

DIRECTOR'S CHAMBERS

12 June 2007

Hon J Hatzistergos MLC
Attorney General
Level 33, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Attorney,

I refer to your letter dated 5 June 2007 concerning the Advice provided by Mr M McHugh AC QC arising of the Dr Power's matter.

I note from the copy of your request to Mr McHugh that you have also obtained advice from other (unidentified) public sector chief executive officers as to how such matters should be and are handled in other public sector agencies. (I have no further information about that.) The implication is that such matters do arise from time to time in other agencies; but this was unprecedented in the 20 year life of the Office and, as far as I know, an event of a nature unprecedented in the 177 year history of the Crown Prosecutors. It might be pertinent to know how those chief executive officers or their agencies dealt with such a matter when it first arose; and in what circumstances it arose, involving what officer(s) with what duties. In the Power case the 7th most senior Crown Prosecutor in the State, highly educated, highly experienced, highly respected, trusted by the Attorney General of the day (including with functions related to children and the law), was associated with possibly criminal conduct of a serious kind. The surprise and enormity of the situation were prominent. Absent an innocent explanation (and the presumption of innocence still applies in NSW), the prospect was the destruction of a life's work and possibly a life. That loomed in the background of any action that was to be taken.

In your letter to me dated 15 May 2007 you posed two questions: *"In light of the matters I have raised do you still maintain that the approach you adopted in this matter was the correct one and that you would do so again in similar circumstances?"* In my letter dated 17 May 2007 I answered "Yes". Only one answer was provided when there should have been two.

The question posed to Mr McHugh is somewhat different from the second question you had posed to me: *"If the same circumstances as arose in the Power case were to arise again, should the Office of*

*the DPP first inform and seek the advice of the Police, rather than first informing the person in whose possession child pornography had been found?" Mr McHugh has re-formulated the question as: "If the Director of Public Prosecution [sic] learns that a person employed in his Office possesses child pornography, should the Director first inform and seek the advice of police officers before informing the person that the pornography has been found." [It is a small point, but Crown Prosecutors, strictly speaking, are not employed in the Office of the DPP. I have already made the point that the range of disciplinary options that apply to them is different from those that apply to staff employed under the *Public Sector Employment and Management Act 2002*.]*

In your letter to me dated 5 June 2007 you asked me to consider Mr McHugh's Advice (a copy of which has been omitted from your letter but was supplied on 7 June 2007) and provide you with my "written response as to whether, in the light of Mr McHugh's advice, [I] continue to maintain that the approach [I] adopted in this matter was the correct and that [I] would take the same action in similar circumstances."

Needless to say, I accept the wisdom of Mr McHugh's Advice; but without being critical of it or of the author I assert that is a counsel of perfection, given with the benefit of hindsight 11 months after the event - hindsight not only of what was known by the actors at the time, but also of what was discovered very much later. Where matters of judgment are for evaluation, hindsight can be a distorting factor.

Mr McHugh's primary advice is predicated on the DPP having concluded that the "*the police will have to be contacted concerning the matter*". For my own part, I had not reached that conclusion and I disagree with Mr McHugh's views about that aspect of the matter expressed particularly at pages 1 and 8. For the reasons explained in previous correspondence, at that stage I did not see the matter as inevitably one for police investigation. That would depend in large part on any input by Dr Power.

While Mr Smith's report of 4 July 2006 did state that when Dr Power came to his chambers, he (Mr Smith) was to advise him (ie intended to advise him) "*that he was not asked to comment*", I have been informed by others who were present that Mr Smith in fact advised Dr Power at the time that he did not need to say anything. The possibility that the material was work related was certainly in my mind and had been discussed with Mr Smith by telephone. It was my understanding that Mr Smith would always be open to Dr Power to volunteer such information as he chose.

Since the conclusion that both Mr Smith and I were asserted to have reached (concerning the need to have the police investigate the matter) formed a significant basis for Mr McHugh's advice, to that extent at least (and speaking for myself) it proceeds on an erroneous premise.

When I wrote of a time "*before any police investigation was likely to be conducted*" (page 9 of the Advice) I had in mind - and did so at the time of the events - that any police response would not be instantaneous. I have commented on that and its consequences already. It is common knowledge that, absent immediate serious harm or threat to life or health, police do not normally respond to reports by mediate attendance.

I also note that a page 5 Mr McHugh states that the conversation between Mr Smith and Dr Powers occurred "*in the presence of two other Crown Prosecutors*". The others present were in fact the Deputy Director of Public Prosecutions, the Senior Crown Prosecutor and the Manager, Personnel Services of the Office.

It is important to note that, having considered all the material supplied to him, in no sense does Mr McHugh even suggest that the actions taken on 4 July 2006 were done by anyone with *mala fides* or a motive to assist Dr Power in any way to avoid responsibility for his conduct. Mr McHugh at page 2 acknowledges that "*Difficult questions may arise concerning the time when the Director should inform the employee of the finding of the material*". At page 7 he expresses a view "*Without intending to criticise the difficult position in which the Director and the Deputy Director found themselves ...*".

I note also that neither the Independent Commission Against Corruption nor the Ombudsman has expressed any criticism of the action that was taken.

I return to the two questions you have now asked me. I have maintained that the approach adopted in my Office on 4 July 2006 was the correct one in the circumstances that pertained at the time.

In the light of the examination that the matter has now received, I accept that there may be different judgments made about that and that, with the benefit of hindsight, mine may not have been the best of those reasonably able to have been formed. Nevertheless, I do not accept that the approach taken was incorrect as being in some way wrong.

In the light of that examination and especially of Mr McHugh's Advice, if such a situation arose again in the future I would need, in accordance with Mr McHugh's Advice, first to assess and conclude whether or not police would be required to be informed in any event. If I come to the view that police will have to be contacted concerning the matter, then the balancing exercises referred to at pages 2 and 3 of Mr McHugh's Advice will still need to be taken into consideration. If the decision is made to inform police, then that will be done immediately without reference to the officer concerned and police advice will be sought and followed. However, if I form the view in a particular case that circumstances exist where it may not be necessary to inform police, those balancing exercises may still need to be undertaken in light of the possibility of eventual police involvement and a judgment made as to the best way to proceed in the particular circumstances.

Yours faithfully

NR Cowdery AM QC

Director of Public Prosecutions