

40TH PARLIAMENT



Report 34

STANDING COMMITTEE ON PUBLIC ADMINISTRATION

Consultation with Statutory Office Holders

Presented by
Hon Adele Farina MLC (Chair)
November 2020

Standing Committee on Public Administration

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Government response

This report is subject to Standing Order 191(1):

Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.

The two-month period commences on the date of tabling.

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EXECUTIVE SUMMARY

- 1 In October 2020, the Standing Committee on Public Administration (Committee) held public hearings with the:
 - Information Commissioner
 - Inspector of Custodial Services
 - Parliamentary Commissioner for Administrative Investigations (Ombudsman)
 - Public Sector Commissioneras part of its regular consultation with those statutory office holders under its term of reference 5.3(b).
- 2 Hearings dealt with matters of interest to the Committee arising from those statutory office holders' most recent annual reports, as well as following up on matters of interest from the previous round of consultation in 2019.
- 3 This report briefly outlines the consultation with each statutory office holder and any additional information provided. The Committee makes two findings and nine recommendations.

Findings and recommendations

Findings and recommendations are grouped as they appear in the text at the page number indicated:

RECOMMENDATION 1

Page 5

The Minister for Corrective Services introduce legislation into the Parliament of Western Australia to remove the 30-day period provided by section 35 of the *Inspector of Custodial Services Act 2003*.

RECOMMENDATION 2

Page 18

The Information Commissioner detail in the External Review Procedure the circumstances in which the Office of the Information Commissioner would consider an exchange of submissions to be appropriate.

FINDING 1

Page 18

Evidence to the Committee suggests that there are occasions where an exchange of submissions has occurred, but the number of instances has not been confirmed.

RECOMMENDATION 3

Page 18

The Office of the Information Commissioner develop guidelines to assist agencies in developing submissions that are able to be shared.

FINDING 2

Page 20

None of the amendments recommended by the Information Commissioner to the *Freedom of Information Act 1992* in the 2018-19 Annual Report of the Office of the Information Commissioner have been legislated.

RECOMMENDATION 4

Page 20

The Attorney General undertake a review of the *Freedom of Information Act 1992*, with public consultation, with a report to be tabled in the Parliament of Western Australia before the end of 2023.

RECOMMENDATION 5

Page 21

The review of the *Freedom of Information Act 1992* specifically consider the Information Commissioner's recommendations regarding private contractors who provide public patient services.

RECOMMENDATION 6

Page 25

The Ombudsman increase the number of yearly regional visits conducted as part of the Regional Awareness and Accessibility Program.

RECOMMENDATION 7

Page 38

As part of its next five-year workforce diversity strategy, the Public Sector Commission introduce an aspirational target for underrepresented groups in the senior executive service.

RECOMMENDATION 8

Page 39

The Public Sector Commission expedite the review of Part 6 of the *Public Sector Management Act 1994* and table the review report in the Parliament of Western Australia by the end of 2022.

RECOMMENDATION 9

Page 41

The Minister for Public Sector Management review the arrangements around the role of State Recovery Controller, including reviewing any issues in relation to performing the dual role of Public Sector Commissioner, and whether this arrangement is appropriate going forward.

CHAPTER 1

Introduction

Terms of reference

- 1.1 The Standing Committee on Public Administration (Committee) is required by paragraph 5.3(b) of its terms of reference to consult regularly with:
- the Parliamentary Commissioner for Administrative Investigations (Ombudsman)
 - the Public Sector Commissioner
 - the Information Commissioner
 - the Inspector of Custodial Services
 - any similar officer.

Background

- 1.2 The Committee last consulted with statutory office holders in May 2019, and tabled its consultation report in the Legislative Council on 15 October 2019. That consultation focussed primarily on the 2017-18 annual reporting period.

Outline of consultation

- 1.3 On 21 October 2020, the Committee held a public hearing with the Information Commissioner. On 26 October 2020, the Committee held public hearings with the Inspector of Custodial Services, the Ombudsman and the Public Sector Commissioner.
- 1.4 Hearings dealt with matters of interest to the Committee arising from those statutory office holders' most recent annual reports, as well as following up on matters of interest from the 2019 consultation.¹
- 1.5 Annual hearings afford the Committee with a valuable opportunity to gain a comprehensive understanding of the current work of statutory office holders, and any relevant issues. The Committee extends its sincere thanks to the four statutory office holders and their staff for their assistance and cooperation throughout this consultation.
- 1.6 This report briefly outlines the consultation with each statutory office holder and any additional information provided, highlighting matters of interest.

Committee's observation

- 1.7 The COVID-19 pandemic has presented unprecedented challenges for Western Australia (WA), as it has done across much of the world. During times of crisis, strong mechanisms for overseeing government actions and decisions are more important than ever.
- 1.8 Statutory office holders, and their independence from the WA Government, are an important source of such oversight. The Committee notes that some oversight processes appear to have been impacted by the pandemic. For example, the Public Sector Commissioner has been performing the dual role of State Recovery Controller since April 2020. During the peak of the COVID-19 pandemic in WA, when prisoners were at their most vulnerable, staff of the

¹ Hearings focussed on the annual reporting period 2019-20, with the exception of the hearing with the Inspector of Custodial Services, which focussed on 2018-19.

Office of the Inspector of Custodial Services were unable to visit or inspect regional prisons in person.

- 1.9 The Committee does not make this observation to criticise the response to the pandemic. Rather, it makes this observation to inform the future 41st Parliament, so that those Members charged with overseeing the overseers may ensure full accountability measures are restored as WA returns to business as usual.

CHAPTER 2

Inspector of Custodial Services

Introduction

- 2.1 The Inspector of Custodial Services (Inspector) is an independent Parliamentary officer, required under the *Inspector of Custodial Services Act 2003* (IOCS Act) to regularly inspect and report on WA prisons, detention centres, court custody centres and lock-ups.
- 2.2 The Office of the Inspector of Custodial Services (OICS) supports the Inspector in performing his functions.

Annual Report

- 2.3 Although the Committee's hearing was held in October 2020, the 2019-20 OICS Annual Report had not yet been tabled, as it was subject to a 30-day embargo period imposed by the IOCS Act. More detail about the embargo period is included at paragraphs 2.10 to 2.17. The 2019-20 OICS Annual Report was subsequently tabled on 3 November 2020.²
- 2.4 The Committee therefore focussed its consultation on the 2018-19 OICS Annual Report (OICS Annual Report), as well as select inspection and review reports released in the 2019-20 reporting period.
- 2.5 The areas of interest identified by the Committee included:
- 30-day embargo period for reports
 - information sharing between OICS and the Department of Justice
 - implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
 - jurisdiction over WA's forensic mental health facility, the Frankland centre
 - treatment assessments and prison programs
 - Bandyup Women's Prison
 - the impact of COVID-19.
- 2.6 An additional topic of interest that the Inspector raised with the Committee was the development of a new procedure for searching OICS staff at prisons.

Hearing and additional information

- 2.7 On 26 May 2020, the following witnesses from OICS appeared at a public hearing before the Committee:
- Eamon Ryan, Inspector
 - Darian Ferguson, Deputy Inspector of Custodial Services (Deputy Inspector)
 - Natalie Gibson, Director of Operations
 - Derek Summers, Manager Corporate Governance
 - Rowena Davis, Director of Reviews.

² Tabled Paper 4511, Legislative Council, 3 November 2020.

- 2.8 The Committee also wrote to the Inspector with an additional question following the hearing.
- 2.9 The evidence provided to the Committee regarding the matters listed at 2.5 and 2.6 are summarised below.

30-day report embargo period

- 2.10 Section 35 of the IOCS Act requires that the Speaker of the Legislative Assembly and the President of the Legislative Council table each document delivered under section 33 (annual reports) and section 34 (inspection reports, reports of occasional inspections and reviews) in their respective Houses of Parliament:

- not before 30 days after the document is delivered
- as soon as practicable after the expiration of that 30 day period.

- 2.11 The provision is intended to allow 30 days for the Minister for Corrective Services to consider a response before a report is tabled in Parliament.³

- 2.12 This issue was raised with the Committee in 2019, with the Inspector stating:

In any of this kind of work, time is a bit of the essence, and the sooner and the more contemporary your report is to the time of the work and the review, the more value it is both to yourselves, the Parliament more generally and the general public.⁴

- 2.13 Following consultation with OICS in 2019, the Committee recommended that the 30-day period provided by section 35 of the IOCS Act, for the tabling in Parliament of documents under section 33 or 34, be reviewed.⁵ On 11 December 2019, the Minister for Corrective Services noted the recommendation.⁶

- 2.14 OICS raised this matter once again in the OICS Annual Report:

Other Western Australian Parliamentary officers such as the Auditor General and the Ombudsman do not face such a long embargo period. Nor do the Inspectors of Custodial Services in New South Wales and the Australian Capital Territory.⁷

- 2.15 This year, the embargo period affected the Committee's consultations. The 2019-20 annual report was embargoed at the time of the hearing in October. As a result, the Committee focussed its inquiry on the 2018-19 annual reporting period as well as inspection reports that had been released throughout the year.

- 2.16 Ideally, the Inspector would prefer to see the embargo period removed rather than reduced, with reports tabled in the same manner as the Auditor General, Ombudsman and Corruption and Crime Commission reports. This would better reflect current practices:

I cannot speak for when the legislation was first enacted almost 20 years ago, but from our perspective, the process we have for publication of an inspection report is now that there would be no surprises. A draft of the report is sent to the department and they take many weeks to comment on the draft, correct factual

³ Prisons Amendment Bill 1998, *Clause Notes*, Legislative Assembly, p 4.

⁴ Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, transcript of evidence, 6 May 2019, p 5.

⁵ Western Australia, Legislative Council, Standing Committee on Public Administration, report 29, *Consultation with Statutory Office Holders*, 15 October 2019, p 5.

⁶ Hon Fran Logan MLA, Minister for Corrective Services, letter, 11 December 2020, p 1.

⁷ Office of the Inspector of Custodial Services, *Annual report 18-19*, 29 October 2019, p 7.

errors, and we understand that in their process they consult with the minister; then the report is finalised and tabled.⁸

- 2.17 The Inspector confirmed that there is no work currently underway to reconsider section 35. If the IOCS Act requires amendment in the near future to facilitate the Inspector's responsibilities under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (see paragraph 2.26), it is likely that OICS will propose an amendment to section 35 at that point.⁹

RECOMMENDATION 1

The Minister for Corrective Services introduce legislation into the Parliament of Western Australia to remove the 30-day period provided by section 35 of the *Inspector of Custodial Services Act 2003*.

Information sharing between the Office of the Inspector of Custodial Services and the Department of Justice

- 2.18 The Committee asked the Inspector for an update on two draft memoranda of understanding (MOUs) between OICS and the Department of Justice (Department) relating to the provision of information, which arose at both the 2018 and 2019 hearings.
- 2.19 The two draft MOUs remain outstanding. The Inspector attributes the delay to COVID-19, but notes that the absence of the MOUs has not hampered OICS ability to access information:
- which is a problem that we had some years ago. Our relationship with the current leadership in the department is very good, and we have not had any difficulties that the MOU would resolve. So it will largely be a procedural document.¹⁰
- 2.20 The Inspector anticipates that the MOUs will be finalised before Christmas. As it did in 2019, the Committee notes that these MOUs have been outstanding for some time, and should be finalised at the earliest opportunity.
- 2.21 OICS has not progressed any legislative amendments to strengthen powers to compel the provision of information. The Inspector advised that the need for stronger powers has not been evident in the past 18 months, due to a 'very open and very candid' relationship with the Department.¹¹ The Committee notes this, but also notes that the capacity to share information should not be reliant on good relationships between individuals, as the Department's leadership could change.

Searching of Office of the Inspector of Custodial Services staff

- 2.22 The Department's searching procedures have recently been subject to criticism from the Corruption and Crime Commission, leading to their review.¹² OICS has spent time throughout the year working with the Department on a new Commissioner's order and procedure for the searching of OICS staff on entry to prisons.
- 2.23 The IOCS Act provides OICS staff with free and unfettered access to prisons, which has traditionally been understood to mean OICS staff are exempt from searching.¹³

⁸ Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, transcript of evidence, 26 October 2020, p 6.

⁹ *ibid.*, p 3.

¹⁰ *ibid.*, p 2.

¹¹ *ibid.*, p 3.

¹² *ibid.*, p 2.

¹³ *Inspector of Custodial Services Act 2003*, ss 28 - 29.

- 2.24 According to the Inspector, the Department received legal advice from the State Solicitor's Office suggesting that 'free and unfettered access' does not include that OICS staff are not subject to search:

So there was a lot of...negotiating, and a lot of refining of the wording of that to ensure that we were not hindered or hampered in any way, and also clarifying the advice that we had, which was that we could not be denied entry to a facility. We had to work out, if there were concerns with one of our staff, how we would practically manage that.¹⁴

- 2.25 While the final Commissioner's order is yet to be released, the Inspector advises that the result is a 'practical, sensible arrangement'.¹⁵

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

- 2.26 In December 2017, the Federal Government ratified the United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). OPCAT will require all Australian jurisdictions to implement systems of independent oversight for all closed places, which includes prisons, secure mental health facilities and police custody.¹⁶

- 2.27 To date, WA is the only state or territory to announce its OPCAT inspection arrangements.¹⁷ The Ombudsman and OICS have been nominated as inspection agencies.

- 2.28 OICS will be responsible for inspecting custodial places of detention, such as prisons and youth detention centres. Implementing OPCAT will require an expansion of jurisdiction to allow OICS to inspect police lock-up. This will likely require legislative amendment.¹⁸

- 2.29 The scope of OPCAT arrangements in Australia is still under consideration. In its 2020 report on OPCAT implementation, the Australian Human Rights Commission notes that OPCAT does not define 'places of detention', but broadly states that it applies to places where 'people are deprived of their liberty'.¹⁹ Article 4 of OPCAT provides:

Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention).²⁰

- 2.30 The Australian Human Rights Commission notes that OPCAT inspections could therefore cover not only those settings with a locked door, but other settings where a person cannot leave at will—such as a person chemically restrained in a hospital emergency ward.²¹ The Federal Government has proposed that in the first instance, the focus should be on 'primary'

¹⁴ Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, transcript of evidence, 26 October 2020, p 2.

¹⁵ *ibid.*

¹⁶ Office of the Inspector of Custodial Services, *Annual report 18-19*, 29 October 2019, p 12.

¹⁷ Australian Human Rights Commission, *Implementing OPCAT in Australia*, 2020, p 5.

¹⁸ Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, transcript of evidence, 26 October 2020, p 4.

¹⁹ Australian Human Rights Commission, *Implementing OPCAT in Australia*, 2020, p 42.

²⁰ United Nations Human Rights, Office of the High Commissioner. See: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>. Viewed 10 November 2020.

²¹ Australian Human Rights Commission, *Implementing OPCAT in Australia*, 2020, p 42.

places of detention, such as prisons, police lock-up, closed involuntary treatment facilities or units and immigration detention centres.²²

- 2.31 The Committee asked the Inspector about how broad OPCAT arrangements could potentially become:

Hon JACQUI BOYDELL: My mind is expanding to all the possible areas you would potentially have to consider in those inspections. I am just trying to get a grasp of how broad that is. Are these being considered, things like schools, boarding schools, I assume detention centres; what about FIFO facilities and things like that? They are all areas where people are being accommodated and if there is a potential issue, they could actually be locked up. Is that being considered? Because four or five extra FTE is not going to cover all of those departments.

Mr RYAN: Our jurisdiction would be focused solely on the corrections, custodial-type places of detention. So where someone is under arrest, either remanded in custody or is under arrest and held in the police lockup, that would be where we would get—the broader jurisdiction that you are talking about would fall within the ambit of the Ombudsman. Now, I think the Ombudsman’s focus is—and I am not speaking for the Ombudsman—around initially mental health. You used the example of schools. If there is a sensory deprivation room, for example, with a child with autism and it is the soft sensory room that has monitoring and all those sorts of things, if the child cannot get out of the room, then that, theoretically at least, would be a place of detention.

...

So the jurisdiction is very, very broad, but I think there is some pragmatic understanding of you have to walk before you run, and certainly our focus would be to expand on those additional 20 or 30 police lockups and that is what our estimation is based on, not any of the things that you anticipate.

Hon KYLE MCGINN: ...what about COVID quarantine?

Mr RYAN: That is a really good question and there has been a number of discussions, not with us, at an international level about whether the OPCAT jurisdiction would extend to places such as hotel quarantine in the circumstances we now face ourselves. Unfortunately, I cannot give you much more detail other than my preliminary recollection of having read those articles many months ago now in the height of the pandemic, that there was some thinking they would be places of detention, internationally, and that they would fall within the jurisdiction of a fully-fledged OPCAT protocol. How that would work in the West Australian context, I cannot answer; I do not know. It would be far too early.²³

- 2.32 Given the potential for broad applicability, the Committee expresses its concern about the capacity of the nominated investigation agencies to carry out the inspection functions, both in terms of resourcing and the qualifications of staff to inspect specialised areas such as mental health facilities.
- 2.33 The Federal Government is working to a revised commencement timeframe of January 2022.²⁴ The Inspector has progressed preliminary costings for approximately four or five new

²² *ibid.*

²³ Hon Jacqui Boyde MLC, Deputy Chair, Standing Committee on Public Administration; Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services; Hon Kyle McGinn MLC, Member, Standing Committee on Public Administration, transcript of evidence, 26 October 2020, pp 5-6.

²⁴ Australian Human Rights Commission, *Implementing OPCAT in Australia*, 2020, p 11.

full-time equivalent staff to fulfil the new functions, although he notes that it is difficult to estimate what resources will be required at this stage.²⁵

Jurisdiction over forensic mental health facility

2.34 The Committee questioned whether the Inspector's jurisdiction should be expanded to include WA's only forensic mental health facility, the Frankland Centre. The Inspector advised that the Frankland Centre will likely fall under the Ombudsman's jurisdiction under OPCAT arrangements. At present, the Frankland Centre is also subject to oversight from the Chief Psychiatrist and the Health and Disability Complaints Office.²⁶

2.35 Given its strong clinical care focus, and that the facility is operated by the Department of Health, the Inspector does not perceive a need to expand jurisdiction to include the Frankland Centre.²⁷ However, the Inspector remains concerned about forensic mental health capacity in prisons:

You have people in prisons who are acutely unwell and who have been assessed by a psychiatrist as needing that acute tertiary care, and they cannot get there because there simply are not enough beds.²⁸

2.36 The Inspector pointed to the upcoming expansion of Casuarina Prison, which could reduce that prisons reliance on the mental health system.²⁹ The Inspector advises that the 344-bed expansion, due for completion in 2023, will include a 40-bed specialist unit for acute forensic mental health patients.³⁰

Treatment assessments and prison programs

2.37 Within 28 days of reception, new prisoners are expected to receive an:

- assessment to determine their security rating and education and treatment needs
- initial Individual Management Plan (IMP).

2.38 After that, prisoners can be assigned to programs that may provide the opportunity for rehabilitation.³¹

2.39 The OICS Annual Report states that on 31 June 2019, 696 prisoner treatment assessments were overdue, and 1023 prisoners were awaiting an initial IMP after 28 days.³² The previous Inspector initially raised this issue with the Department in 2018, and OICS has been receiving monthly status updates on the situation since then.³³

2.40 The Committee heard that the backlog continued to spike until about July 2019, but has since reduced. This is largely due to an effort by the Department to assign additional resources and bring the number down:

²⁵ Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, transcript of evidence, 26 October 2020, p 5.

²⁶ *ibid.*, p 10.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *ibid.*, p 7.

³¹ Office of the Inspector of Custodial Services, *Annual report 18-19*, 29 October 2019, p 10.

³² *ibid.*

³³ Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, transcript of evidence, 26 October 2020, p 7.

There was a bit of a spike towards the end of last year and the beginning of this year, where the numbers went back up again as a result of some of the resources finishing, their contracts finishing, but they have addressed that and they now have resources back. We had a briefing recently from the department and the backlog is still in the vicinity of 500 or so, I think that is roughly the right number.

It is trending down, but it will need either one of two things; those resources that we have spoken about that they have allocated to continue on an ongoing basis, or some sort of refinement of the process of undertaking those assessments.³⁴

2.41 Between 31 July 2019 and 30 September 2020, the number of overdue treatment assessments reduced by 49 per cent and the number of overdue initial IMPs reduced by 58 per cent.³⁵ The Department told the Committee that it employed the following strategies to achieve these short-term results:

- in June 2018, effected a Custodial Operations Broadcast outlining strategies to assist in clearing overdue initial IMPs, such as reprioritising cohorts of prisoners for initial assessments
- in June 2019, appointed additional resources to undertake initial IMPs, including eight treatment assessors, one education assessor and one assessment writer
- in November 2019, 10 temporary public service staff commenced to assist with reducing the backlog of IMPs due to prison officers undertaking operational assessments being redeployed
- between 2018 and 2020, suitably trained staff from the Offender Programs Unit have been redirected to undertake initial treatment assessments when they have not been dedicated to undertaking an offender program.³⁶

2.42 The Department also recognises that long-term strategies are required to address the issue systemically. In July 2019, the Department established a Project Steering Committee to review the IMP process to improve the delivery and timeliness of education, treatment and operational assessments. Review recommendations that have been approved by the Commissioner of Corrective Services include:

- establishing a dedicated operational assessment governance area within the Rehabilitation and Reintegration branch to provide oversight, standards, monitoring and consistent training to operational staff
- establishing dedicated public service positions across all public prisons to complete operational assessments
- extending the timeframe for completing initial IMPs from 28 days to six weeks.³⁷

2.43 A project team has been established to progress these reforms, which are expected to be finalised by September 2021.³⁸

2.44 The Committee expresses its concern that one of the measures identified for addressing this issue is simply extending the timeframe for completing initial IMPs from 28 days to six weeks. The Department should aim to complete initial IMPs within 28 days, rather than extend the timeframe.

³⁴ *ibid.*

³⁵ Dr Adam Tomison, Director General, Department of Justice, letter, 4 November 2020, p 1.

³⁶ *ibid.*

³⁷ *ibid.*, p 2.

³⁸ *ibid.*

- 2.45 A consequence of a backlog in assessments and IMPs has been programs being cancelled or moved, because not enough people had been assessed as suitable to join. In terms of program availability more generally, the Inspector told the Committee that ideally there would be more across the system—both to increase chances of consideration for parole or early release, and to prevent recidivism on release.³⁹

Bandyup Women's Prison

- 2.46 In 2019, the Inspector gave evidence to the Committee about an incident at Bandyup Women's Prison (Bandyup) which saw a woman give birth alone while locked in her cell. Following this consultation, the Committee made three recommendations pertaining to pregnant women at Bandyup.⁴⁰
- 2.47 OICS inspected Bandyup in April 2020. The final report is pending, but the Inspector was able to tell the Committee that OICS observed a number of improvements at the prison, including:
- reduced population pressure, due to the opening of Melaleuca Remand and Reintegration Facility and Wandoo Rehabilitation Prison⁴¹
 - the introduction of a special line of pregnancy uniforms⁴²
 - trauma informed training has been developed and delivered to approximately 80 per cent of staff.⁴³
- 2.48 The Committee notes the provision of trauma informed training to staff, but also notes that the Department will need to ensure that future staff changes are accounted for, and that knowledge remains current. This may mean incorporating the training into any induction for staff commencing at Bandyup, and providing refresher courses.
- 2.49 Issues around infrastructure remain, and will likely be a focus of the inspection report recommendations.⁴⁴ Director of Operations, Natalie Gibson, told the Committee while potential additional accommodation for pregnant women and mothers with babies had been identified, neither converted dongas or cells are ideal in situations where emergency medical care is required:
- But they have taken some small steps, I guess, within the parameters that they had.⁴⁵
- 2.50 The Committee notes these improvements, and will continue to monitor the situation at Bandyup.

³⁹ Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, transcript of evidence, 26 October 2020, p 7.

⁴⁰ Western Australia, Legislative Council, Standing Committee on Public Administration, report 29, *Consultation with Statutory Office Holders*, October 2019.

⁴¹ Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, transcript of evidence, 26 October 2020, p 9.

⁴² Natalie Gibson, Director of Operations, Office of the Inspector of Custodial Services, transcript of evidence, 26 October 2020, p 9.

⁴³ Darian Ferguson, Deputy Inspector, Office of the Inspector of Custodial Services, transcript of evidence, 26 October 2020, p 10.

⁴⁴ Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, transcript of evidence, 26 October 2020, p 9.

⁴⁵ Natalie Gibson, Director of Operations, Office of the Inspector of Custodial Services, transcript of evidence, 26 October 2020, p 9.

Impact of COVID-19

2.51 The Committee is aware that limitations on visits and travel during the peak of COVID-19 restrictions in WA lead to concern for the mental wellbeing of prisoners.⁴⁶ The Committee questioned how COVID-19 had impacted OICS operations. The 2019-20 OICS Annual Report will cover this topic in greater detail.⁴⁷

2.52 During the height of restrictions in WA, OICS staff were unable to travel to regional areas. This meant that a scheduled inspection of West Kimberley Regional Prison was primarily virtual, utilising Skype and phone interviews. Since regional border restrictions eased, OICS have also conducted a physical inspection.⁴⁸

2.53 In inspecting Bandyup in April 2020, OICS took a different approach:

Ordinarily for our inspection we would take a large team in and be in there for five to 10 days, with eight, nine or 10 people. What we did with the Bandyup inspection, as much to provide reassurance to the women there that we were not being cavalier, was we stretched the inspection out over probably two and a half weeks, and we had fewer people there at any one time.⁴⁹

2.54 OICS operates the Independent Visitors Service, which involves volunteer visitors attending a nominated prison or detention centre at least once every three months to talk with prisoners or juvenile detainees about their concerns or issues regarding the facility.⁵⁰ Apart from regional travel restrictions, OICS staff were not prevented from attending prisons. However, volunteer Independent Prison Visitors mostly chose not to visit during this time out of fear of inadvertently introducing the virus:

There was an enormous amount of concern in Australia about COVID getting into prisons.⁵¹

2.55 OICS is now largely back to business as usual, visiting and inspecting prisons in person, with added precautions such as temperature checking and social distancing. During 2019-20, OICS undertook 57 liaison visits to custodial facilities across WA (including work camps and lockups), and nine 'contact reports' (undertaken via telephone).⁵² A breakdown of visits and contact reports by facility is at Appendix 1.⁵³ The OICS Annual Report measures these visits under the key efficiency indicator 'liaison visit report'. The Committee notes that the 2019-20

⁴⁶ Hon Jacqui Boyde MLC, Deputy Chair, Standing Committee on Public Administration, transcript of evidence, 26 October 2020, p 11.

⁴⁷ Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, transcript of evidence, 26 October 2020, p 11.

⁴⁸ *ibid.*

⁴⁹ *ibid.*, p 12.

⁵⁰ Office of the Inspector of Custodial Services. See: https://www.oics.wa.gov.au/about-oics/independent-visitor-service/?doing_wp_cron=1604975115.1448059082031250000000. Viewed 10 November 2020.

⁵¹ Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, transcript of evidence, 26 October 2020, p 13.

⁵² Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, letter, 30 October 2020, p 1.

⁵³ The Inspector of Custodial Services advises that the figures provided do not include visits undertaken by independent visitors or the time spent in custodial facilities by OICS staff during inspections. The number of visits will vary from the number of liaison reports listed under Key Efficiency Indicators in the 2019-20 annual report, due to a timing issue.

number (63) is less than the 2018-19 number (70), and also notes that the target number has dropped in response to budget cuts from prior years.⁵⁴

- 2.56 The Inspector observed that the lockdown in prisons was 'quite significant'.⁵⁵ Social visits were cancelled, replaced with free and unlimited phone calls. Many service providers scaled back operations. Electronic visits commenced, which OICS have long been advocating. While this was a difficult time for prisoners who simply wanted to hug their children, many understood that outside visitors posed the greatest risk of introducing the virus:

so they were actually aware of the tension between, "Okay, I can't have visits, but I'm safe."⁵⁶

- 2.57 Visits have largely returned to usual, phone calls are no longer free and most service providers are back in prisons. While it has been a tense environment, the Inspector says that the prisons and Department's management of the situation was 'quite a commendable effort'.⁵⁷

- 2.58 The Committee accepts this assessment, but notes that prison visits and regional inspections were hampered during the height of the pandemic, at a time of great uncertainty and vulnerability for prisoners. The Committee considers that this is precisely the context in which the OICS oversight role is most important. The Committee will be interested to hear if and how functions and operations have changed at next year's hearing, after a year of operating in a 'COVID-normal' environment.

Concluding comment

- 2.59 During this round of consultation, the Committee heard about improvements in terms of information sharing with the Department and the treatment assessment backlog in prisons. Progress has been limited in other areas, such as reforming the 30-day embargo period and implementing OPCAT. The Committee will continue to monitor the impact of COVID-19 in prisons, the implementation of OPCAT and progress at Bandyup in 2020-21.

⁵⁴ Office of the Inspector of Custodial Services, *Annual report 18-19*, 29 October 2019, p 26.

⁵⁵ Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, transcript of evidence, 26 October 2020, p 12.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

CHAPTER 3

Information Commissioner

Introduction

- 3.1 The Information Commissioner is an independent officer, reporting directly to Parliament. The position is established by the *Freedom of Information Act 1992* (FOI Act), and supported by staff of the Office of the Information Commissioner (OIC).
- 3.2 The Information Commissioner's main function is to provide independent, external review of decisions made by agencies under the FOI Act on:
- applications to access information
 - requests to amend personal information.
- 3.3 The Information Commissioner's other functions include:
- ensuring agencies are aware of their responsibilities under the FOI Act
 - ensuring that members of the public are aware of the FOI Act and their rights
 - assisting members of the public and agencies on matters relevant to the FOI Act
 - recommending to Parliament legislative or administrative changes that could be made to help the objects of the FOI Act to be achieved.⁵⁸

Annual Report

- 3.4 The 2019-20 Annual Report of OIC was tabled in the Legislative Council on 24 September 2020 (OIC Annual Report).⁵⁹ Matters of interest identified by the Committee included:
- review of strategic goals and initiatives and new strategic plan
 - external review indicators, including participant satisfaction and timeliness
 - legislative change and review.
- 3.5 Other matters of interest related to the 2019 consultation, or were raised by OIC or Members:
- external review procedure, particularly:
 - sharing submissions with parties to an external review
 - the practice of agencies in including exempt material in submissions
 - appeals to the Supreme Court
 - police body-worn cameras
 - single-point agency contacts in newly formed departments and single FOI application
 - privacy and data sharing.

⁵⁸ Office of the Information Commissioner. See: <https://www.oic.wa.gov.au/en-au/H005>. Viewed 26 October 2020.

⁵⁹ Tabled Paper 4375, Legislative Council, 24 September 2020.

Hearing and additional information

- 3.6 On 21 October 2020, the following witnesses from OIC appeared before the Committee:
- Catherine Fletcher, Information Commissioner
 - Tony Pruyn, Manager, Complaints
 - Alison McCubbin, Coordinator, Education and Communication
 - Michelle Fitzgerald, Executive Officer.
- 3.7 In March 2020, the Hon Nick Goiran MLC wrote to the Committee requesting that it inquire into a potential systemic flaw with OIC procedure, and making himself available to assist in this matter.⁶⁰ On invitation from the Committee and pursuant to Standing Order 164(1), the Hon Nick Goiran MLC attended and participated in the hearing.⁶¹
- 3.8 The Committee wrote to the Information Commissioner with additional questions following the hearing.
- 3.9 The evidence provided to the Committee regarding the matters listed in paragraphs 3.4 and 3.5 is summarised below.

Review of strategic goals and initiatives and new strategic plan

- 3.10 The OIC Annual Report identifies that during 2019-20, OIC completed a review of its strategic goals and initiatives. On 30 June 2020, the Information Commissioner approved the OIC strategic plan for 2020-23.⁶²
- 3.11 The Information Commissioner advised that the new strategic goals essentially align with those articulated in the previous strategic plan. The exception is that the new strategic plan has a much greater focus on information technology (IT):
- The Office of the Information Commissioner has not had any significant change in IT assets for a long time—perhaps I should say information systems, document management systems and complaints management systems.
- ...
- While we are not a data-rich organisation as perhaps some big government departments and state departments, nonetheless we, like everybody, have data, and in fact we collect data from agencies across the public sector, so we really feel the need for better systems to be able to interrogate that data, not only to understand what is going on in the broader public sector with FOI data, but also to assist our own processes. Therefore, there is a much greater emphasis in our current strategic plan around IT, which cuts across all of our operational areas of advice and awareness, external review, and corporate services.⁶³
- 3.12 The Committee enquired as to what stage IT improvements were at, including whether OIC had approached the WA Government for any funding or support. OIC indicated it is at a 'fairly early stage' of this process:

⁶⁰ Hon Nick Goiran MLC, Member for the South Metropolitan Region, letter, 6 March 2020, p 2.

⁶¹ Standing Order 164(1) provides that any Member of the Council may participate in the taking of oral evidence by a Committee, and by leave of a Committee its deliberations and proceedings but may not vote.

⁶² Office of the Information Commissioner, *Annual report 2019/2020*, 24 September 2020, p 3.

⁶³ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 2.

In terms of looking for budgetary resources, we are yet to put together a business case, because we are yet to really identify what it is that we need.⁶⁴

- 3.13 Further, the OIC IT Manager retired in 2019. While the role still exists in the OIC structure, the resources have been used to hire additional external review staff. As a core function, external review resources are a priority.⁶⁵
- 3.14 It appears that OIC is at the start of its journey in planning to modernise their IT systems. The Committee will continue to monitor their progress.

External review function indicators

- 3.15 The Information Commissioners' core function is to review decisions made by agencies under the FOI Act. OIC measures the performance of this service in two ways—the:
- satisfaction of participants of an external review with the way in which the external review was conducted (78 per cent, down from 82 per cent in 2018-19)
 - number of external review applications resolved by conciliation (64 per cent, down from 82 per cent in 2018-19).⁶⁶
- 3.16 The Committee also considered timeliness of external review. In 2019-20, the average age in days of external reviews on hand was 224.⁶⁷ This represents an increase of 93 days from 2018-19.⁶⁸ It should be noted that external reviews 'on hand' means those underway, not those received during the course of the reporting period.⁶⁹
- 3.17 The Information Commissioner mainly attributes this to the growth in demand of matters outstripping resourcing. Matters received were down six per cent on the previous year.⁷⁰ However, a sustained level of matters of more than 150 per year over the last three years has meant that even though OIC has maintained a steady level of output, it has not been able to keep pace with demand.⁷¹
- 3.18 Work outside of the external review function is also a factor. Preparing annual reports, responding to parliamentary committee reports, and participating in the Department of the Premier and Cabinet's privacy and data-sharing project are examples of work that have directed resources away from external reviews.⁷²
- 3.19 The Information Commissioner told the Committee that no excuses are proffered:
- There are reasons for it, but it is concerning that we have had matters age considerably.⁷³

⁶⁴ *ibid.*, p 3.

⁶⁵ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 21 October 2020, pp 2-3.

⁶⁶ Office of the Information Commissioner, *Annual report 2018/2019*, 26 September 2019, p 9, and Office of the Information Commissioner, *Annual report 2019/2020*, 24 September 2020, p 10.

⁶⁷ Office of the Information Commissioner, *Annual report 2019/2020*, 24 September 2020, p 5.

⁶⁸ Office of the Information Commissioner, *Annual report 2018/2019*, 26 September 2019, p 4.

⁶⁹ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 4.

⁷⁰ *ibid.*

⁷¹ Antonius Pruyn, Manager, Complaints, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 4.

⁷² Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 21 October 2020, pp 3-4.

⁷³ *ibid.*, p 4.

- 3.20 OIC has started looking at reporting periods in brackets of time, as the raw figure of average days to finalise an external review 'does not necessarily convey the full story of what that workload was':

Those figures from time to time might be influenced by a lot of early matters being resolved and then in the next year some of the aged matters that could have been on hand for a significant period of time being finalised in that period of time.⁷⁴

- 3.21 With reference to the drop in satisfaction observed by external review participants in 2019-20, the OIC believes that the increase in time taken to finalise reviews is likely to be a factor.⁷⁵

External review process

- 3.22 Part 4 of the FOI Act provides for the external review of decisions and appeals. OICs External Review Procedure – Guide for Parties outlines the process. In brief:

- the Information Commissioner receives a valid application for external review and notifies parties in writing
- the Information Commissioner investigates the agency's decision
- if the matter cannot be resolved through conciliation, the Information Commissioner will make a formal determination.⁷⁶

- 3.23 Section 70 prescribes the procedure for dealing with complaints. Section 74 provides that the Commissioner is to ensure the non-disclosure of exempt matter. Both are relevant to this section of the report, and are included at Appendix 2.

Sharing submissions with parties to an external review

- 3.24 After the Committee tabled its report on consultation with statutory officer holders in 2019, the Hon Nick Goiran MLC raised in the Legislative Council a potential systemic flaw in the external review process.⁷⁷ With reference to his own experience, he stated that where the Information Commissioner makes a preliminary decision taking into account an agency submission, that submission should be provided to the applicant so that they may have a right of reply.
- 3.25 The Hon Nick Goiran MLC also refers to section 70(3) of the FOI Act, which provides that the Information Commissioner has to ensure that the parties to a complaint are given a reasonable opportunity to make submissions. In failing to provide agency submissions to the applicant, he suggests that the Information Commissioner denies applicants that reasonable opportunity.⁷⁸

⁷⁴ Antonius Pruyn, Manager, Complaints, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 4.

⁷⁵ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 12.

⁷⁶ Office of the Information Commissioner, *External Review Procedure – Guide for Parties*, October 2019.

⁷⁷ Hon Nick Goiran MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 30 October 2019, p 8547.

⁷⁸ *ibid.*, p 8546.

3.26 The Hon Nick Goiran MLC asked whether it is OICs practice to provide copies of each parties submissions during the external review process. The Committee heard that it 'would not be usual to have a pure exchange of submissions process'.⁷⁹

3.27 The Commissioner told the Committee that this is because in providing submissions, agencies may reveal exempt or potentially exempt matter.⁸⁰ Where submissions contain some exempt matter, or some matter claimed to be exempt, section 74 of the FOI Act will preclude the Information Commissioner from releasing them.⁸¹

We acknowledge sometimes there is a difficulty in both our decisions—our preliminary views that we send to parties or final decisions—that sometimes we cannot give them the full breadth and depth of the opposing party's submissions, but that is because of the confidentiality requirements around potentially exempt documents that the commissioner has under the legislation.⁸²

3.28 This Information Commissioner takes her guidance from the Supreme Court on this matter, particularly the principle enunciated in *Lee v Department of Health* [2020].⁸³

The requirement that the party affected be informed of the nature and content of adverse material requires the decision-maker to ensure that the party is informed of the nature and content of any material adverse to the interests of a party that is 'credible, relevant and significant' to the decision to be made. The point is not to ensure that the party is given a copy of every document that contains adverse material. The point is to ensure that the party has a meaningful opportunity to be heard on the issues. The point is to avoid practical injustice.⁸⁴

3.29 Antonius Pruyn, Manager, Complaints advised that this approach is consistent with the OIC External Review Procedure.⁸⁵ The procedure provides that where it is considered appropriate, the Information Commissioner may provide details of any submissions received to the other party to the external review:

When you say that a party, a complainant, is not receiving submissions, in practice, details of the submissions provided may come in a number of forms. I said earlier I think rarely it would be the complete submission, but I am unaware that we would not provide, at the very least, some kind of summary. Now, that summary might be in the form of a preliminary view position that the commissioner would be taking and it might be built within that document.⁸⁶

3.30 The Committee is of the view that many would not understand 'provide details' to mean 'provide a summary', and considers that the External Review Procedure could be clearer in this regard.

⁷⁹ Antonius Pruyn, Manager, Complaints, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 5.

⁸⁰ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 6.

⁸¹ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, letter, 2 November 2020, p 2.

⁸² Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 6.

⁸³ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, letter, 2 November 2020, p 2.

⁸⁴ *Lee v Department of Health* [2020] WASC 103, [50].

⁸⁵ Antonius Pruyn, Manager, Complaints, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 5.

⁸⁶ *ibid.*, p 7.

RECOMMENDATION 2

The Information Commissioner detail in the External Review Procedure the circumstances in which the Office of the Information Commissioner would consider an exchange of submissions to be appropriate.

- 3.31 The Committee sought to understand in how many instances full submissions were shared between parties. OIC does not keep this data:

That would require physically looking at every single file, so it would be a convoluted and extensive process to determine. It is possible, but it would be very difficult.⁸⁷

- 3.32 The Information Commissioner recalled a recent matter where it was deemed appropriate to share submissions, with consent of a party.⁸⁸

FINDING 1

Evidence to the Committee suggests that there are occasions where an exchange of submissions has occurred, but the number of instances has not been confirmed.

Practice of agencies including exempt material in submissions

- 3.33 The Committee questioned why parties are including exempt matter in their submissions to the Information Commissioner, and whether such inclusion voids the argument that the information is exempt. The Information Commissioner considers that it does not:

The FOI Act contemplates that the Information Commissioner will, in the course of dealing with a complaint, obtain information from agencies about documents or parts of documents claimed to be exempt: see section 70(1)...which provides that 'In order to deal with a complaint the Commissioner may obtain information from such persons and sources, and make such investigations and inquiries, as the Commissioner thinks fit'.⁸⁹

- 3.34 The Committee notes that this process may put applicants or appellants at a disadvantage, as they are often unable to know the full extent of the other party's argument. OIC could take steps to improve procedural fairness by issuing guidelines that assist agencies to make submissions that can be shared with an applicant.

RECOMMENDATION 3

The Office of the Information Commissioner develop guidelines to assist agencies in developing submissions that are able to be shared.

Appeals to the Supreme Court

- 3.35 The Information Commissioner advised that in every case, at least a summary of the submissions is provided, to the extent that it complies with section 74 of the FOI Act. Failure

⁸⁷ *ibid.*, p 8.

⁸⁸ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 8.

⁸⁹ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, letter, 2 November 2020, p 3.

to provide either a full submission or a summary could lead to an alleged lack of procedural fairness, and an applicant may choose to seek judicial review in the Supreme Court.⁹⁰

- 3.36 The Hon Nick Goiran MLC pointed out that this is unfair for appellants to subject themselves to the risks of significant court costs in circumstances where they do not know the other party's argument/submission.⁹¹
- 3.37 The Information Commissioner has not seen consistent evidence of appeals on these grounds. The number of appeals is generally low—out of 166 matters received for external review in 2019–20, only three decisions were made on appeal.⁹² The Committee notes that the costs associated with appealing to the Supreme Court are likely to be a factor in this low number.
- 3.38 The Committee asked why OIC favours a practice that places the applicant or appellant at a distinct disadvantage, by withholding information needed to appeal to the Supreme Court. OIC responded:

The Office does not favour the practice described or consider that it operates in a manner that places the applicant/appellant at a distinct disadvantage from exercising a right of appeal to the Supreme Court on a question of law.

In exercising her statutory powers, the Commissioner must strike a balance, having regard to her different legislative obligations. This includes her obligation to give the parties to a complaint a reasonable opportunity to make submissions to her under section 70(4) and her obligation not to disclose exempt information under section 74(1).⁹³

Legislative change and review

- 3.39 One of the functions of the Information Commissioner is to recommend legislative and administrative changes that could be made to help achieve the objects of the FOI Act. The objects of the FOI Act are to:
- enable the public to participate more effectively in governing the State
 - make the persons and bodies that are responsible for State and local government more accountable to the public.
- 3.40 The OIC Annual Report identifies that as a priority, section 61(1) of the FOI Act should be amended to allow the Information Commissioner to appoint staff directly. Currently, all OIC staff (apart from those seconded from other WA Government agencies) are appointed by the Governor in Executive Council on the recommendation of the Commissioner, which can result in significant delays.⁹⁴
- 3.41 The OIC Annual Report also identifies a list of legislative amendments that have been suggested in previous years. However, none of the amendments recommended in the OIC 2018–19 Annual Report have been legislated.⁹⁵

⁹⁰ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 7.

⁹¹ Hon Nick Goiran MLC, Member for South Metropolitan Region, Legislative Council, transcript of evidence, 21 October 2020, p 7.

⁹² Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 9.

⁹³ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, letter, 2 November 2020, p 3.

⁹⁴ Office of the Information Commissioner, *Annual report 2019/2020*, 24 September 2020, p 35.

⁹⁵ *ibid.*

FINDING 2

None of the amendments recommended by the Information Commissioner to the *Freedom of Information Act 1992* in the 2018-19 Annual Report of the Office of the Information Commissioner have been legislated.

- 3.42 The OIC Annual Report goes on to note that while the FOI Act has stood up well since it was enacted almost 30 years ago, it now operates in a significantly different environment, where almost all government records are 'born digital'.⁹⁶

In this context, an appropriately scoped, and independent, review of the FOI Act could examine and report back to the Parliament how best this important accountability device can continue to support transparency and trust in government.

The OIC will consider making a recommendation that a review of the FOI Act take place before its 30 year anniversary, which could then report back to the Parliament how this important accountability device can continue to best support transparency and trust in government.⁹⁷

- 3.43 The Committee asked the Information Commissioner for an update on a change that has now been recommended in several OIC annual reports—amending the FOI Act to apply to private health facilities who provide public patient services pursuant to contract with the Minister for Health. The Information Commissioner has discussed her legislative recommendations with the Attorney General, in the context of the FOI Act requiring a more substantial overhaul:

We have not achieved any piecemeal reform of any substance for many years. The act is 28 years old, so it is coming up to 30 years.⁹⁸

- 3.44 The Information Commissioner acknowledges that amendments to the FOI Act have likely not been a priority of the WA Government's legislative reform agenda. OIC will commence work soon to articulate why reform is needed.⁹⁹
- 3.45 The good operation of the FOI Act has significant implications for transparency and accountability. Therefore, the Committee is of the view that after 28 years of operation, the FOI Act is overdue for review.

RECOMMENDATION 4

The Attorney General undertake a review of the *Freedom of Information Act 1992*, with public consultation, with a report to be tabled in the Parliament of Western Australia before the end of 2023.

⁹⁶ *ibid.*, p 3.

⁹⁷ *ibid.*, p 35.

⁹⁸ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 10.

⁹⁹ *ibid.*

RECOMMENDATION 5

The review of the *Freedom of Information Act 1992* specifically consider the Information Commissioner's recommendations regarding private contractors who provide public patient services.

Police body-worn cameras

- 3.46 In 2019, the Information Commissioner told the Committee that recent developments in technology, such as police body-worn cameras, were likely to present issues into the future.¹⁰⁰
- 3.47 The Information Commissioner had expected to see external review applications contesting a lack of access to body-worn cameras.¹⁰¹ However, OIC has not seen a proliferation of these matters. This may be due to the nature of the information collected:

It is always going to involve the issue of exempt personal information because of the likelihood that you will have people involved in that footage other than the people seeking access to the footage.¹⁰²

- 3.48 The Information Commissioner does not necessarily think that modernising the FOI Act will impact this:

the model for most jurisdictions is a broad category of what is the document of an agency, what is an agency, and what are the categories of exempt status for matter in documents.

Even in some of the jurisdictions that have more modern legislation, it is a much simpler regime of fewer exemptions and an overall principle around is there any harm in releasing a document. They tend not to particularise types of information to that level of detail.¹⁰³

Single-point contact and application

- 3.49 In both 2018 and 2019, the Committee asked the Information Commissioner about issues regarding the management of FOI applications across amalgamated departments following the 2017 machinery-of-government changes.¹⁰⁴
- 3.50 The Information Commissioner advised that these issues have largely now been addressed.¹⁰⁵ OIC now has a single source of contact in each amalgamated agency. Alison McCubbin, Coordinator, Education and Communications provided further detail:

I think the concern with them when it was the MOG was that people would not know where to go. It seems that in the last couple of years, agencies have done that work of having a single FOI email address, their webpages. We have worked

¹⁰⁰ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 6 May 2019, p 10.

¹⁰¹ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 11.

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ Michelle Fitzgerald, Executive Officer and Alison McCubbin, Coordinator, Education and Communications, Office of the Information Commissioner, transcript of evidence, 14 May 2018, p 2 and Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 6 May 2019, pp 3-4.

¹⁰⁵ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 13.

with the new wa.gov.au website. We have worked with those agencies that have migrated, even a sort of generic FOI application, so we are trying to find those ways to give the pathways to people so they are not lost in “Where do I go?” but they can find a sort of more straightforward source to get to.¹⁰⁶

- 3.51 The creation of a single-point FOI application, available at wa.gov.au, is a significant development. While not all agencies have yet migrated across, the Information Commissioner anticipates that more will in the future.¹⁰⁷

Privacy and data sharing

- 3.52 OIC continues to monitor developments around privacy and data sharing at the state and national levels. OIC has been involved in developments at the state level, submitting a response to the WA Government’s discussion paper on privacy and responsible information sharing for the WA public sector.¹⁰⁸

Concluding comment

- 3.53 The Committee appreciates the opportunity this consultation provided to delve into the external review process in more detail. In 2020-21, the Committee is of the view that a review of the FOI Act is necessary.

¹⁰⁶ Alison McCubbin, Coordinator Education and Communications, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 13-14.

¹⁰⁷ Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, transcript of evidence, 21 October 2020, p 14.

¹⁰⁸ Office of the Information Commissioner, *Annual report 2019/2020*, 24 September 2020, p 48.

CHAPTER 4

Parliamentary Commissioner for Administrative Investigations (Ombudsman)

Introduction

- 4.1 The Ombudsman is an independent officer of Parliament established under the *Parliamentary Commissioner Act 1971*. The Ombudsman's principle functions are:
- receiving, investigating and resolving complaints about WA Government agencies, local governments and universities
 - reviewing certain child deaths and family and domestic violence fatalities
 - undertaking own motion investigations
 - undertaking a range of additional functions, including statutory inspection and monitoring functions.¹⁰⁹

Annual Report

- 4.2 The Ombudsman's 2019-20 Annual Report (Ombudsman Annual Report) was tabled in the Legislative Council on 17 September 2020.¹¹⁰
- 4.3 Areas of interest identified by the Committee arising from the Annual Report included:
- issues related to the complaints function, including:
 - an increase in the number of out of jurisdiction complaints received
 - the Regional Awareness and Accessibility Program, and regional visits
 - issues relating to the review of child deaths and associated own-motion investigations, including:
 - decrease in child suicides
 - the over-representation of Aboriginal children and children in regional and remote areas in child deaths
 - interagency communication and collaboration
 - agency cooperation and timeliness in implementing recommendations
 - issues relating to the review of family and domestic violence fatalities and associated own-motion investigations, including:
 - strategy for preventing and reducing Aboriginal family violence
 - new own-motion inquiries.
- 4.4 The Committee also asked the Ombudsman about the impact of COVID-19 on his office at Ombudsman WA and complaints.

¹⁰⁹ Ombudsman Western Australia. See: https://www.ombudsman.wa.gov.au/About_Us/Role.htm. Viewed 30 October 2020.

¹¹⁰ Tabled Paper 4228, Legislative Council, 17 September 2020.

Hearing and additional information

- 4.5 On 26 October 2020, the following witnesses from the Ombudsman WA appeared before the Committee:
- Chris Field, Ombudsman
 - Mary White, Deputy Ombudsman.
- 4.6 The Committee sent the Ombudsman 10 additional questions following the hearing. The evidence provided to the Committee regarding the matters listed in paragraph 4.3 and 4.4 is summarised below.

Issues related to the Ombudsman's complaints function

Out of jurisdiction complaints

- 4.7 The Ombudsman told the Committee in 2019 that over time, he would like to see a reduction in complaints that are considered outside of jurisdiction.¹¹¹
- 4.8 The Committee notes that the number of out of jurisdiction complaints has increased by 6 per cent, from 519 in 2017-18 to 552 in 2019-20.¹¹² This represents 28 per cent of all complaints about agencies for the reporting period. The Committee questioned whether the Ombudsman had taken any steps in terms of education and awareness raising over the past year to improve public understanding of where to direct complaints.¹¹³
- 4.9 The Committee heard that the number of out of jurisdiction complaints may have been slightly affected by COVID-19, with an increase in people going to the Ombudsman for information about where to take their complaint:
- In that sense, I do not see it so much as out-of-jurisdiction complaints, but in an unusual event, nearly a one-in-a-century economic but much more importantly personal health tragedy, that people were able to come to our office with the confidence that they might be able to be directed to where they ought to go.¹¹⁴
- 4.10 In this sense, the Ombudsman suspects that this year is likely to be an outlier, and that out of jurisdiction complaints will reduce going forward.¹¹⁵
- 4.11 Measures such as the Regional Awareness Accessibility Program and website updates can contribute to reducing the number of out of jurisdiction complaints. While the Ombudsman can continue additional efforts to raise awareness, in a federal system and with a number of industry Ombudsman available, it is anticipated that there will always be a level of out of jurisdiction complaint.¹¹⁶

There is certainly growing understanding, and that has been exponential over decades in my view. But to fully comprehend the nuanced difference between the jurisdiction of all of those ombudsman, I think, is something that would be unreasonable for us to expect citizens to do.¹¹⁷

¹¹¹ Chris Field, Ombudsman, Ombudsman Western Australia, transcript of evidence, 6 May 2019, p 2.

¹¹² Ombudsman Western Australia, *Annual report 2019-20*, 17 September 2020, p 264 and Ombudsman Western Australia, *Annual report 2017-18*, 9 October 2018, p 272.

¹¹³ Hon Adele Farina MLC, Chair, Standing Committee on Public Administration, transcript of evidence, 26 October 2020, p 2.

¹¹⁴ Chris Field, Ombudsman, Ombudsman Western Australia, transcript of evidence, 26 October 2020, p 2.

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*, p 3.

¹¹⁷ *ibid.*

Regional Awareness and Accessibility Program

- 4.12 Ombudsman WA visited Kalgoorlie and Leonora in the Goldfields-Esperance region in December 2019 as part of the Regional Awareness and Accessibility Program. The visit included:
- providing an information stall and complaints clinic
 - meetings with the Aboriginal community to discuss government service delivery
 - liaison with community, advocacy and consumer organisations and public authorities.¹¹⁸
- 4.13 Complaint clinics held in remote areas are free and open to members of the public. The clinics are locally promoted in the weeks prior, and are typically held in community facilities in collaboration with other independent complaints agencies, such as the Health and Disability Services Complaints Office. The Ombudsman reports receiving positive feedback from complainants about the office's ability to resolve matters quickly or immediately.¹¹⁹
- 4.14 The Committee questioned whether the locations visited each year are strategically pre-determined. The Ombudsman advised that the program does involve a strategic plan for which areas are visited in each year, for equity reasons, but locations can be adjusted based on ongoing needs and interests.¹²⁰ Ombudsman WA plans to increase regional visits in the coming years. These visits will be both in-person and virtual.¹²¹
- 4.15 Aboriginal and Torres Strait Islander people and people living in regional areas have historically been underrepresented 'in complaints'.¹²² The Ombudsman has observed that regional activities are playing a direct role in improving this under-representation.¹²³

RECOMMENDATION 6

The Ombudsman increase the number of yearly regional visits conducted as part of the Regional Awareness and Accessibility Program.

Issues related to review of child deaths and associated own-motion investigations

Expansion of child death review function

- 4.16 Since 2009, the *Parliamentary Commissioner Act 1971* has provided for the Ombudsman to review child deaths in WA in certain circumstances—primarily, where a child was known to, or involved with, the Department of Communities.¹²⁴ In addition to reviewing those deaths, the Ombudsman's functions include to identify any patterns or trends in relation to the deaths and to make recommendations to departments/authorities about ways to prevent or reduce investigable deaths.
- 4.17 Some years after the Ombudsman's child death review function was introduced, senior officers from the Department of Health suggested that to address gaps, the jurisdiction should be expanded to include all child deaths in WA.¹²⁵ In the 2019-20 annual reporting period, the Ombudsman undertook substantial work to expand the child death review

¹¹⁸ Ombudsman Western Australia, *Annual report 2019-20*, 17 September 2020, p 187.

¹¹⁹ Chris Field, Ombudsman, Ombudsman Western Australia, letter, 4 November 2020, p 3.

¹²⁰ *ibid.*, p 2.

¹²¹ *ibid.*

¹²² Ombudsman Western Australia, *Annual report 2019-20*, 17 September 2020, p 187.

¹²³ Chris Field, Ombudsman, Ombudsman Western Australia, letter, 4 November 2020, p 3.

¹²⁴ Section 19A(3) of the *Parliamentary Commissioner Act 1971* defines investigable deaths.

¹²⁵ Chris Field, Ombudsman, Ombudsman Western Australia, transcript of evidence, 26 October 2020, p 10.

function to include consideration of all child deaths that occur in WA.¹²⁶ Work undertaken to expand the function has included:

- additional resourcing for Ombudsman WA
- transfer of capital to develop a database
- expanding the Ombudsman's Advisory Panel to include additional medical experts
- triaging a backlog of 80 cases
- reconciling data from the Coroner, the Registrar of Births, Deaths and Marriages, and others.¹²⁷

4.18 The Ombudsman confirmed that no child deaths in the state will be excluded, meaning child deaths that occur during surgery will be within jurisdiction.¹²⁸ Depending on the status of this work, from either 1 January 2021 or 1 July 2021 the Ombudsman will investigate every child death in the state, and not just investigable child deaths under section 19A of the *Parliamentary Commissioner Act 1971*.¹²⁹

4.19 The Ombudsman does not anticipate that legislative change will be required to expand the review function. He informed the Committee that he believes the Royal Commission and own motion powers contained in the *Parliamentary Commissioner Act 1971* will likely be sufficient.¹³⁰

4.20 In the event of resistance from private sector parties to providing information, the Ombudsman would approach Cabinet about a possible amendment.¹³¹ However, the Ombudsman advises that the methodology used in the past to obtain information from private medical practitioners has been successful, although irregularly used:

One of the ways we can do that, if we do not get it directly from a private practitioner, is through the director general of the Department of Health, who has quite significant powers under the Health Act to also request information.¹³²

4.21 The Committee notes these comments and the current process, however, under expansion of the child death review function, this process may require review as necessary through legislative amendment, where there is a process to obtain information from private sector parties.

Over-representation

4.22 Aboriginal children and children living in regional and remote areas continue to be over-represented in child deaths across all age groups.¹³³ This appears to be a relatively consistent trend since data collection began in 2009-10. The Ombudsman and the Committee are in agreement that this continued over-representation is tragic, and further inroads need to be made:

The CHAIR: I note from the annual report that males, Aboriginal children and children living in remote and regional areas remain over-represented in child

¹²⁶ Ombudsman Western Australia, *Annual report 2019-20*, 17 September 2020, p 126.

¹²⁷ Chris Field, Ombudsman, Ombudsman Western Australia, transcript of evidence, 26 October 2020, p 10.

¹²⁸ *ibid.*, p 12.

¹²⁹ *ibid.*, p 10.

¹³⁰ *ibid.*, p 11.

¹³¹ *ibid.*, p 12.

¹³² *ibid.*, p 11.

¹³³ Ombudsman Western Australia, *Annual report 2019-20*, 17 September 2020, pp 58 and 60.

deaths. That seems to be a consistent outcome. We do not seem to be making much in-road into this area.

Mr FIELD: No; I think we need to make more in-roads. I think that would be a shared view. There is a tragic over-representation of Aboriginal Western Australians in a range of areas in which we work—family and domestic violence—in relation to child deaths.¹³⁴

- 4.23 The Ombudsman advised that his office is focussing on listening to over-represented groups, building stronger partnerships and increasing representation within the office. Actions include:
- increased staffing in the office for Aboriginal policy and engagement
 - recruiting the first senior assistant Ombudsman for Aboriginal engagement, collaboration and consultation
 - establishing an Aboriginal Advisory Council, with membership from across the state and the potential involvement of children and young people.¹³⁵
- 4.24 The Committee encourages these steps, and will continue to monitor progress in this area. However, the Committee is of the view that it will take more than improved communication and partnerships to address this issue.

Interagency information sharing and privacy

- 4.25 The Ombudsman Annual Report identifies insufficient interagency communication and collaboration as an issue in both child death reviews and family and domestic violence fatality reviews.¹³⁶
- 4.26 With the powers of a Royal Commission, information sharing and privacy concerns do not directly affect the Ombudsman's performance of his functions.¹³⁷ However, the Ombudsman acknowledges that restrictions on information sharing between agencies impacts on the matters he investigates:

Imagine if you had a situation where a life was lost—a woman in the case of a violent man, or a child in the case of information where certain concerns were brought to the attention of the department but that did not get to another department that may have been able to intervene in a more timely way.¹³⁸

- 4.27 For these reasons, the Ombudsman supports further capacity for information sharing between agencies. The Ombudsman has not made specific legislative recommendations to the WA Government in this regard, but has discussed these matters with ministers:

certainly one of the things we talk about is that there would be virtue in information-sharing legislation to ensure that those clauses which either may be unnecessarily prohibitive or, alternatively, simply outdated and could be read in a way that was more cautious than we would like, were made more explicit about the capacity to share information, particularly where there is a public-interest requirement—life-and-death-type issues.¹³⁹

¹³⁴ Hon Adele Farina MLC, Chair, Standing Committee on Public Administration, and Chris Field, Ombudsman, Ombudsman Western Australia, transcript of evidence, 26 October 2020, p 6.

¹³⁵ Chris Field, Ombudsman, Ombudsman Western Australia, transcript of evidence, 26 October 2020, p 6.

¹³⁶ Ombudsman Western Australia, *Annual report 2019-20*, 17 September 2020, p 91 and 160.

¹³⁷ Chris Field, Ombudsman, Ombudsman Western Australia, transcript of evidence, 26 October 2020, p 8.

¹³⁸ *ibid.*, p 9.

¹³⁹ *ibid.*, p 9.

Agency cooperation in implementing recommendations

4.28 The Committee heard that for 13 consecutive years, every Ombudsman recommendation has been accepted.¹⁴⁰ Since 2016, the Ombudsman has published implementation reports 12 months after the release of an own-motion investigation report:

what do those implementation reports show? They show that departments are implementing those reports in a good faith way. They are giving effect to my recommendations.¹⁴¹

4.29 The Ombudsman reports being pleased in recent years with the timing and engagement of agencies in implementing recommendations, particularly in relation to the investigation into ways to prevent or reduce deaths of children by drowning. This includes an acceptance that many recommendations need to be implemented iteratively:

That is because, of course, some of these things cannot be implemented overnight. They are a process.¹⁴²

Child suicide

4.30 The Ombudsman Annual Report identified that child suicides are two-thirds lower in 2019-20 than in 2018-19.¹⁴³ The Ombudsman has undertaken significant work in this space. In addition to investigating child suicides and making de-identified findings and recommendations as part of each annual report, the Ombudsman has conducted two own-motion inquiries in this regard:

- Investigation into ways that State government departments and authorities can prevent or reduce suicide by young people (2014)¹⁴⁴
- Preventing suicide by children and young people (2020).¹⁴⁵

4.31 The most recent investigation into preventing suicide, which includes seven new recommendations, contains a strong focus on suicide prevention, particularly for Aboriginal children and young people.¹⁴⁶ The report of the investigation is intended as a repository of data, analytics and information to be used by relevant agencies into the future:

We do get access to information which others simply cannot access through our standing royal commission powers and the capacity to bring them together. I certainly know, for example, our identification of four principal cohorts.

When you can identify the cohorts where you might suspect or have an idea around youth suicide, it really helps with early intervention strategies, collaborative organisation within government to target those at-risk groups and to target your resources because, of course, resources are constrained and there are opportunity costs to it. What we want to do is make sure that, whilst, I think, there are very good amounts of money spent on these issues, it can be targeted at much as

¹⁴⁰ *ibid.*, p 13.

¹⁴¹ *ibid.*

¹⁴² *ibid.*

¹⁴³ Ombudsman Western Australia, *Annual report 2019-20*, 17 September 2020, p 62.

¹⁴⁴ Ombudsman Western Australia, *Investigation into ways that State government departments and authorities can prevent or reduce suicide by young people*, April 2014.

¹⁴⁵ Ombudsman Western Australia, *Preventing suicide by children and young people 2020 – volume 1: Ombudsman's foreword and executive summary*, September 2020.

¹⁴⁶ Chris Field, Ombudsman, Ombudsman Western Australia, transcript of evidence, 26 October 2020, p 4.

possible. Of course, data like that is helping target exactly where you will spend your money and your resource.¹⁴⁷

- 4.32 While it is too early to identify a trend in decreasing child suicides, the Ombudsman is hopeful that the work of his office, the Coroner and relevant agencies can lead to improved outcomes.¹⁴⁸

Issues related to review of family and domestic violence fatalities and associated own-motion inquiries

Strategy for preventing and reducing Aboriginal family violence

- 4.33 The Ombudsman's 2015 investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities recommended that the former Department of Child Protection and Family Support (now Department of Communities) develop a strategy tailored to preventing and reducing Aboriginal family violence.¹⁴⁹
- 4.34 In 2016, the Department of Communities said it had taken steps towards this.¹⁵⁰ The Committee sought an update. The Ombudsman advised that further progress has been made, and the specific strategy is expected for completion in 2022.¹⁵¹ The Committee notes that this is seven years after the recommendation was made. The Committee expresses its concern at the time taken to develop a strategy.
- 4.35 In general, the Ombudsman reports being 'very satisfied' with the timeliness and cooperation of relevant agencies in relation to implementing recommendations arising from reviews and own-motion inquiries into family and domestic violence fatalities.¹⁵²

New own-motion inquiries

- 4.36 In September 2020, the Ombudsman tabled a report on the investigation into ways that State government departments and authorities can prevent or reduce suicide by children and young people 2020.¹⁵³ Following this, the new own-motion investigations being undertaken are:
- an investigation into family and domestic violence and suicide 2021.
 - an investigation into homelessness 2021.¹⁵⁴

Impact of COVID-19

- 4.37 During the peak of the COVID-19 pandemic in WA, Ombudsman WA responded by ensuring that service delivery continued uninterrupted, by facilitating ways of working from home and using video-conferencing facilities. Ombudsman WA was unable to receive complaints in person during this time, which affected 1 per cent of contacts.¹⁵⁵

¹⁴⁷ *ibid.*, pp 4-5.

¹⁴⁸ *ibid.*, p 4.

¹⁴⁹ Ombudsman Western Australia, *Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities*, November 2015, p 39.

¹⁵⁰ Ombudsman Western Australia, *Annual report 2019-20*, 17 September 2020, p 155.

¹⁵¹ Chris Field, Ombudsman, Ombudsman Western Australia, letter, 4 November 2020, p 4.

¹⁵² *ibid.*

¹⁵³ Tabled Paper 4326, Legislative Council, 24 September 2020.

¹⁵⁴ Chris Field, Ombudsman, Ombudsman Western Australia, letter, 4 November 2020, p 5.

¹⁵⁵ *ibid.*, p 2.

- 4.38 Ombudsman WA has not observed that COVID-19 impacted the volume or type of complaints received. The exception is that a small number of complaints were received in relation to hotel quarantine, intra-state travel and inter-state travel.¹⁵⁶

Concluding comment

- 4.39 The Committee notes, in particular, the important ongoing work of the Ombudsman in reviewing child deaths and family and domestic violence fatalities. In 2020-21, the Committee will continue to monitor the Ombudsman's progress in this area.

¹⁵⁶ *ibid.*

CHAPTER 5

Public Sector Commissioner

Introduction

- 5.1 The Public Sector Commissioner (Commissioner) is an independent statutory officer established under the *Public Sector Management Act 1994*. The Commissioners' functions under this Act include:
- promoting the overall efficiency and effectiveness of the public sector
 - planning for the future management and operation of the public sector
 - issuing Commissioner's instructions establishing public sector standards and codes of ethics and on matters including human resources management and dealing with disciplinary matters.
- 5.2 The Public Sector Commission (PSC) supports the Commissioner in performing her functions.

Annual Report

- 5.3 The PSC 2019-20 Annual Report (PSC Annual Report) was tabled in the Legislative Council on 24 September 2020.¹⁵⁷ In this reporting period, PSC also published:
- State of the Western Australian Government Sector Workforce 2018/19 (State of the Sector Report) – December 2019
 - Action Plan for People with Disability in Public Sector Employment – December 2019.
- 5.4 Areas of interest identified by the Committee included:
- increase in PSC staffing
 - conversion of positions from contract/casual to permanent
 - conversion figures for 2019-20
 - fixed-term employment
 - review of decisions
 - minor misconduct function
 - Chief Executive Officer delivery and performance agreements
 - diversity in the public sector
 - women in the senior executive service
 - people with disability in the public sector
 - Aboriginal and Torres Strait Islander people in the public sector
 - review of Part 6 of the *Public Sector Management Act 1994*
 - response rate to the annual client perception survey
 - Commissioner's role as State Recovery Controller.

¹⁵⁷ Tabled Paper 4338, Legislative Council, 24 September 2020.

Hearing and additional information

- 5.5 On 26 October 2020, the following witnesses from PSC appeared before the Committee:
- Sharyn O'Neill, Commissioner
 - Shaun McLeod, Manager, Corporate Services
 - Dan Volaric, Executive Director, Integrity and Risk
 - Lindsay Warner, Executive Director, Policy and Practice
 - Tanya Milici, Acting Executive Director, Workforce Data Analytics.
- 5.6 The Commissioner took four questions on notice. The evidence provided to the Committee regarding the matters listed in paragraph 5.4 are summarised below.

Increase in Public Sector Commission staffing

- 5.7 On 30 June 2020, PSC had 141 staff (134.4 full-time equivalents (FTE)), as compared to 108 staff (100.2 FTE) in the previous reporting period. The PSC Annual Report attributes this to the creation of a number of temporary positions until 30 June 2020 to progress work on diversity, leadership, talent and integrity projects over a concentrated period.¹⁵⁸
- 5.8 The Commissioner advised that prior to her commencement in the role two years ago, PSC was not staffed to its full complement. An increase in staffing was held over until the completion of Carmel McGregor's review of PSC in October 2018.¹⁵⁹

The results that you are seeing there at 30 June, when we had 141, we had probably more than our full complement. We had some carryover funding and we used that for a handful of temporary staff to work on some priorities. That is why you see the difference from, I think, 108 up to 141. Going forward, we are budgeted for 129, so we are much closer to that figure.¹⁶⁰

- 5.9 As at 1 July 2020, PSC has 121 FTE, all of which are budgeted full-time positions.¹⁶¹

Conversion of positions from contract/casual to permanent

- 5.10 In August 2018, the WA Government announced its intention to consider public sector employees who had worked for more than two years in fixed-term or casual roles for permanency.¹⁶² Premier's Circular 2018/02 states that where there is a vacant and ongoing role within an employing authority, it should be filled on a permanent basis. The use of fixed term contract and casual employment should be limited to the circumstances provided for under legislation and/or the relevant industrial agreement (usually circumstances where there is not an ongoing role and finite funding).¹⁶³

¹⁵⁸ Public Sector Commission, *Annual report 2019-20*, 24 September 2020, p 13.

¹⁵⁹ Government of Western Australia, *Response to the independent review of the Public Sector Commission*, August 2019, p 1.

¹⁶⁰ Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, transcript of evidence, 26 October 2020, p 2.

¹⁶¹ *ibid.*

¹⁶² Hon Mark McGowan MLA, Minister for Public Sector Management, *Thousands of State Government workers to receive job security*, media statement, 9 August 2018.

¹⁶³ Government of Western Australia, *Premier's circular: permanent engagement of fixed term contract and casual employees*, August 2018, p 1.

- 5.11 Conversion decisions have been made under three separate Commissioner's instructions:
- Commissioner's Instruction No. 23, which provides a framework for the conversion and permanent appointment of current fixed-term contract and casual employees
 - Commissioner's Instruction No. 22, which dealt specifically with review of fixed term contract arrangements for lecturers and the filling of permanent lecturing positions in TAFE Colleges (it has served its purpose and has been repealed)
 - Commissioner's Instruction No. 2, which provides for transition from non-secure to permanent employment in certain circumstances.¹⁶⁴

Conversion figures for 2019-20

- 5.12 In 2019-20, 10 482 employees were made permanent, which is a significant increase from 2691 in 2018-19. The 10 482 converted included:

- 2304 employees under Commissioner's Instruction No 23
- 8178 employees under Commissioner's Instruction No 2.¹⁶⁵

- 5.13 The Commissioner advised that 16 520 casual or fixed-term staff were reviewed in 2019-20.¹⁶⁶ Given that this is much higher than the number converted, the Committee questioned whether the criteria for conversion is appropriate. The Commissioner does not believe the review criteria is an issue, with the rate of conversion mainly driven by the requirement that funding for positions is ongoing.¹⁶⁷ This requirement makes it difficult to apply a blanket approach:

if that piece of work or that funding was finite in nature, then you would not automatically convert that person. But in the situation where that work might be ongoing and it is reasonable to expect that that funding might be available, that would be a consideration. That is what the review process is there for—to examine each of those cases.¹⁶⁸

- 5.14 Between 2018 and 2020:

- 39 375 contracts were reviewed under Commissioner's Instruction (CI) 23
- 3378 contracts were converted under CI 23
- 9521 contracts were converted under CI 2
- 274 contracts were converted under CI 22
- 35 442 contracts were not converted under CI 23 as they did not meet the criteria
- 555 offers of conversion under CI 23 were declined by employees.¹⁶⁹

- 5.15 See Appendix 3 for a breakdown by agency.

¹⁶⁴ Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, letter, 5 November 2020, pp 2-3.

¹⁶⁵ Public Sector Commission, *Annual report 2019-20*, 24 September 2020, p 23.

¹⁶⁶ Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, transcript of evidence, 26 October 2020, p 2.

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*, p 4.

¹⁶⁹ Carissa Mitchell, Consultant Strategic Planning and Governance, Public Sector Commission, email, 10 November 2020, attachment 1, p 4.

Fixed-term employment

- 5.16 It remains open to employing authorities to employ people on a fixed-term basis where the work is funded in a finite way, for example through grant funding. At the end of June 2020, there were 22 933 employees on fixed term contracts in the WA public sector.¹⁷⁰ See Appendix 4 for a breakdown by agency.
- 5.17 The Committee asked whether the Commissioner had seen any evidence of attempts to subvert the policy by allowing for gaps in service:

The CHAIR: I understand that if someone has been on a fixed-term contract and they get another fixed-term contract and then another one and they meet the two-year criteria, if there has been a one-week break in between two of those fixed-term contracts, that would exclude them from consideration. Is that correct?

Ms O'NEILL: It is at the employer's discretion, as I understand it. It probably is a case-by-case consideration. I think you are referring to the two-year window and the conversion I spoke about, with the ongoing funding. On a case-by-case basis, there is consideration of what would be considered continuous service. Probably the purpose of that one-week break would be relevant. Obviously, leave would not exclude people. In between contracts, if there was only a one-week window, I think it would be in the hands of the directors general to give consideration to that.

The CHAIR: Are you aware of any directors general who are using that as a basis not to provide the conversion?

Ms O'NEILL: I am not aware of any directors general or CEOs using that as a basis. In fact, I met with them all late last year and talked to them about the spirit of the new commissioner's instruction, which is quite the reverse; it is about the stability of the workforce going forward, so it certainly has not been brought to my attention that people are using something like a lack of continuous service to not convert.¹⁷¹

- 5.18 PSC provided further information following the hearing:

One of the conditions to be met for Commissioner's Instruction No. 22 and 23 is for the employee to have completed two or more years of continuous service in the same or similar role. Under these instructions a period of absence not considered to be a break in service includes:

- authorised periods of absence and approved leave
- breaks between fixed term contracts of up to 10 working days
- any period of absence that in accordance with the relevant industrial instrument does not break service
- any other period of absence due to a traditional period of reduced staffing such as, a close-down of operations for term or semester' breaks.

Any employee with a break of service of less than 10 days should not be excluded from conversion for that reason alone. Employers, in considering all the facts and

¹⁷⁰ Sharyn O'Neill, Public Sector Commissioner, Answer to question on notice 2 asked at hearing held 26 October 2020, dated 5 November 2020, p 7.

¹⁷¹ Hon Adele Farina MLC, Chair, Standing Committee on Public Administration, and Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, transcript of evidence, 26 October 2020, pp 2-3.

circumstances, may exercise discretion to convert an employee who has had a break in service of greater than ten days.¹⁷²

Review of decisions

- 5.19 Lindsay Warner, Executive Director Workforce Policy and Practice, informed the Committee that employees who wish to have a decision about conversion reviewed may appeal through internal dispute resolution mechanisms within their agency. In the event that these mechanisms are unsatisfactory, an employee would have access industrially.¹⁷³
- 5.20 The Committee notes that the policy was announced in 2018. As at 30 June 2020, there were 22 933 fixed term contract staff in the public sector.

Minor misconduct function

- 5.21 PSC provides oversight of minor misconduct matters. Of the 473 minor misconduct matters received in 2019-20, PSC monitored and reviewed the progress of 79 matters, and requested the agency to advise of the outcome in a further 66 matters.¹⁷⁴ If PSC has any concerns once it has reviewed a report, it raises these directly with the authority.¹⁷⁵ Eighty matters were assessed as involving serious misconduct, and referred to the Corruption and Crime Commission.¹⁷⁶
- 5.22 PSCs oversight role is two-fold:
- prevention education and raising awareness about key responsibilities in relation to minor misconduct
 - reviewing processes, reports and outcomes of investigations to ensure compliance with the principles of natural justice and investigative quality.¹⁷⁷
- 5.23 PSC elaborated on their role following the hearing:
- Public authorities or individuals can refer minor misconduct matters to the Public Sector Commission.
- If a public officer is subject to a minor misconduct notification or report, the responsible employing authority may undertake a disciplinary process or corrective action. If a disciplinary process is undertaken and the public officer is unhappy with the outcome of that process, they may be able to lodge an appeal before the Industrial Relations Commission.
- If an individual makes a report of minor misconduct and is unhappy with the outcome of the process, they may approach the Public Sector Commission which is responsible for ensuring minor misconduct matters are dealt with appropriately. The Commission can monitor and review the outcome of the minor misconduct

¹⁷² Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, letter, 5 November 2020, Attachment B, p 2.

¹⁷³ Lindsay Warner, Executive Director, Workforce Policy and Practice, Public Sector Commission, transcript of evidence, 26 October 2020, p 3.

¹⁷⁴ Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, transcript of evidence, 26 October 2020, p 5.

¹⁷⁵ Sharyn O'Neill, Public Sector Commission, Answer to question on notice 3 asked at hearing held 26 October 2020, dated 6 November 2020, p 2.

¹⁷⁶ Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, transcript of evidence, 26 October 2020, p 6.

¹⁷⁷ *ibid.*

matter including the process undertaken but there is no formal appeal mechanism available to an individual.¹⁷⁸

Chief Executive Officer delivery and performance agreements

- 5.24 In October 2019, PSC commenced a two-year trial of a new approach to managing the performance and development of directors general. The new approach includes:
- agency-specific deliverables
 - whole of government priorities
 - measures to determine performance
 - ongoing development and support to enhance leadership capabilities and achieve deliverables.¹⁷⁹
- 5.25 The trial involves 17 directors general of WA Government departments.¹⁸⁰
- 5.26 PSC is conducting continuous improvement monitoring, and will seek feedback from directors general and ministers. At the conclusion of the two-year period, PSC will provide advice to government about the efficacy of the approach and any learnings.¹⁸¹

Diversity in the public sector

- 5.27 PSC released the Workforce Diversification and Inclusion Strategy for WA Public Sector Employment 2020-25 (Strategy) in September 2020.¹⁸² The goals of the Strategy are to:
- increase the representation of people from different backgrounds at all levels across the sector
 - ensure all staff in the sector experience a sense of belonging and inclusion in the work environment.¹⁸³
- 5.28 The Strategy includes data on the public sector's diversity profile, and includes aspirational employment and leadership targets for specific groups. During the first year of the five-year plan, PSC is working with agencies to ensure they understand the basis for the targets and associated strategies.¹⁸⁴

Women in the senior executive service

- 5.29 The Strategy sets an aspirational target of 50 per cent women in the senior executive service (SES).¹⁸⁵ The State of the Sector 2018-19 Report showed that women made up 36 per cent of

¹⁷⁸ Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, letter, 5 November 2020, Attachment B, p 1.

¹⁷⁹ Public Sector Commission, *Annual report 2019-20*, 24 September 2020, p 19.

¹⁸⁰ Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, transcript of evidence, 26 October 2020, p 7, footnote 1.

¹⁸¹ *ibid.*, p 7.

¹⁸² *ibid.*, p 7, footnote 2.

¹⁸³ WA Government. See: <https://www.wa.gov.au/government/publications/workforce-diversification-and-inclusion-strategy-wa-public-sector-employment-2020-2025>. Viewed 2 November 2020.

¹⁸⁴ Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, transcript of evidence, 26 October 2020, p 7.

¹⁸⁵ Public Service and Government Officers Civil Service Association General Agreement level nine or above.

the SES, but the rate of growth meant that gender parity in the SES would not be achieved until 2035.¹⁸⁶

5.30 The Commissioner was pleased to advise the Committee that between 2019 and 2020, the proportion of women in the SES has increased to 42.5 per cent, an all-time high for the WA public sector. Based on the current rate of growth, gender parity is now expected by 2022.¹⁸⁷

5.31 The Committee notes that the Strategy was released nine months after the State of the Sector Report. The Committee commends this result, and notes that the parity gap has reduced substantially. The Commissioner attributed this to the development of a diversity dashboard that shows agency performance against targets, and the inclusion of targets in directors general performance agreements:

I think that laying out very clear expectations from the outset is very powerful, rather than a set-and-forget approach, and then backing that up with a comprehensive diversity strategy—this is the first time across government that we have had this—for all of those groups, with ambitious targets. It is never just one thing, but certainly setting those expectations and asking all directors general to sign up to their implementation in a very supportive and positive way, and they will report on those things. It is sort of expectation, but it is also, I think, the personal commitment of the leadership to make a change in this space.¹⁸⁸

People with disability in the public sector

5.32 Between 2014 and 2020, the proportion of public sector employees with a (disclosed) disability has decreased from 2.4 per cent to 1.5 per cent. The Strategy sets an aspirational target of 5 per cent by 2025.¹⁸⁹

5.33 A strategy that the Commissioner feels will be particularly impactful is increasing a sense of safety and confidence to disclose disability to an employer or potential employer.¹⁹⁰

5.34 Under its Action Plan for people with disabilities, the PSC is to provide guidance on the use of provisions in the *Equal Opportunity Act 1984* to specifically target employment of people with disability.¹⁹¹ The PSC has recently published some advice on how agencies can recruit directly for people with disability, without being discriminatory under that Act:

Under the Equal Opportunity Act, you can declare a position will be recruited just for people with disability for two basic rationales. They are called exceptions. One because you want to increase the representation of that group, which is a reasonable expectation under the EO act, and the other is if as an occupational qualification, it would be reasonable to have, for example in this case, someone with disability undertaking a role because they are working with people with disability. We provided that information, I think, just a week and a half ago, about how to go about that appropriately. It has to be advertised clearly in that way. You have to meet the rationales as per the exceptions that I am just referring to and

¹⁸⁶ Public Sector Commission, *State of the Western Australian government sector workforce 2018/19*, December 2019, p 22.

¹⁸⁷ Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, transcript of evidence, 26 October 2020, p 8.

¹⁸⁸ *ibid.*

¹⁸⁹ Public Sector Commission, *Workforce diversification and inclusion strategy for WA public sector employment 2020-2025*, August 2020, pp 4 and 6.

¹⁹⁰ Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, transcript of evidence, 26 October 2020, p 7.

¹⁹¹ Public Sector Commission, *People with disability: action plan to improve WA public sector employment outcomes 2020-2025*, August 2020, p 6.

quote the various parts of the act. It is entirely acceptable to do that with a strong rationale.¹⁹²

- 5.35 The Committee notes that there is no specific target in the Strategy for increasing the representation of people with disability in the SES.

Aboriginal and Torres Strait Islander people in the public sector

- 5.36 With reference to the Strategy, the Committee notes that the percentage of public sector employees who are Aboriginal and Torres Strait Islander has decreased from 2.9 per cent in 2014 to 2.7 per cent in 2020.¹⁹³ This falls short of the previous goal of 3.2 per cent by 2019.¹⁹⁴ The Strategy sets a new aspirational target of 3.7 per cent Aboriginal and Torres Strait Islander employment by 2025.¹⁹⁵
- 5.37 Aboriginal Australians account for 1.4 per cent of the SES, an increase from 1.3 per cent in 2015.¹⁹⁶ The Commissioner advised that at June 2019, there were four people of Aboriginal and Torres Strait Islander background in the SES. By June 2020, this had increased to six. The Commissioner noted that this only includes people who have chosen to disclose their background in workplace information.¹⁹⁷
- 5.38 The Committee notes that there is no specific target in the Strategy for increasing the representation of Aboriginal and Torres Strait Islander Australians in the SES.¹⁹⁸

RECOMMENDATION 7

As part of its next five-year workforce diversity strategy, the Public Sector Commission introduce an aspirational target for underrepresented groups in the senior executive service.

Review of the Part 6 of the *Public Sector Management Act 1994*

- 5.39 Part 6 of the *Public Sector Management Act 1994* (PSM Act) was amended by the *Workforce Reform Act 2014* to provide for the involuntary severance of public servants. Section 96B of the PSM Act requires that a review of Part 6 be carried out as soon as practicable after the fourth anniversary of the day on which the *Workforce Reform Act 2014* section 15 comes into operation (1 July 2014).
- 5.40 The PSC Annual Report states that during 2019-20, PSC developed and finalised the consultation approach for the review of Part 6, but further progress was deferred due to a number of external factors.¹⁹⁹ The Commissioner advised that COVID-19 was a key factor in

¹⁹² Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, transcript of evidence, 26 October 2020, pp 7–8.

¹⁹³ Public Sector Commission, *Workforce diversification and inclusion strategy for WA public sector employment 2020-2025*, August 2020, p 4.

¹⁹⁴ Public Sector Commission, *State of the Western Australian Government Sector Workforce 2018/19*, December 2019, p 23.

¹⁹⁵ Public Sector Commission. See: <https://www.wa.gov.au/government/publications/workforce-diversification-and-inclusion-strategy-wa-public-sector-employment-2020-2025>. Viewed 6 November 2020.

¹⁹⁶ Public Sector Commission, *State of the Western Australian Government Sector Workforce 2018/19*, December 2019, p 23.

¹⁹⁷ Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, transcript of evidence, 26 October 2020, p 9.

¹⁹⁸ *ibid.*

¹⁹⁹ Public Sector Commission, *Annual report 2019-20*, 24 September 2020, p 24.

this delay, with staff redirected to matters such as working from home, the introduction of COVID-19 leave and public sector recovery.²⁰⁰

- 5.41 It is anticipated that the review will recommence at the start of next year.²⁰¹ An expected completion date has not yet been identified.
- 5.42 From 2015-16 to 2019-20 there were 26 involuntary severances in the WA public sector.²⁰²
- 5.43 Given that Part 6 has a significant impact on the rights of public service employees, and that the review was due to be conducted in 2018, the Committee would like to see this work expedited.

RECOMMENDATION 8

The Public Sector Commission expedite the review of Part 6 of the *Public Sector Management Act 1994* and table the review report in the Parliament of Western Australia by the end of 2022.

Response rate to the client perception survey

- 5.44 PSC uses an annual client perception survey to measure its performance against key effectiveness indicators.²⁰³ In 2019-20, the PSC distributed its client perception survey to the following core clients:
- 24 departments²⁰⁴
 - 17 ministerial offices
 - 30 senior executive service organisations²⁰⁵
 - 44 non-senior executive service organisations
 - 145 local governments, including nine regional councils
 - 4 public universities
 - 15 government trading enterprises.²⁰⁶
- 5.45 The client perception survey response rate decreased from 43 per cent in 2018-19 to 39 per cent in 2019-20, or 108 out of 279 core clients. The PSC Annual Report states that this was a foreseen consequence of a decision to minimise follow up during results collection, to reduce the burden on core clients in the context of COVID-19.²⁰⁷
- 5.46 The Committee questioned whether PSC was satisfied with this level of response. The Commissioner advised that the level of response was high amongst departments, with whom PSC had greater levels of interaction.

²⁰⁰ Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, transcript of evidence, 26 October 2020, p 9.

²⁰¹ Lindsay Warner, Executive Director, Workforce Policy and Practice, Public Sector Commission, transcript of evidence, 26 October 2020, p 9.

²⁰² Sharyn O'Neill, Public Sector Commission, Answer to question on notice 4 asked at hearing held 26 October 2020, dated 6 November 2020, p 2.

²⁰³ Public Sector Commission, *Annual report 2019-20*, 24 September 2020, p 65.

²⁰⁴ Established under section 35 of the *Public Sector Management Act 1994*.

²⁰⁵ Specified in schedule 2, column 2 of the *Public Sector Management Act 1994*.

²⁰⁶ Public Sector Commission, *Annual report 2019-20*, 24 September 2020, p 65.

²⁰⁷ *ibid.*

5.47 PSCs core client group changed in 2017-18 to include local governments, public universities and government trading enterprises.²⁰⁸ The Commissioner advises that some of these clients are less directly involved with PSC, and some chose not to respond to the survey:

when people think about core clients, you would expect to have some ongoing relationship. The fact is that for some of what are deemed to be core clients, we would not have a lot to do with them unless we were investigating them or referring them to the CCC and some people would not consider that a relationship.²⁰⁹

5.48 During COVID-19, the Commissioner has increased interactions with clients that PSC typically has less interaction with, such as government trading enterprises, through fortnightly videoconference meetings.²¹⁰

5.49 The Commissioner acknowledges that PSC will always have a relationship with these clients, due to a statutory responsibility in relation to minor misconduct. Whether or not these clients can be differentiated from core clients is something that PSC wishes to consider further:

I think we really have core clients, but the technical definition, and we have a range of other people who we have some statutory responsibility for.²¹¹

5.50 The Committee is of the view that PSC needs to do more to develop relationships with all organisations comprising the public sector in WA.

Commissioner's role as State Recovery Controller

5.51 In addition to her role as Commissioner, in 2019-20 the Commissioner was appointed to two additional roles to support the WA Government's response to COVID-19:

- public sector coordinator (appointed March 2020)
- State Recovery Controller (appointed April 2020).²¹²

5.52 The role of the State Recovery Controller includes to:

- develop and oversee implementation of the WA Impact Statement²¹³
- develop and oversee implementation of the WA Recovery Plan²¹⁴
- accompany the Premier as an adviser to National Cabinet meetings.²¹⁵

5.53 The Commissioner confirmed that State Recovery Controller is a role and not a position, and does not involve additional remuneration.²¹⁶

²⁰⁸ Western Australia, Legislative Council, Standing Committee on Public Administration, report 29, *Consultation with Statutory Office Holders*, 15 October 2019, p 20.

²⁰⁹ Sharyn O'Neill, Public Sector Commission, Answer to question on notice 4 asked at hearing held 26 October 2020, dated 6 November 2020, p 10.

²¹⁰ *ibid.*

²¹¹ *ibid.*

²¹² Public Sector Commission, *Annual report 2019-20*, 24 September 2020, pp 4-5.

²¹³ Government of Western Australia, *WA Impact Statement – COVID-19 pandemic*, 30 June 2020.

²¹⁴ Government of Western Australia, *WA Recovery Plan*, July 2020.

²¹⁵ Sharyn O'Neill, Public Sector Commissioner, Public Sector Commission, transcript of evidence, 26 October 2020, p 11.

²¹⁶ *ibid.*

- 5.54 At present, there is no designated end date for the Commissioner's performance of the State Recovery Controller role. This is due to the ongoing nature of the COVID-19 pandemic:

The problem here is that we are still responding—health crisis becomes economic crisis becomes social crisis. It is not linear in the normal sense, but it is open to the government to decide at any point if it wants to approach it in a different way.²¹⁷

- 5.55 State Recovery Controller and Public Sector Commissioner are both important, high-profile leadership roles. The Committee expresses its concern that no end date has been identified for the Commissioner performing the role of State Recovery Controller. While this may be a suitable short-term arrangement, if it is intended that the dual performance of roles will be ongoing, the Committee is of the view that arrangements need to be in place within PSC to ensure that leading the public sector remains a standalone priority.
- 5.56 The Committee is concerned about how fair or manageable the expectation on the Commissioner is in the longer term, for example, in the event that WA experiences an upswing in COVID-19 cases.

RECOMMENDATION 9

The Minister for Public Sector Management review the arrangements around the role of State Recovery Controller, including reviewing any issues in relation to performing the dual role of Public Sector Commissioner, and whether this arrangement is appropriate going forward.

- 5.57 The Committee notes the potential for the additional roles to impact the Commissioner's general functions. For example, the Commissioner was unable to attend two Corporate Executive meetings in 2020 due to the additional roles. This was managed by amending the Corporate Executive terms of reference to enable the Commissioner to nominate a Corporate Executive member to chair meetings, and all final decisions and outcomes were determined by the Commissioner out of session.²¹⁸

Concluding comment

- 5.58 The Committee considers that PSC has undertaken important work in 2019-20 through the Strategy. In 2020-21, the Committee will continue to monitor these matters, including the review of Part 6 of the PSM Act.



Hon Adele Farina MLC
Chair

²¹⁷ *ibid.*

²¹⁸ Public Sector Commission, *Annual report 2019-20*, 24 September 2020, p 17.

APPENDIX 1

SUMMARY OF LIAISON VISITS AND CONTACT REPORTS 2019-20

Period Covered: 1 July 2019 – 30 June 2020

Locations	No of visits	Contact Reports	Locations	No of visits
PRISONS			CS&CS, CCC & LOCKUPS	
Acacia	5	1	<i>Metropolitan</i>	
Albany	2		Armadale Court	
Bandyup	3	1	Central Law Courts	1
Banksia Hill	4		District Court	1
Boronia	2	1	Fremantle Court	
Broome	1		Joondalup Court	
Bunbury	4	1	Mandurah Court	
Casuarina	1		Midland Court	
WKRP (Derby)			Northbridge	
EGRP	3	1	Perth Children's Court	
Greenough	2		Rockingham Court	
Hakea	3	1	Supreme Court	
Karnet	3	1	Fiona Stanley Secure Facility	1
Melaleuca	5		Total	3
Pardelup	1			
Roebourne	2	1		
Wandoo	3	1		
Wooroloo	2			
Total	46	9		
			<i>Country</i>	
WORKCAMPs			Albany Court	
Roebourne	1		Broome Court	1
Walpole (via Albany)			Bunbury Court	1
Warburton (via Kalgoorlie)	1		Carnarvon Court	
Wheatbelt (Dowerin)	1		Geraldton Court	
Wyndham (via Kununurra)	1		Kalgoorlie Court	2
			Kununurra Court	
Total	4		Roebourne CSCS base	
			South Hedland Court	
			Total	4

[Source: Eamon Ryan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, letter, 30 October 2020, p 3.]

APPENDIX 2

FREEDOM OF INFORMATION ACT 1992

70. Complaint, procedure for dealing with

- (1) In order to deal with a complaint the Commissioner may obtain information from such persons and sources, and make such investigations and inquiries, as the Commissioner thinks fit.
- (2) Proceedings are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Commissioner permit, and the Commissioner is not bound by rules of evidence.
- (3) The Commissioner has to ensure that the parties to a complaint are given a reasonable opportunity to make submissions to the Commissioner.
- (4) The Commissioner may determine the procedure for investigating and dealing with complaints and give any necessary directions as to the conduct of the proceedings.
- (5) For example, the Commissioner may —
 - (a) deal with the complaint without holding formal proceedings or hearings;
 - (b) direct that all submissions are to be in writing;
 - (c) require parties to attend compulsory conferences.
- (6) If a party is required or permitted to appear before the Commissioner the party may be represented by a legal practitioner or by any other person.

74. Exempt matter etc., Commissioner to ensure non-disclosure of

- (1) In dealing with a complaint the Commissioner has to give such directions and do such things as the Commissioner thinks necessary to avoid the disclosure of —
 - (a) exempt matter; or
 - (b) information as to the existence or non-existence of a document containing matter exempt under clause 1, 2 or 5 of Schedule 1.
- (2) The Commissioner is not to include exempt matter, or information of a kind referred to in subsection (1)(b), in a decision on a complaint or in reasons given for the decision.
- (3) If the question of whether or not a document is a document of the agency is in issue, subsections (1) and (2) apply to the contents of the document as if those contents were exempt matter.

APPENDIX 3

FIXED TERM AND CASUAL CONTRACTS REVIEWED AND CONVERTED BY PUBLIC SECTOR AGENCIES FROM 10 AUGUST 2018 TO 30 JUNE 2020

Public sector agency	Commissioner's Instruction 23				Commissioner's Instruction 2	Commissioner's Instruction 22	Commissioner's Instructions 2, 22 and 23
	Number of contracts reviewed	Number of contracts reviewed and not converted as did not meet criteria	Number of offers of conversion declined by employee	Number of contracts converted	Number of contracts converted	Number of contracts converted	Total number of contracts converted under all Commissioner's Instructions
Animal Resources Authority	17	11	2	4	1	0	5
Architects Board of WA	0	0	0	0	0	0	0
Burswood Park Board	1	1	0	0	0	0	0
Central Regional TAFE	393	323	17	53	11	30	94
ChemCentre	57	25	0	32	4	0	36
Child and Adolescent Health Service	1003	948	2	53	54	0	107
Commissioner for Children and Young People	3	2	0	1	1	0	2
Construction Training Fund	4	4	0	0	0	0	0
Department of Biodiversity, Conservation and Attractions	550	404	0	146	106	0	252
Department of Primary Industries and Regional Development	230	170	1	59	34	0	93
Department of Communities	259	133	1	125	288	0	413
Department of Education	16874	16397	19	458	6168	0	6626
Department of Finance	113	80	2	31	25	0	56
Department of Fire and Emergency Services	213	185	0	28	15	0	43
Department of Health	141	108	0	33	17	0	50
Department of Jobs, Tourism, Science and Innovation	44	27	0	17	1	0	18
Department of Justice	2085	1943	19	123	1166	0	1289
Department of Local Government, Sport and Cultural Industries	200	171	1	28	36	0	64

Public sector agency	Commissioner's Instruction 23				Commissioner's Instruction 2	Commissioner's Instruction 22	Commissioner's Instructions 2, 22 and 23
	Number of contracts reviewed	Number of contracts reviewed and not converted as did not meet criteria	Number of offers of conversion declined by employee	Number of contracts converted	Number of contracts converted	Number of contracts converted	Total number of contracts converted under all Commissioner's Instructions
Department of Mines, Industry Regulation and Safety	40	18	1	21	46	0	67
Department of Planning, Lands and Heritage	49	38	0	11	47	0	58
Department of the Premier and Cabinet	35	19	0	16	15	0	31
Department of Training and Workforce Development	17	14	0	3	18	0	21
Department of Transport	38	24	0	14	87	0	101
Department of Treasury	14	12	0	2	22	0	24
Department of Water and Environmental Regulation	214	171	2	41	24	0	65
East Metropolitan Health Service	3271	2711	200	360	156	0	516
Economic Regulation Authority	8	6	0	2	1	0	3
Equal Opportunity Commission	0	0	0	0	0	0	0
Forest Products Commission	100	50	0	50	25	0	75
GESB	1	0	0	1	1	0	2
Health and Disability Services Complaints Office	0	0	0	0	0	0	0
Health Support Services	135	85	0	50	4	0	54
Healthway	4	0	0	4	4	0	8
Insurance Commission of Western Australia	18	15	0	3	21	0	24
Landgate	197	195	0	2	4	0	6
Legal Aid Commission of Western Australia	62	44	0	18	21	0	39
Legal Practice Board	19	8	1	10	1	0	11
Lotterywest	18	15	0	3	6	0	9
Main Roads Western Australia	5	2	0	3	4	0	7
Mental Health Commission	70	62	0	8	13	0	21

Public sector agency	Commissioner's Instruction 23				Commissioner's Instruction 2	Commissioner's Instruction 22	Commissioner's Instructions 2, 22 and 23
	Number of contracts reviewed	Number of contracts reviewed and not converted as did not meet criteria	Number of offers of conversion declined by employee	Number of contracts converted	Number of contracts converted	Number of contracts converted	Total number of contracts converted under all Commissioner's Instructions
Metropolitan Cemeteries Board	4	4	0	0	2	0	2
Metropolitan Redevelopment Authority	27	15	1	11	13	0	24
Mineral Research Institute of Western Australia (MRIWA)	4	0	0	4	0	0	4
National Trust of Australia (W.A.)	107	97	0	10	3	0	13
North Metropolitan Health Service	2393	2092	38	263	318	0	581
North Metropolitan TAFE	993	920	48	25	48	75	148
North Regional TAFE	152	149	1	2	42	0	44
Office of the Auditor General	11	3	0	8	10	0	18
Office of the Director of Public Prosecutions	182	143	0	39	21	0	60
Office of the Information Commissioner	0	0	0	0	0	0	0
Office of the Inspector of Custodial Services	0	0	0	0	0	0	0
Ombudsman Western Australia	1	0	0	1	2	0	3
PathWest	598	386	8	204	33	0	237
Public Sector Commission	5	5	0	0	0	0	0
Public Transport Authority	155	154	0	1	28	0	29
Small Business Development Corporation	7	6	0	1	0	0	1
South Metropolitan Health Service	1266	1196	18	52	258	0	310
South Metropolitan TAFE	844	697	20	127	35	117	279
South Regional TAFE	218	160	6	52	44	52	148
VenuesWest	1018	919	9	90	13	0	103
Veterinary Surgeons' Board of WA	1	1	0	0	0	0	0
WA Country Health Service	4701	3908	136	657	181	0	838

Public sector agency	Commissioner's Instruction 23				Commissioner's Instruction 2	Commissioner's Instruction 22	Commissioner's Instructions 2, 22 and 23
	Number of contracts reviewed	Number of contracts reviewed and not converted as did not meet criteria	Number of offers of conversion declined by employee	Number of contracts converted	Number of contracts converted	Number of contracts converted	Total number of contracts converted under all Commissioner's Instructions
Western Australian Electoral Commission	18	18	0	0	0	0	0
Department of the Registrar, Western Australian Industrial Relations Commission	0	0	0	0	0	0	0
Western Australian Meat Industry Authority	31	25	1	5	0	0	5
Western Australian Police	109	108	1	0	15	0	15
WorkCover Western Australia	28	15	0	13	8	0	21
Total	39375	35442	555	3378	9521	274	13173

[Source: Carissa Mitchell, Consultant Strategic Planning and Governance, Public Sector Commission, email, 10 November 2020, Attachment 1, pp 1-4.]

APPENDIX 4

HEADCOUNT OF FIXED TERM CONTRACT EMPLOYEES BY LEVEL BY AGENCY AT END JUNE 2020

Public sector agency	Public Sector CSA 2019 Agreement equivalent salary bands										TOTAL
	Level 1 and under	Level 2	Level 3	Level 4	Level 5	Level 6	Level 7	Level 8	Level 9	Class 1 and above	
Burswood Park Board	0	0	1	0	0	0	0	1	0	0	2
Central Regional TAFE	7	17	14	24	19	2	0	1	0	0	84
ChemCentre	3	12	9	4	3	4	3	0	0	1	39
Child and Adolescent Health Service	117	158	60	82	155	204	82	81	45	142	1,126
Commissioner for Children and Young People	1	0	0	3	0	0	0	0	0	1	5
Construction Training Fund	0	0	0	0	0	0	0	0	0	0	0
Corruption and Crime Commission	0	4	6	12	20	27	17	32	6	9	133
Department of Biodiversity, Conservation and Attractions	84	36	48	28	43	38	11	4	0	0	290
Department of Communities	76	255	269	84	169	96	54	25	15	32	1,075
Department of Education	1,969	790	787	884	811	1,070	106	20	16	23	6,476
Department of Finance	0	15	29	18	19	8	9	4	4	6	112
Department of Fire and Emergency Services	2	17	7	12	11	19	13	3	2	0	86
Department of Health	0	24	31	21	46	48	52	20	3	39	284
Department of Jobs, Tourism, Science and Innovation	0	0	16	11	17	18	11	15	6	13	107
Department of Justice	60	150	75	66	86	37	19	12	21	63	589
Department of Local Government, Sport and Cultural Industries	29	63	37	44	34	18	23	7	2	4	261
Department of Mines, Industry Regulation and Safety	4	47	29	27	22	14	18	8	6	16	191
Department of Planning, Lands and Heritage	1	22	24	9	15	8	13	8	5	9	114
Department of Primary Industries and Regional Development	24	76	53	38	47	38	24	11	3	13	327
Department of the Premier and Cabinet	2	34	22	17	27	25	41	26	17	36	247

Public sector agency	Public Sector CSA 2019 Agreement equivalent salary bands										TOTAL
	Level 1 and under	Level 2	Level 3	Level 4	Level 5	Level 6	Level 7	Level 8	Level 9	Class 1 and above	
Department of the Registrar, Western Australian Industrial Relations Commission	0	0	1	0	0	0	0	0	0	0	1
Department of Training and Workforce Development	0	8	11	0	5	6	2	1	0	0	33
Department of Transport	1	114	18	16	14	14	9	2	6	12	206
Department of Treasury	5	0	10	0	2	1	2	6	0	6	32
Department of Water and Environmental Regulation	0	15	23	16	33	13	9	1	2	2	114
East Metropolitan Health Service	152	230	212	232	201	245	120	143	85	300	1,920
Economic Regulation Authority	0	0	2	0	1	1	1	0	0	3	8
Forest Products Commission	2	3	1	7	1	6	1	0	0	1	22
GESB	1	0	0	3	1	0	0	0	0	4	9
Health and Disability Services Complaints Office	1	0	1	1	1	2	1	0	0	1	8
Health Support Services	11	34	72	12	34	55	22	20	9	9	278
Infrastructure WA	0	0	0	1	0	1	0	0	0	0	2
Insurance Commission of Western Australia	7	12	7	3	3	3	1	0	0	7	43
Landgate	0	14	10	3	1	6	2	3	0	5	44
Legal Aid Commission of Western Australia	11	22	18	8	23	9	3	0	0	1	95
Legal Practice Board	1	0	2	0	0	2	0	0	0	2	7
Lotterywest	1	0	14	21	5	9	0	1	1	4	56
Main Roads Western Australia	0	2	2	3	3	3	1	3	1	2	20
Mental Health Commission	3	4	7	3	14	2	7	3	3	21	67
Metropolitan Cemeteries Board	9	4	3	0	1	1	0	0	0	1	19
Metropolitan Redevelopment Authority	0	1	3	4	3	1	2	0	0	2	16
Minerals Research Institute of Western Australia (MRIWA)	0	0	0	0	1	0	0	1	0	1	3
National Trust of Australia (W.A.)	1	5	4	1	3	1	1	0	0	1	17

Public sector agency	Public Sector GSA 2019 Agreement equivalent salary bands										TOTAL
	Level 1 and under	Level 2	Level 3	Level 4	Level 5	Level 6	Level 7	Level 8	Level 9	Class 1 and above	
North Metropolitan Health Service	173	492	302	229	335	351	170	136	128	367	2,683
North Metropolitan TAFE	1	17	44	61	51	6	0	0	0	0	180
North Regional TAFE	0	9	5	3	1	2	0	0	0	1	21
Office of the Auditor General	0	6	2	4	0	1	1	1	1	1	17
Office of the Director of Public Prosecutions	4	5	3	3	5	1	1	1	0	9	32
Office of the Information Commissioner	0	0	0	0	0	0	0	0	0	1	1
Office of the Inspector of Custodial Services	0	1	0	0	0	0	0	0	0	0	1
Ombudsman Western Australia	0	0	0	0	0	2	1	1	2	4	10
PathWest	100	94	58	21	33	25	17	15	10	75	448
Public Sector Commission	0	2	1	8	1	5	1	1	0	3	22
Public Transport Authority	13	18	27	35	69	68	24	35	12	2	303
Salaries and Allowances Tribunal	0	0	0	0	0	0	0	0	0	0	0
Small Business Development Corporation	0	0	0	1	1	2	1	0	0	1	6
South Metropolitan Health Service	133	287	245	294	186	297	147	148	125	392	2,254
South Metropolitan TAFE	11	23	33	48	29	3	0	0	0	0	147
South Regional TAFE	1	11	24	13	6	2	0	0	0	0	57
VenuesWest	2	3	3	0	4	4	3	0	4	3	26
WA Country Health Service	201	368	228	245	206	229	63	46	14	267	1,867
Western Australia Police	51	99	42	15	21	24	7	5	5	5	274
Western Australian Electoral Commission	1	0	1	0	0	0	0	0	0	0	2
Western Australian Meat Industry Authority	0	0	0	0	0	0	0	0	0	1	1
WorkCover Western Australia	0	4	3	1	2	0	1	0	0	2	13
TOTAL	3,276	3,627	2,957	2,699	2,844	3,077	1,117	851	559	1,926	22,933

[Source: Sharyn O'Neill, Public Sector Commission, Answer to question on notice 2 asked at hearing held 26 October 2020, dated 6 November 2020, p 5-7.]

GLOSSARY

Term	Definition
Bandyup	Bandyup Women's Prison
CI	Commissioner's Instruction
Commissioner	Public Sector Commissioner
Committee	Standing Committee on Public Administration
Department	Department of Justice
FOI Act	<i>Freedom of Information Act 1992</i>
FTE	Full-time equivalent
IMP	Individual Management Plan
Inspector	Inspector of Custodial Services
IOCS Act	<i>Inspector of Custodial Services Act 2003</i>
IT	Information technology
MOUs	Memoranda of understanding
OIC	Office of the Information Commissioner
OIC Annual Report	2019-20 Annual Report of the Office of the Information Commissioner
OICS	Office of the Inspector of Custodial Services
OISC Annual Report	2018-19 Annual Report of the Office of the Inspector of Custodial Services
Ombudsman	Parliamentary Commissioner for Administrative Investigations
Ombudsman Annual Report	2019-20 Annual Report of the Ombudsman
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
PSC	Public Sector Commission
PSC Annual Report	2019-20 Annual Report of the Public Sector Commission
PSM Act	<i>Public Sector Management Act 1994</i>
SES	Senior executive service
State of the Sector Report	State of the Western Australian Government Sector Workforce 2018/19
Strategy	Workforce Diversification and Inclusion Strategy for WA Public Sector Employment 2020-2025

Standing Committee on Public Administration

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'5. Public Administration Committee

5.1 *A Public Administration Committee is established.*

5.2 The Committee consists of 5 Members.

5.3 The functions of the Committee are to —

(a) inquire into and report on —

- (i) the structure, efficiency and effectiveness of the system of public administration;
- (ii) the extent to which the principles of procedural fairness are embodied in any practice or procedure applied in decision making;
- (iii) the existence, adequacy, or availability, of merit and judicial review of administrative acts or decisions; and
- (iv) any Bill or other matter relating to the foregoing functions referred by the Council;

and

(b) consult regularly with the Parliamentary Commissioner for Administrative Investigations, the Public Sector Commissioner, the Information Commissioner, the Inspector of Custodial Services, and any similar officer.

5.4 The Committee is not to make inquiry with respect to —

- (a) the constitution, function or operations of the Executive Council;
- (b) the Governor's Establishment;
- (c) the constitution and administration of Parliament;
- (d) the judiciary;
- (e) a decision made by a person acting judicially;
- (f) a decision made by a person to exercise, or not exercise, a power of arrest or detention; or
- (g) the merits of a particular case or grievance that is not received as a petition.'



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