commission to making recommendations as to whether consideration should be given to the prosecution of particular persons, neither matter would prevent the Commission commencing and prosecuting its own criminal proceedings because the CPA was enacted after the Act, and because the Act is merely silent on whether or not the Commission has the power to commence and prosecute its own criminal proceedings.

On 6 March 2007, in response to the legal advice described above, an Acting Commissioner, with whom that Acting Commissioner said the other Acting Commissioner agreed, provided the Executive Director with contrary advice.<sup>7</sup> The Acting Commissioner said that:

1. they [both Acting Commissioners] held concerns that the success of any criminal prosecution arising from the Commission's investigations of Mr Burke and others should not be put at risk by adopting a prosecutorial process that may be susceptible to challenge;
2. the legal advice of the senior lawyer in the Commission did not resolve the Acting Commissioners' concerns in this regard;
3. the canons of statutory interpretation required the Act to be construed in accordance with its objects, scope and purpose (pursuant to s 18 of the *Interpretation Act 1984 (WA)*), and that ss 16, 23 and 43 of the Act did not appear to contemplate an active prosecutorial role for the Commission, particularly in view of ss 7A, 7B and 16;
4. the terms of the Act were the prime source when interpreting and applying the CPA, and the purposes of the Act did not expressly

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<sup>7</sup> This advice was circulated to the Commissioner, Director Legal Services, Director Operations, a senior Commission lawyer and a senior Commission investigator.

include the conferral of a prosecutorial function on the Commission;

5. if s 23 of the Act was interpreted to allow the Commission to prosecute criminal proceedings it would be inconsistent with the express language, structure and operation of s 43; it would be an ancillary implied power additional to s 43 dealing with a primary function of the Commission, and would be outside the apparent objects and purposes of the Act;
6. if the concerns expressed about the combined effect of ss 23 and 43 are well-founded, the Commission could not act as a prosecutor within the meaning of the CPA, and, as a consequence, the balance of the Commission's advice regarding the conduct of prosecutions fell away, and
7. the Commission should seek some formal, independent, legal advice on the issue.

In response to the Acting Commissioner's advice, Commissioner Hammond wrote briefly to the Executive Director on 13 March 2007 saying, relevantly:

1. he wished to make some contribution to the ongoing debate;
2. he never had any doubt whatsoever as to the Commission's ability to initiate prosecutions, so it was with some concern that he had read the views expressed by the Acting Commissioners;
3. nobody had ever challenged the power of the Commission to initiate prosecutions before the Acting Commissioners expressed their views, and that it was 'only yesterday' that the Director of Public Prosecutions indicated clearly that he had no doubt about the Commission's power in this regard,<sup>8</sup> and
4. he [Commissioner Hammond] preferred the views expressed by the senior lawyer in the Commission to those of the Acting Commissioner.

Commissioner Hammond on that day also met with, and sought advice on the issue from, senior counsel in the State Solicitor's Office. The question the Commissioner asked was whether an officer of the Commission who is an authorised officer under s 184 of the Act can commence a prosecution for an offence under the *Criminal Code*, or under the Act. Two days later senior counsel of the State Solicitor's Office provided his written advice to the Commissioner, to the effect that there was no doubt as to the ability of an authorised officer to initiate prosecutions by virtue of the combined effect of s 184 of the Act and s 20(3)(a)(iii) of the CPA.

On 16 March 2007 the senior counsel who was the second of the Acting Commissioners referred to above provided the Commissioner with his written legal

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<sup>8</sup> It is not clear from the Commission's documents how or why the Commissioner received the Director of Public Prosecutions' view.



advice.<sup>9</sup> He agreed with the advice previously given to the Commissioner by the other Acting Commissioner, and said specifically:

1. The Commission's actions in the coming months will be scrutinised by those representing people who might be charged by the Commission with criminal offences. From a personal perspective he wanted to be confident that the actions he took were lawful, and that for the following reasons he was not convinced they would be;
2. the reliance on s 184(3) of the Act was flawed because, although it states that an authorised officer of the Commission may perform all the functions of a 'public officer', a special constable, it does not specify that the authorised officer *is* appointed a special constable. The officer is therefore not a police officer with the powers of a police officer;
3. the only reference made in the Act to the prosecution of a person is in relation to the Commission making a recommendation to the Director of Public Prosecutions to so prosecute, and in this regard, for the purpose of s 20(2) of the CPA, the Act impliedly limits who may commence a prosecution for an offence;
4. it is curious, if the intent of the wording of the Act was to specifically provide a power to the Commission to prosecute criminal proceedings, that it did not do so in clear terms, and for the purposes of statutory construction on this point he would be looking for clear words on a matter of such central importance;
5. when the only reference to a prosecution in the Act is to make a recommendation for such a prosecution, the inference is arguably against the power to charge and prosecute criminal offences;
6. there is no reference in Hansard during the Parliamentary debates that suggests an intention on the part of Parliament to grant the Commission the power to prosecute, and
7. because he was providing his advice with the reputation and standing of the Commission uppermost in his mind, he further advised that independent legal advice from an external senior barrister would be a good idea.

On the same day the other Acting Commissioner provided the Commissioner with further legal advice as to why he thought the Commission did not have the power to commence and prosecute criminal proceedings. He said:

1. if asked to authorise a prosecution by the Commission under the Act he could not do so, and

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<sup>9</sup> This advice was circulated to the Executive Director, Director Legal Services, Director Operations, and the Deputy Director Operations.

2. he repeated his suggestion that independent legal advice should be obtained.<sup>10</sup>

In response to the advice provided to the Commissioner by both Acting Commissioners, and on the same day, Commissioner Hammond replied in writing, saying relevantly:

1. the advice he received from senior counsel in the State Solicitor's Office was unequivocal, and that the Commission was able to commence and prosecute criminal proceedings;
2. having received senior counsel's advice, he forwarded a copy to the Parliamentary Inspector (to whom he had previously provided a copy of the first Acting Commissioner's advice), and that the Parliamentary Inspector shared the view concerning the issue expressed by senior counsel;
3. noting the Acting Commissioners' reservations, he [the Commissioner] instead accepted the contrary advice which supported the Commission's current practice, and
4. senior counsel's advice could be used to counter any future formal challenge to the Commission's authority to commence and prosecute criminal proceedings.

On 20 March 2007, following a meeting between Commissioner Hammond and the then Parliamentary Inspector on 8 March 2007, the Parliamentary Inspector provided his opinion to the Commissioner that the Commission does have the power to prosecute criminal proceedings.<sup>11</sup> The Parliamentary Inspector's view followed similar reasoning to that which underpinned the advice given by senior counsel from the State Solicitor's Office. Further, he said:

1. while the Act did not expressly confer upon the Commission a power to prosecute criminal proceedings, neither did it limit who may commence such a prosecution for the purposes of s 20(2) of the CPA, and
2. an officer of the Commission who became an authorised officer under s 184 of the Act could, by virtue of that section, perform all of the functions of a special constable, and one of those functions is to prosecute criminal proceedings.

On 22 March 2007 Commissioner Hammond wrote to both Acting Commissioners informing them of, and enclosing, copies of the advice obtained from the State Solicitor's Office and from the Parliamentary Inspector. The Commissioner

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<sup>10</sup> This advice was circulated to the Executive Director, Director Legal Services, Director Operations, and the Deputy Director Operations.

<sup>11</sup> This advice was circulated to the Executive Director, Director Legal Services, Director Operations, and the Deputy Director Operations.

reaffirmed his belief that the Commission possessed the power to commence and prosecute criminal proceedings.

On the same day, senior counsel from the State's Solicitor's Office wrote to the Commissioner in response to the Commissioner's request for further advice in light of the advice from the two Acting Commissioners and from the Parliamentary Inspector (a copy of which senior counsel had received from the Commissioner). He said:

1. despite the views expressed by the Acting Commissioners, he remained of the opinion that an authorised officer of the Commission had the power to commence a prosecution pursuant to the Act;
2. there was no basis for the view that an authorised person who has the functions of a special constable does not have the functions of a police officer under s 20(3)(a)(iii) of the CPA, and
3. the functions and purposes of the Commission set out in ss 7A, 7B and 18 of the Act provide no basis for concluding that the Commission does not have the power to commence and prosecute criminal proceedings.

On 10 April 2007 the Director Legal Services requested legal advice on the issue from an external senior Queen's Counsel. That was obtained and the relevant aspects of the advice from counsel were:

1. neither the Commission, nor its officers, had the power to commence and/or conduct prosecutions arising upon their appointment as such, but,
2. an officer of the Commission who was separately appointed as a special constable by the Commissioner of Police had the power to commence and/or conduct a criminal prosecution, provided it was plain that he/she was seen to be, and was, acting as a special constable and not as an officer or employee of the Commission.<sup>12</sup>

However, an officer of the Commission so acting would still raise the potential for allegations to be made that he or she was acting in the course of duty as an officer of the Commissioner (and therefore under direction from the Commission) rather than solely as a special constable, and it would be difficult to avoid such a challenge from arising.

In February 2008 Ms Gail Archer SC completed a review of the Act under s 226.<sup>13</sup> The Commission, under the hand of the new Commissioner, the Hon Roberts-Smith RFD QC, on 10 August 2007, submitted a number of matters to Ms Archer for her

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<sup>12</sup> A view rejected by the Court in *Maughan* in circumstances where the officer of the Commission is doing so in purported pursuance of a Commission investigation because the Commission only has an investigative, rather than a criminal law, function.

<sup>13</sup> *Review of the Corruption & Crime Commission Act 2003*, February 2008.

consideration, one of which was that the Commission should seek a declaratory amendment to the Act, confirming that the Commission and its authorised officers have, and have always had, the power to commence and conduct criminal prosecutions, including prosecutions for indictable offences, in the Magistrates Court.

The other relevant matter for consideration, submitted to Ms Archer SC by Commissioner Roberts-Smith RFD QC, was that consideration should be given to the appointment by the Government of a Special Prosecutor for Corruption and Crime, on the basis that criminal prosecutions generated by the Commission should be timely and supported by specialist, dedicated prosecution resources.

In support of the Commission's submission seeking a declaratory amendment to the Act, Commissioner Roberts-Smith RFD QC recited the various legal bases upon which the Commission had previously concluded that the Act impliedly empowered it to commence and prosecute criminal proceedings. In respect of the doubts held by the Commission about the existence of this power, the Commissioner said:

Whilst there is no express power given in the CCC Act to prosecute, on the basis of the above I am confident that the Commission has the power to commence and conduct prosecutions. However, there is some residual doubt as to whether the general scheme of the CCC Act allows that.<sup>14</sup>

After reciting some of the bases upon which the contrary legal advice relied, Commissioner Roberts-Smith RFD QC continued:

As I have indicated above, I do not agree with the opinion that the Commission does not have the power to commence a prosecution in a Magistrate's Court. Nonetheless, it is obviously undesirable that there be uncertainty or ambiguity about this. It is undesirable that Commission prosecutions be at risk of a possibly successful challenge on the ground that the Commission has no power to commence a prosecution. It is for that reason that the Commission seeks a declaratory amendment to the CCC Act confirming that the Commission (both itself and by its authorised officers) has and has had the power to commence prosecutions in the Magistrates Court.

In her review Ms Archer SC cited the Commissioner's submission and agreed that the uncertainty as to the existence of the power which the Commission claimed to have should be removed, adding that the power should be expressly provided in the Act.<sup>15</sup>

The Commission, when providing the relevant documents to me, confirmed that after making its submission to Ms Archer SC it did not make a formal application for a declaratory amendment to the Act. Nor did the Commission provide me with any evidence that, before it commenced criminal proceedings against Mr Burke on 6 November 2008, it took an action in the Supreme Court for a declaration to determine whether the Act empowered it to commence and prosecute criminal proceedings.

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<sup>14</sup> Page 3, Appendix 1, of the Commission's submission to Ms Archer SC.

<sup>15</sup> Page 258-259 of Ms Archer SC's review. In Recommendation 55 she said the Act should 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.

Finally, the Commission's documents establish that Commissioner Roberts-Smith RFD QC provided the final authorisation for the prosecutions of Mr Burke to be commenced.

### *The Commission's claim of legal professional privilege*

When the Commission provided the documents detailed above to me on 3 November 2016, it said it did not waive legal professional privilege in respect of any of the advice it had received. The Commission did not explain why it made this claim, despite having apparently waived the right before the Joint Standing Committee for the Corruption and Crime Commission four days earlier in respect of its report to Parliament as to whether the Commission ought to have the power to charge and prosecute individuals.<sup>16</sup>

On 10 November 2016 I wrote to the Commission and asked it to specify precisely the documents it considered were capable of attracting legal professional privilege. I asked why the Commission was not prepared to waive its claim of legal professional privilege.

I also said that I would not disclose the nature of the documents, or their contents, to any person during my assessment. I added that if I found it necessary to report my assessment of Mr Burke's complaint to me to the Joint Standing Committee or to Parliament, I envisaged describing the documents in general terms as to their nature and content, as I have done.

On 17 November 2016 I also wrote to the Commission and requested copies of legal advices listed in Appendix 9 of the Joint Standing Committee's report which had not been included in the Commission's response to me on 3 November 2016. The Commission provided me with two advices on 24 November 2016, and again said that it did not waive legal professional privilege in respect of them.<sup>17</sup>

### *The State Solicitor Office's advice*

I doubted the Commission's assertion that the various materials described above were capable of attracting a claim of legal professional privilege as against me and in relation to the fulfilment of my functions under the Act.

On 15 November 2016 I wrote to the State Solicitor requesting legal advice on that matter and on the scope of my function to determine matters of misconduct on the

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<sup>16</sup> Report No. 33 dated November 2016 titled, *The ability of the Corruption and Crime Commission to charge and prosecute*, 19, fn 50 and Appendix Nine.

<sup>17</sup> The first of these two advices was from external senior counsel dated 3 July 2006, and was given in response to a request made by the Commission for advice, *inter alia*, whether it should commence criminal proceedings against a particular individual. The Commission's questions asked of counsel were based on its assumption that it had the legal authority to commence and prosecute such proceedings, and nothing in the advice given by counsel was contrary to that notion.

The second of these two advices was dated 7 July 2006 and was from two lawyers who were invited by the Commission to comment on the advice from senior counsel dated 3 July 2006. The relevant aspects of the advice were that the principal role of the Commission was to investigate and report on misconduct, and if it does have the legal authority to commence and prosecute criminal proceedings, then such power is not primary, but incidental.

part of the Commission as prescribed in s 195(1)(b) of the Act.

On 15 December 2016 the Deputy State Solicitor, in summary, advised:

1. the Commission is not entitled to refuse to provide me with any information or documents in its possession on the ground of legal professional privilege;
2. once information and documents have been provided to me by the Commission, I may disclose them for the purpose of performing my functions and exercising my powers under the Act;
3. in particular, there is no restriction on the extent to which I may disclose in a report to Parliament or to the Joint Standing Committee made under ss 199 or 201 of the Act, information that might otherwise be protected by legal professional privilege;
4. not all of the documents and information which the Commission has provided to me are properly the subject of a claim of legal professional privilege;
5. generally speaking, the Commission will not waive legal professional privilege in any documents that are properly the subject of a claim by providing them under compulsion to me pursuant to a requirement or request under s 196(3) of the Act. Accordingly, the Commission will be entitled to maintain a claim of legal professional privilege in respect of such documents against third parties, unless it has otherwise waived privilege, and
6. while the matter is not free from doubt, the preferable construction of s 195(1)(b) of the Act is simply to read the reference to ‘misconduct on the part of the Commission’ as no more than an (unnecessary and duplicative) reference to ‘misconduct’ (as defined in s 4 of the Act) on the part of officers of the Commission, including the Commissioner.<sup>18</sup>

*The Commission’s withdrawal of its claim of legal professional privilege*

Coinciding with my receipt of the above advice on 15 December 2016, the Commission on that day wrote to me in the following terms:

The Commission claimed legal professional privilege over the copies of legal advices provided to you on 3 November 2016 and 24 November 2016 because the CCM Act provisions that set out the functions of the Parliamentary Inspector only expressly abrogate legal professional privilege when the PI is holding any inquiry under section 197.

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<sup>18</sup> The uncertainty expressed in point 6 as to whether the Act intends me to have the function of determining misconduct on the part of the Commission is addressed below in the sub-chapter titled *My jurisdiction*.

However, we have given further consideration to the issue in this particular matter and in this instance the Commission waives legal professional privilege in relation to the legal advices referred to above.

We do this on the basis of your letter which advises that it is not your intention to disclose the nature of the documents and their contents to any person during your assessment of Mr Burke's complaint to you, and that if you found it necessary to report your assessment to the Joint Standing Committee, or to Parliament, you envisage describing in general terms the nature and details of the documents.

## 5. MY ASSESSMENT

### *My jurisdiction*

Section 195(1)(b) of the Act expressly gives me the function to 'deal with matters of misconduct on the part of the Commission, officers of the Commission' and my own officers, (of which there is only one, unless I make appointments by way of secondment for particular purposes).

In respect of the Commission itself, this is the only reference in the Act to misconduct by the Commission, and I note the advice of the Deputy State Solicitor that I should construe this provision as no more than an 'unnecessary and duplicative' reference to the provisions of the definition of 'misconduct' in s 4 of the Act, which, s 3(1), the definition of 'misconduct', makes clear, defines the term for the purposes of the Act generally.

With respect to the reasons for this view, I would accept it reluctantly only if no alternative interpretation appeared to be open, because s 195(1)(b) immediately distinguishes misconduct by the Commission from misconduct by its officers.

Certainly, s 4 speaks in terms of the duties of a person who is a 'public officer'. It refers to corruption in the performance of the functions of a public officer's 'office or employment', to such an officer corruptly obtaining a benefit 'for himself or herself ... or to cause a detriment to any person', to a public officer 'acting or purporting to act in his or her official capacity', and s 4(d) speaks of conduct which may provide reasonable grounds for the termination of the 'person's office or employment'.

Is the Commission a 'person' capable of being described as a public officer, albeit one who may not be fixed with liability under all the provisions of s 4 of the Act? Section 5 of the *Interpretation Act 1984 (WA)* defines 'person' as including a corporation. By s 3(1) of the Act the term 'public officer' has the meaning given to that term by s 1 of the *Criminal Code*. Paragraph (ad) of the *Code* definition refers to 'a person exercising authority under a written law' and paragraph (e) refers to any person 'holding office under, or employed by,' the State of W.A.

The Commission is established by s 8 of the Act as a body corporate. It is a person whose functions are performed by the Commissioner: s 9(1) and (2). The Commissioner is included in the definition of the term 'officer of the Commission' in

s 3(1). He or she is both the legal personification of the Commission and a public officer, an officer of the Commission. In my view the Commission, as distinct from its officers in a personal capacity, will be guilty of misconduct if conduct of the Commissioner, while acting in that role and therefore as the Commission, falls within any of the provisions of s 4 of the Act.

That will not, of course, affect the question whether in any case, conduct, whether of an isolated or systemic kind, by an officer of the Commission, including the Commissioner, will fall within s 4 and therefore be misconduct by a public officer acting for or in the name of the Commission. The point is a technical one.

### *The availability of legal professional privilege*

Section 144(1) of the Act is concerned to preserve the availability of legal professional privilege for persons generally, who are required under the Act to provide information in any form. There is an arguable issue in this case as to whether there are some documents in respect of which the claim of privilege is made, which are not of a type in respect of which a sustainable claim could be made, but it is unnecessary to deal with that question for the purposes of this Report.

The question of the availability of the claim against me is answered by reference to s 144(2) of the Act in the context of other provisions of the Act. It provides that a claim of privilege preserved by ss (1) may not be made as a 'privilege of a public authority or public officer in that capacity'. The term 'public authority' is defined in s 3(1) in paragraph (c) to include 'an authority, board, corporation, commission ... established under a written law'. Because the Commission is a public authority, it is precluded by s 144(2) from claiming legal professional privilege as it purported to do in this matter, as were its officers, including the Commissioner.

As has been seen, s 195(1)(b) of the Act refers to my misconduct function concerning the Commission and its officers. Section 195(1)(c) of the Act gives me the function to assess the effectiveness and appropriateness of the procedures of the Commission which were (or were not) in place on 6 November 2008 and which related to the commencement of criminal proceedings against Mr Burke. In pursuing my investigation, I utilised the plenary powers provided by s 196(2) and (3)(a), (b) and (c) to obtain access to the information I required.

Section 197(1)-(3) of the Act empowers me to make, or hold, an inquiry for the purpose of fulfilling one or more of my functions, and allows me to utilise the powers in various sections of the *Royal Commissions Act 1968 (WA)* to assist me in doing so. It was unnecessary to take that course in this case.

Section 197(5) of the Act prohibits any public authority or public officer from claiming legal professional privilege when required by me under s 197 'to answer questions, give evidence, produce records, things or information or make facilities available'. The provision is limited in its application to a formal inquiry under s 197. In that context it performs a task which is like that in s 144(2). The fact that it is limited in its application to an inquiry under s 197 is no answer to the proper interpretation of s 144. The point taken by the Commissioner, which was maintained in the Commission's representations to me concerning this Report, is rejected.



### *The significance of Mr Burke's complaint*

Mr Burke's complaint to me does not involve an allegation of misconduct on the part of the Commission or its officers based on the misuse of power possessed by the Commission. This is because the Commission on 6 November 2008 did not have the power to commence the criminal proceedings which are the subject of my assessment.

Rather, Mr Burke's complaint is one of misconduct by way of an unlawful act committed by the Commission. As such, given the judgment in *Maughan*, his complaint requires my assessment to focus on how and why the Commission decided to act in the way it did, and why its procedures were ineffective in preventing it from acting unlawfully, despite the judicial and parliamentary processes available to it to authoritatively determine any uncertainty as to the existence or scope of its powers.

The outcome of Mr Burke's trials is not material to my assessment of his complaint, nor is the weight of the evidence of his suspected wrongdoing that the Commission believed it possessed before commencing its criminal proceedings. That the Commission's prosecutions were conducted by prosecutors from the Office of the Director of Public Prosecutions is also irrelevant to my assessment, as is the fact that Mr Burke was convicted of just one offence as the result of all the prosecutions commenced by the Commission.

What is relevant to my assessment is whether the Commission's conduct, through its executive officers, fell within the definition of misconduct under s 4 of the Act, and why the Commission's procedures did not prevent it from acting beyond its statutory functions and powers.

### *Conclusion*

It must be said that the commencement of criminal proceedings against any individual is a serious step to take, regardless of the offence suspected of having been committed and regardless of the prospect of conviction. Various State laws, once those proceedings have been commenced, control the course of the proceedings to ensure that an accused person is dealt with according to law, but the unlawful commencement of criminal proceedings by a State instrumentality is an extremely serious matter, the consequences of which, for the individuals involved and for the State's criminal justice system, are difficult to measure.

The Commission's documents, as described above, clearly establish that its executive officers,<sup>19</sup> prior to the initiation of the proceedings the subject of this complaint, knew of the differences of opinion as to whether the Commission had the power to do so.

Commissioner Hammond, prior to the appointment of Commissioner the Hon Roberts-Smith RFD QC, was unequivocal in his belief that the Commission had the power to commence and prosecute criminal proceedings. This was so despite the advice to the contrary provided by two Acting Commissioners. The main reason for

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<sup>19</sup> The relevant members being the Commissioner, the Executive Director, the Director of Legal Services and the Director of Operations. In some instances, as seen, other senior Commission officers had distributed to them some of the contending pieces of legal advice, namely, the Deputy Director Operations and a senior investigator in the Operations Directorate.

their view that the Commission did not have the power to commence and prosecute criminal proceedings – that the Act did not give the Commission, and therefore its officers, the power to do so – was also the primary reason given by the Court in *Maughan* for determining that the criminal proceedings in that case, commenced by the Commission, were void.

The Commission only has the functions expressly given to it by its statute or by any other written law. Its powers, granted by various pieces of legislation to it and its officers, in order to be lawfully exercised, must be used in pursuit of those functions. It is for the executive of the Commission, and ultimately the Commissioner, to be satisfied that those powers are exercised for that purpose *before* acting. The proposition is a simple one.

These fundamentally important considerations were no doubt uppermost in the Commission's mind before criminal proceedings were commenced against Mr Burke. In the face of real doubt about the Commission's power in this regard, the Commission might have had the question authoritatively determined either by Parliament or, perhaps more conveniently and expeditiously, by the Supreme Court by way of declaration, before acting.

And yet, on both sides of the debate there were carefully reasoned arguments presented by three senior counsel, lawyers of considerable eminence, who favoured the conclusion that the Commission possessed a prosecutorial power, as did the Commission, who was himself a senior counsel and retired judge.

The Commission's files do not, of course, provide affirmative evidence that in making the decisions to prosecute which are the subject of this Report, those responsible were motivated by any consideration other than to ensure that the Commission was able to act effectively to 'reduce the incidence of misconduct in the public sector': s 7A(b) – to battle corruption in public office.

Nor would I expect to find such evidence, but the files do show a process of investigation and the drawing of the conclusion that there was evidence sufficient to support the view that the offences charged had been committed, a normal process in the making of a discretionary judgment to prosecute when those responsible believe there is power to do so.

It is against that background that I turn to the provisions of s 4 of the Act and the question whether the Commission and its officers were guilty of misconduct in initiating and prosecuting the charges the subject of this Report.

### *The Question of Misconduct*

There is no question that a conclusion of corruption may arise simply out of the fact that the prosecutions were launched and conducted without power. There must be more.

Section 4(a) refers to a public officer corruptly acting or failing to act in the performance of the functions of his or her office or employment; s 4(b) speaks of a public officer corruptly taking advantage of that office or employment to obtain a

benefit for, or cause a detriment to, any person; and s 4(c) applies to the commission of an offence punishable by 2 or more years imprisonment while acting, or purporting to act, in the public officer's official capacity.

In a Report to the Parliament, dealing with the misconduct of an officer of the Commission and dated 7 February 2017, at p10, I said that the term 'corruptly', not being defined by the Act, bears its natural or ordinary meaning. I added:

In relation to the conduct of a public officer performed in the purported exercise of a function or duty of [his, her, or its] office, it is not necessary that the conduct be unlawful or that it be outside the functions of the office, when properly understood. What is necessary is that there should be an element of fault, a wrongful motivation or intent, a perversion of the proper performance of the functions or duties of the office, to gain some benefit or advantage for the officer or another or to cause some detriment to another party.

There is certainly no such element of fault in the actions of those officers who, as they would understand, were authorised to sign prosecution notices, and who otherwise participated in the prosecutions with which this Report is concerned. They were merely doing their duty in accordance with instructions received and in apparent accord with what was understood by Commissioners Hammond and Roberts-Smith RFD QC to be the law. No question of misconduct in any degree arises in respect of their conduct.

As to the Commission, acting by the Commissioner and its executive officers at the relevant times, I can see no basis for a conclusion that there was any conduct which would be described by the Act as serious misconduct.

The relevant actions of the Commission were unlawful, but that is insufficient of itself and in my view it cannot be said that the conduct in prosecuting Mr Burke, supported as it was by the opinions of eminent lawyers, despite the opinions of other eminent lawyers to the contrary, was a corrupt perversion of the proper performance of the misconduct function of the Commission, when there is no suggestion or evidence that the intent was other than to have the Commission do the job for which it was created, in an environment of consideration of the matter within the Commission which supported the conclusion that the necessary power to act existed.

Particularly is that so when the alternative was for the Commission in effect to do nothing following its investigations while an action for a declaration was brought in the Supreme Court, or to make submissions to the Government for the enactment of clarifying legislation, and then to wait to see if government would act to introduce legislation in the Parliament and, if so, what was the fate of such a Bill.

I turn then, finally, to s 4(d) of the Act and what is now described by the Act as minor misconduct. I do not propose to set out the terms of the sub-section. It is sufficient to say that, for the reasons already given, sub-paras. (i) and (iv) have no application to this case.

Nor, in my view, is there any evidence to support a conclusion that the conduct of those executive officers, from the Commissioner down, who acted for the

Commission in the way described above, was such as to cause them to perform their functions in a manner which was 'not honest or impartial', or constituted a breach of the trust placed in them by reason of the public offices they held.

That was not so to any degree and, so far as s 4(d)(vi) might have applied to officers of the Commission who were involved in the prosecution actions, their conduct was not, in my view, such as to constitute a disciplinary offence providing reasonable grounds for their dismissal from office. The complaint of misconduct in this matter has not been made out.

A handwritten signature in black ink, appearing to read 'Murray', written in a cursive style.

**HON MICHAEL MURRAY AM QC  
PARLIAMENTARY INSPECTOR**