



Joint Standing Committee on the Corruption and Crime Commission

Recent amendments to the *Corruption and Crime Commission Act 2003*: Some implications for Western Australia's integrity framework

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Joint Standing Committee on the Corruption and Crime Commission

Recent amendments to the *Corruption and Crime Commission Act 2003*: Some implications for Western Australia's integrity framework

Report No. 21

Presented by

Hon Nick Goiran, MLC and Mr Peter Watson, MLA

Laid on the Table of the Legislative Assembly and Legislative Council
on 18 June 2015

Chairman's Foreword

The Legislative Council agreed to the Third Reading of the *Corruption and Crime Commission Amendment (Misconduct) Bill 2014* on 2 December 2014, following the Bill's earlier passage through the Legislative Assembly on 15 October 2014.

The main purpose of the Bill was to amend the *Corruption and Crime Commission Act 2003* (CCC Act) to transfer the Corruption and Crime Commission's (CCC) oversight of minor misconduct by public officers, and its corruption prevention and education functions, to the Public Sector Commissioner. Section 5 of the new Act, when this section is proclaimed, will also rename the CCC Act to the *Corruption, Crime and Misconduct Act 2003* (CCM Act).

The Committee was advised that the Public Sector Commission (PSC) and the CCC were working towards an indicative date for the transfer of the relevant functions to the PSC of 1 July 2015.

This report provides both an overview of the preparation being undertaken by the two agencies to prepare for when all of the sections of the new CCM Act have been proclaimed and, more importantly, raises a number of issues that have been identified during hearings and through other evidence given to the Committee.

The transfer of minor misconduct matters to the Public Sector Commissioner leaves a gap in the oversight of the handling of such matters. The current oversight function in relation to matters that will now be known as minor misconduct is provided for under Section 216A of the CCC Act. This section provides for the establishment of the Joint Standing Committee which as part of its function is to report to Parliament on the exercise of the functions of the CCC and the Parliamentary Inspector of the Corruption and Crime Commission (PICCC). The new CCM Act, however, does not provide any formal mechanism for an external agency or body to oversight the PSC's investigation of minor misconduct matters.

Similarly, the Bill sought no change to the functions, duties and powers of the PICCC that are currently contained in Part 13 of the CCC Act, and as such the PICCC would not be able to assess complaints about the actions of the Public Sector Commissioner. On this matter, the Committee sought a specific response from the PICCC, PSC and the CCC on the mechanism, if any, in the new CCM Act for people who may want to make allegations of misconduct against the Public Sector Commissioner.

In acknowledging the new Act will not contain any specific provisions for the investigation of minor misconduct allegations levelled at the Public Sector Commissioner, the Commissioner, Mr Mal Wauchope, provided the Committee with

alternate avenues where such claims can be made under other legislation, such as to the Ombudsman, the Auditor General, the Governor and any member of Parliament.

Under the amendments to the CCC Act, the CCC retains its exclusive powers and responsibility for investigating all allegations of serious misconduct within WA Police and other sections of the State's public service (including local government and universities). The evidence and submissions provided to the Committee from the PICCC, PSC and CCC were consistent in that there was a common understanding of what was serious misconduct. The difficulty raised with the Committee by all parties, as stated by the new CCC Commissioner, Hon John McKecknie QC, was that there is an inescapable degree of overlap between serious and minor misconduct, and many complaints may involve allegations of both.

Mr Wauchope said in his submission to the Committee that he was committed to working with the CCC to achieve a shared understanding of the meanings of 'minor misconduct' and 'serious misconduct', and the overlap between the two, in a way that is "both robust at law, and able to be applied in practice in a workable and reasonable way." He and Commissioner McKecknie were working towards taking a consistent approach in each respective Commission's set of guidance materials to minimise confusion with a view "to helping identify the relevant body to which an allegation should be referred, and will be instrumental in supplementing the practical application of the statutory terms."¹

The Committee is confident the two agencies are working collaboratively, and with good will, on the transfer of the functions as required under the amended legislation and the recommendations made in this report are in relation to the identified gaps in oversight that might impact on the State's integrity framework.

The Committee is not confident that the guidelines being developed by the PSC and the CCC will be finalised early enough to allow the proper time to educate the 138,000 public servants in Western Australia, as well as those employed in the State's local governments, universities and Government Trading Enterprises, on the new arrangements for reporting minor misconduct to the PSC. It has recommended that the proclamation of the remaining sections of the amending Act be delayed by the Attorney General to ensure that this education process is effectively managed.

My thanks go to the Public Sector Commissioner, Mr Mal Wauchope; the CCC Commissioner, Hon John McKecknie QC; the CCC's Acting Commissioner Neil Douglas; and the Parliamentary Inspector, Hon Michael Murray QC, for providing their submissions on the issue in a timely manner. The PSC also sought advice on the legal implications of the new CCM Act from the State Solicitor's Office and the CCC from senior counsel, Mr Chris Zelestis QC.

1 Mr Mal Wauchope, Commissioner, Public Sector Commission, Letter, 15 May 2015, p5.

I would also like to thank my fellow Committee Members for their input on this report; the Committee's Deputy Chairman, the Member for Albany, Mr Peter Watson MLA; the Member for Forrestfield, Mr Nathan Morton MLA, and the Member for the South West Region, Hon Adele Farina MLC. The Committee members were once again ably supported by the Committee's Secretariat, Dr David Worth and Ms Jovita Hogan.

A handwritten signature in blue ink, consisting of a stylized 'N' with a horizontal stroke extending to the right.

HON NICK GOIRAN, MLC
CHAIRMAN

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Ministerial Response

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

Findings and Recommendations

Finding 1

Page 2

The Standing Orders of the Legislative Assembly and Legislative Council do not provide an express function to empower the Joint Standing Committee on the Corruption and Crime Commission to oversee the Public Sector Commission in performing activities outlined in sections 45 and 21AA, 21AB and 21AC of the amended *Corruption and Crime Commission Act 2003*.

Recommendation 1

Page 3

The Standing Committees on Procedure and Privileges in the Houses consider inquiring into amending their Standing Orders describing the functions of the Joint Standing Committee on the Corruption and Crime Commission so that it is expressly empowered to oversee the activities of the Public Sector Commission in relation to the education and minor misconduct matters it will have responsibility for in the *Corruption, Crime and Misconduct Act 2003*.

Finding 2

Page 6

The Public Sector Commission has established a transition taskforce that is liaising with the Corruption and Crime Commission to establish procedures that will allow it to handle an estimated 3,500 to 4,000 notifications of minor misconduct that could be received during 2015-16.

Finding 3

Page 6

The Public Sector Commission's computer system is being enhanced so that it can record additional information that is required to be collected under the new *Corruption, Crime and Misconduct Act 2003* and to ensure that its database fields match those of the computer system used by the Corruption and Crime Commission.

Recommendation 2

Page 6

Proclamation of the remaining sections of the *Corruption and Crime Commission Amendment (Misconduct) Act 2014* should only occur once the Public Sector Commission's computer system has been enhanced so that it can record the additional information that is required to be collected under the new *Corruption, Crime and Misconduct Act 2003* and its database fields match those of the computer system used by the Corruption and Crime Commission.

Finding 4

Page 7

The adequacy of the Public Sector Commission's funding and staff it received from the Corruption and Crime Commission in the 2015-16 State Budget, for the purpose of enabling it to undertake the new functions it has acquired through the recent

amendments to the *Corruption and Crime Commission Act 2003*, is unknown given the Public Sector Commissioner's uncertainty as to the number of misconduct notifications that he will receive.

Finding 5

Page 11

The *Corruption, Crime and Misconduct Act 2015* will not provide a clear avenue for a person to lodge allegations of minor misconduct against the Public Sector Commissioner.

Recommendation 3

Page 11

The Attorney General propose an amendment to the *Corruption, Crime and Misconduct Act 2015* to empower the Corruption and Crime Commission to receive allegations of minor misconduct against the Public Sector Commissioner.

Recommendation 4

Page 12

The Corruption and Crime Commission should develop a Protocol with the Public Sector Commissioner, in a similar fashion to the one it has developed with the Parliamentary Inspector, to ensure that there is oversight of the Public Sector Commissioner's investigation of minor misconduct matters.

Recommendation 5

Page 12

In future Annual Reports, the Corruption and Crime Commission should report on:

1. the effectiveness of the Protocol referred to in Recommendation 4 of this report; and
2. the effectiveness of its oversight of the Public Sector Commissioner's investigation of minor misconduct matters.

Finding 6

Page 13

Referrals by the Public Sector Commissioner (PSC) under section 45T(1)(b) of the *Corruption, Crime and Misconduct Act 2015* to the Corruption and Crime Commission (CCC) may mitigate the unintended consequence of the Parliamentary Inspector of the Corruption and Crime Commission not being able to exercise his powers where the PSC is investigating an allegation of minor misconduct against an officer of the CCC.

Recommendation 6

Page 14

In future Annual Reports, the Parliamentary Inspector of the Corruption and Crime Commission include a report on the effectiveness of section 45T(1)(b) referrals on his capacity to use his powers in matters involving allegations of minor misconduct against an officer of the Corruption and Crime Commission.

Finding 7**Page 25**

There is a substantial degree of overlap of conduct that can be defined as either minor or serious misconduct under the *Corruption and Crime Commission Act 2003*, and many notifications will contain allegations involving both types of misconduct.

Finding 8**Page 30**

The Public Sector Commission and the Corruption and Crime Commission are working collaboratively to produce notification guidelines by 1 July 2015 for public sector agencies and their staff with the aim to clarify their responsibilities under the *Corruption, Crime and Misconduct Act 2003* for identifying and reporting allegations of minor and serious misconduct.

Recommendation 7**Page 30**

Proclamation of the remaining sections of the *Corruption and Crime Commission Amendment (Misconduct) Act 2014* take place only once the joint engagement and communication strategy to be used to educate the 138,000 public servants in Western Australia, as well as those employed in the State's local governments, universities and Government Trading Enterprises, on the new arrangements for reporting minor misconduct to the Public Sector Commissioner is ready for implementation.

Chapter 1

Review of recent amendments to the CCC Act

We did not see it as a bolt-on of a new function coming in. ...Given the importance of the transfer of the function, I have taken my two Deputy Commissioners offline to work on two specific work streams... Mr Mal Wauchope, Public Sector Commissioner.

Introduction

Parliament passed the *Corruption and Crime Commission Amendment (Misconduct) Bill 2014* on 2 December 2014. The purpose of this new Act was to amend the *Corruption and Crime Commission Act 2003* (CCC Act) to transfer the Corruption and Crime Commission's (CCC) oversight of minor misconduct by public officers and its corruption prevention and education functions to the Public Sector Commissioner.² Section 5 of the new Act, when this section is proclaimed, will also rename the CCC Act to *Corruption, Crime and Misconduct Act 2003* (CCM Act).

On 11 March 2015 the Public Sector Commissioner, Mr Mal Wauchope, appeared at a public hearing before the Joint Standing Committee to discuss his plans for the Public Sector Commission (PSC) undertaking these new activities by a proposed starting date of 1 July 2015. The transcript of this hearing is attached in Appendix 1. At a later hearing, Acting Commissioner, Mr Neil Douglas appeared before the Committee to outline the CCC's plans to prepare for a significant shift in its responsibilities in preventing corruption in Western Australia.

This report provides an overview of the preparation being undertaken by the PSC and CCC to prepare for when all of the sections of the new Act have been proclaimed. The report also raises some issues identified during the hearings with the PSC and CCC, and from later advice sought from the Parliamentary Inspector of the Corruption and Crime Commission (PICCC), Hon Michael Murray QC.

2 These provisions are similar in nature to those contained in the *Corruption and Crime Commission Amendment Bill 2012*. This Bill was introduced into the 38th Parliament and was read a second time in the Legislative Assembly on 21 June 2012 but did not pass through Parliament by the time of the 2013 State election. See www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=5BE1B95B35BF034348257A240011530E.

Chapter 1

Evidence by Public Sector Commissioner

Role of the Joint Standing Committee

Section 216A of the current CCC Act required the establishment of the Joint Standing Committee. The Committee operates under the Standing Orders of the Western Australian Legislative Assembly and its functions are described in SO 289:

- a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission;
- b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and
- c) carry out any other functions conferred on the Committee under the *Corruption and Crime Commission Act 2003*.

The establishment and functions of the Committee are also provided for in Schedule 1(9) of the Standing Orders of the Legislative Council. The Committee invited the Public Sector Commissioner, Mr Mal Wauchope, to the hearing under the power provided to the Committee by the Legislative Assembly's SO 289(b).

The *Corruption and Crime Commission Amendment (Misconduct) Act 2014* (CCCA(M) Act) does not provide any formal mechanism for an agency or body to oversee the PSC's investigation of minor misconduct matters, such as that currently provided for by the Committee's oversight of the CCC and the operation of the PICCC in overseeing the activities of the CCC as currently provided for by the CCC Act.

During the second reading stage of the CCCA(M) Bill in the Legislative Council, the Attorney General acknowledged that the CCC Act outlined the requirement for a Joint Standing Committee to oversee the CCC's investigation of misconduct.³ In relation to the Committee's possible oversight of the Public Sector Commissioner's processes for dealing with minor misconduct in the public sector, the Attorney General noted "Whether Parliament amends its standing orders to accommodate some other oversight is a matter for both Houses."⁴

Finding 1

The Standing Orders of the Legislative Assembly and Legislative Council do not provide an express function to empower the Joint Standing Committee on the Corruption and Crime Commission to oversee the Public Sector Commission in performing activities

3 Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 2 December 2014, p9082.

4 Ibid.

outlined in sections 45 and 21AA, 21AB and 21AC of the amended *Corruption and Crime Commission Act 2003*.

Recommendation 1

The Standing Committees on Procedure and Privileges in the Houses consider inquiring into amending their Standing Orders describing the functions of the Joint Standing Committee on the Corruption and Crime Commission so that it is expressly empowered to oversee the activities of the Public Sector Commission in relation to the education and minor misconduct matters it will have responsibility for in the *Corruption, Crime and Misconduct Act 2003*.

Implementation process

Mr Wauchope told the Committee that the Premier, Hon Colin Barnett MLA, had indicated that his preference was for the two agencies to complete their preparations so that the remaining sections of the CCCA(M) Act can be proclaimed by the beginning of the 2015-16 financial year on 1 July 2015.⁵ He said that the PSC was working towards that date and had established an interim organisational structure within the PSC to take over the new minor misconduct oversight function from the CCC. Mr Wauchope said:

*We did not see it as simply a bolt-on of a new function coming in. ...Given the importance of the transfer of the function, I have taken my two Deputy Commissioners offline to work on two specific work streams, with one Deputy dealing with the notifications and assessments side of the business, and the other Deputy looking at the capacity building work and the prevention–education program.*⁶

The Committee was advised that Deputy Commissioner Barrett has a dedicated transition team within the PSC that has discussed with the CCC the processes it uses and the estimated number of allegations the PSC might need to deal with in the first year.⁷ This estimate is based on the total allegations received by the CCC in 2013-14 and the data that the CCC has kept over the past several years on the number of allegations which, in their initial assessment, meet section 4 (a), (b), (c) or the subsections of section 4(d) of the CCC Act.

Table 1 below shows the number of minor and serious allegations received by the CCC between 2009 and 2014. In its 2013-14 Annual Report the Commission also warns that the figures are distorted by one-off increases, such as an increase of 974 allegations

5 Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, 11 March 2015, p3.

6 Ibid.

7 Ibid.

Chapter 1

concerning WA Police in 2012-13 and 1,069 allegations concerning the Department of Corrective Services last year.⁸

Table 1- Total number of allegations received by the CCC⁹

2009-10	2010-11	2011-12	2012-13	2013-14
3,340	3,208	5,944	6,148	7,260

Table 2 reports the non-police notifications and misconduct allegations received by the CCC in 2013-14 by originating agency and sector, such as local government.

Table 2- Non-police notifications and misconduct allegations received by the CCC by agency and sector¹⁰

Department	Number of allegations	Proportion of allegations
Department of Corrective Services	1,761	40.2%
Department of Education	1,017	23.2%
Department of Health	537	12.3%
Local government	317	7.2%
Other authorities and independent agencies	748	17.1%
TOTAL	4,380	

The CCC reported that in 2013-14 the main categories of misconduct allegation involved breach of code of conduct/policy/procedure (16.5%), assault involving physical/excessive use of force (15.9%), trafficking contraband (10.8%), unprofessional conduct –demeanour/attitude/language (9.3%), and neglect of duty (8.2%).¹¹

If a similar level of notifications are received by the PSC in 2015-16 to that which the CCC received in 2013-14, then it might need to manage between 3,500 to 4,000 notifications per annum.¹² Mr Barrett said that the CCC's experience was that very few minor misconduct matters "go to a full investigation. ... Very few minor matters, if any, it has been suggested to me, actually then progress to their investigations branch, and are subject to the more fulsome investigation."¹³

8 Corruption and Crime Commission, *Annual Report 2013-2014*, 26 September 2014, p71. Available at: www.ccc.wa.gov.au/Publications/Reports/Annual%20Reports/CCC%20Annual%20Report%202013-2014%20Complete.pdf. Accessed on 28 May 2015.

9 Ibid.

10 Ibid, p13.

11 Ibid, pp87-88.

12 Mr Alan Barrett, Director, Public Sector Commission, *Transcript of Evidence*, 11 March 2015, p5.

13 Ibid, p13.

Mr Wauchope said that all agencies should be able to deal with the minor misconduct allegations themselves but did acknowledge that smaller agencies might not have the staffing capacity to manage their notifications and will need assistance from the PSC:

*...we would like to get them to deal with them early. Typically, when they are HR kind of issues, the longer they go, the more they fester and they become open to being that bigger problem to that kind of problem. So we would want to be putting it back in their hands. ... when you are talking about big agencies, they should and do have the capacity to deal with [the notifications.]*¹⁴

Mr Wauchope acknowledged to the Committee that the PSC currently had little corporate knowledge of some of the new organisations it would be responsible for overseeing, such as universities, local government and Government Trading Enterprises (GTEs), and the likely areas where minor misconduct notifications might arise.¹⁵ He said that the PSC was trying to build its own knowledge and capacity around these organisations and he along with other PSC staff had met with local government staff and the four Vice Chancellors to assist this process. In terms of the large local government sector, Mr Wauchope confirmed that “my oversight will only be in relation to the non-elected people, the paid officials” in councils.¹⁶

Approach to dealing with notifications

Mr Barrett said the PSC would take a similar approach to notifications and allegations of minor misconduct to that presently taken by the CCC and refer the large majority of them back to the employing agency for investigation. He said the CCC currently:

*... do not invest a great deal of resources in doing detailed assessments or conducting their own investigations of the minor matters. Mostly, they record the data, and that is important in understanding patterns, issues and potential hot spots, but mostly those matters are referred back to the employing authority to deal with.*¹⁷

In terms of information sharing, Mr Wauchope confirmed that the CCC would have direct access to the PSC’s database of notifications, called RESOLVE, which is the same database that the Ombudsman uses to manage complaints made to his office. The PSC is in the process of enhancing this computer system to take on additional information that is required to be collected under the new CCM Act. It is also developing protocols for the use of RESOLVE by CCC staff and planning on how to match its database and

14 Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, 11 March 2015, p5.

15 Ibid, p3.

16 Ibid, p11.

17 Mr Alan Barrett, Director, Public Sector Commission, *Transcript of Evidence*, 11 March 2015, p5.

Chapter 1

map some of the fields that the CCC currently capture when they do their initial screening of minor misconduct allegations.¹⁸

Finding 2

The Public Sector Commission has established a transition taskforce that is liaising with the Corruption and Crime Commission to establish procedures that will allow it to handle an estimated 3,500 to 4,000 notifications of minor misconduct that could be received during 2015-16.

Finding 3

The Public Sector Commission's computer system is being enhanced so that it can record additional information that is required to be collected under the new *Corruption, Crime and Misconduct Act 2003* and to ensure that its database fields match those of the computer system used by the Corruption and Crime Commission.

Recommendation 2

Proclamation of the remaining sections of the *Corruption and Crime Commission Amendment (Misconduct) Act 2014* should only occur once the Public Sector Commission's computer system has been enhanced so that it can record the additional information that is required to be collected under the new *Corruption, Crime and Misconduct Act 2003* and its database fields match those of the computer system used by the Corruption and Crime Commission.

Resources required to complete the new functions

Mr Wauchope told the Committee that part of the transition process, and one of the roles that Mr Barrett is tasked with, is to work with the CCC to identify what resources should be transferred from the CCC to the PSC to enable it to complete its new function. Mr Wauchope said he was unsure of the resources that might be required for the PSC to undertake these new tasks, especially to have a presence in the regions outside of Perth, and particularly to oversee the large number of local government agencies. He said that resourcing was one of the issues that would be a factor in determining when the proclamation of the new CCCA(M) Act occurs, "because, quite clearly, I cannot really take a function on without adequate resources to address that."¹⁹

Acting Commissioner Chris Shanahan SC, forwarded to the Committee a copy of a letter the CCC had sent to the Under Treasurer, Mr Michael Barnes, on 31 March 2015 after initial discussions on how many FTE the CCC might transfer to the PSC in the 2015-16 Budget. The CCC was concerned that Treasury had based their planning on a 2011

18 Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, 11 March 2015, p17.

19 Ibid, p12.

proposal from the then-Attorney General, Hon Christian Porter, in relation to amendments to the CCC Act that were then before the 38th Parliament (but did not proceed). The proposal was for seven FTE to move to the PSC but the CCC argued in its letter that the current amendments were different in scope to the 2011 amendments and so an updated review was warranted. Also, the CCC argued that a recent review of the impact of the operation of the new CCCM Act would see many of the minor misconduct notifications stay with the CCC for investigation, rather than the PSC, because the allegations overlapped with claims of serious misconduct.²⁰

In the 2015-16 Budget tabled in Parliament on 14 May 2015 the Government transferred \$1.65 million from the CCC to the PSC for the “Oversight of Minor Misconduct and Corruption Prevention and Education Functions”. The funds to be transferred to the PSC for this function rise to \$1.78 million in 2018-19, the last year of the forward estimates.²¹ In the 2015-16 financial year, the CCC loses 27 FTE positions, 5 FTE of which will be transferred to the PSC for their new minor misconduct functions.²² The PSC recently advertised, with a closing date of 25 May 2015, for a pool of applicants to fill level 3 to level 6 minor misconduct positions.²³

Finding 4

The adequacy of the Public Sector Commissioner’s funding and staff it received from the Corruption and Crime Commission in the 2015-16 State Budget, for the purpose of enabling it to undertake the new functions it has acquired through the recent amendments to the *Corruption and Crime Commission Act 2003*, is unknown given the Public Sector Commissioner’s uncertainty as to the number of misconduct notifications that he will receive.

Allegations of minor misconduct made against the Public Sector Commissioner

The Committee sought a specific response from the PICCC, PSC and the CCC on the mechanism, if any, in the new CCM Act for people who may want to make allegations of misconduct against the Public Sector Commissioner.

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- 20 Mr Chris Shanahan SC, Acting Commissioner, Corruption and Crime Commission, Letter to Mr M Barnes, Under Treasurer, Department of Treasury, 31 March 2015.
 - 21 Department of Treasury, *2015-16 Budget Papers- Division 38 Corruption and Crime Commission*, 14 May 2015, p452 & 455. Available at: http://static.ourstatebudget.wa.gov.au/15-16/bp2/02_part_09_corruption_and_crime_commission.pdf. Accessed on 25 May 2015.
 - 22 Department of Treasury, *2015-16 Budget Papers- Division 4 Public Sector Commission*, 14 May 2015, p82. Available at: http://static.ourstatebudget.wa.gov.au/15-16/bp2/02_part_02_public_sector_commission.pdf. Accessed on 25 May 2015.
 - 23 Public Sector Commission, *Minor Misconduct Management - Recruitment Pools*, nd. Available at: <https://search.jobs.wa.gov.au/page.php?pageID=160&AdvertID=175193&source=other>. Accessed on 26 May 2015.

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The Committee's Chairman, Hon Nick Goiran MLC, raised the role of the CCC, if any, in the new legislation in regard to this matter with Acting Commissioner Douglas in a closed hearing:

My concern at the moment and, I understand, the concern of the Committee is that there is this gap because if there is a minor misconduct allegation against the Public Sector Commissioner, he cannot under 45T(1) refer it to you, because to do so he needs to be able to refer it to you in the context of 45M(d), which means that he has to have made an assessment of the allegation; but 45G says that he cannot even receive it, so he cannot make an assessment because he is not even allowed to look at it. That is a concern to the Committee because minor misconduct includes, for example, under the [new CCM] Act "constitutes or involves the performance of his or her functions in a manner that is not honest or impartial". That is one of them.

If there was a complaint about the Public Sector Commissioner—I am not suggesting for a moment that there is any such allegation but we do not want to have any gaps in the oversight umbrella—I would want to have the confidence that someone had the capacity to look into it, and I am not currently confident that that exists.²⁴

Mr Wauchope acknowledged that the amendments to the CCC Act contained in the new CCCA(M) Act did not provide a clear avenue for someone who wished to lodge a complaint or allegation against him. He said that they could:

... go to the Ombudsman because what I would have been doing was an administrative action, which would be subject to scrutiny by the Ombudsman. At the end of the day, they can also go to the members of Parliament.²⁵

The Committee sought advice from the Parliamentary Inspector, Hon Michael Murray QC, on this and other matters associated with the changes to the CCC Act included in the CCCA(M) Act. The PICCC consulted the Public Sector Commissioner before he completed his submission. He agreed in his submission (see Appendix 4) that the CCCA(M) Act made no change to his functions, duties and powers that are currently

24 Hon Nick Goiran MLC, Chairman, Joint Standing Committee on the Corruption and Crime Commission, *Transcript of Evidence*, 15 April 2015, p19.

25 Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, 11 March 2015, p7.

contained in Part 13 of the CCC Act, and as such he would not be able to hear complaints about the actions of the Public Sector Commissioner.²⁶

The Committee also asked Mr Wauchope to prepare a submission, and gave permission for him to provide the PICCC's submission to the Committee to the State Solicitor's Office for their advice. In his submission (see Appendix 6), Mr Wauchope expanded on the options open to someone who wished to lodge a complaint against his actions:

As observed by the Chairman, section 45G of the CCM Act provides that the Public Sector Commissioner cannot receive or initiate an allegation of minor misconduct about the Public Sector Commissioner.

...

Whilst neither the CCC or the Public Sector Commissioner have functions to oversight minor misconduct allegations levelled at the Public Sector Commissioner, a number of other bodies have functions and powers capable of allowing them to receive and investigate allegations in relation to the Public Sector Commissioner, which would encompass allegations of minor misconduct.

In circumstances where allegations are levelled against the Public Sector Commissioner which do not constitute serious misconduct of the type referable to the CCC, but which may constitute minor misconduct, the following mechanisms are available to ensure the allegations can be adequately and independently examined:

- *Allegations including minor misconduct about the Public Sector Commissioner can be made to any member of Parliament, after which the member may in Parliament move a motion for suspension or removal of the Public Sector Commissioner. This could potentially commence the process provided for in section 18(3) of the Public Sector Management Act 1994 (PSM Act), whereby the Public Sector Commissioner can be removed or suspended from office on an address from both Houses of Parliament. The Parliament's power to remove the Public Sector Commissioner is not limited by the terms of the PSM Act.*
- *Under section 18(4)(b) and (d) of the PSM Act, the Governor may suspend the Public Sector Commissioner from office if*

26 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, Letter, 20 April 2015.

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satisfied the Public Sector Commissioner is incompetent, for neglect of duty, or if the Public Sector Commissioner has been guilty of misconduct. Allegations of minor misconduct can be made to the responsible Minister, currently the Premier, to commence such a process.

- *Under the Public Interest Disclosure Act 2003 (PID Act), allegations that constitute public interest information concerning the Public Sector Commissioner can be made:*

if it is claimed that the Public Sector Commissioner has committed an offence under a written law, to the CCC or to a police officer under section 5(3)(a);

if the allegation relates to substantial unauthorised or irregular use of, or substantial mismanagement of, public resources, to the Auditor General under section 5(3)(b), or

because the Public Sector Commissioner is a public officer, to the Parliamentary Commissioner for Administrative Investigations (the Ombudsman) under section 5(3)(g).

- *Both the Auditor General and the Ombudsman have jurisdiction outside the public interest disclosure regime, to receive allegations involving the Public Sector Commissioner within their respective jurisdictions:*

The Public Sector Commissioner is an accountable authority under the Auditor General Act 2006. Minor misconduct allegations about the Public Sector Commissioner that may concern financial impropriety, or allege that the Public Sector Commissioner's functions are not being adequately or properly performed, would fall within the functions and powers of the Auditor General to investigate and report to Parliament.

Minor misconduct allegations about the Public Sector Commissioner could also constitute a 'matter of administration' for the purposes of section 14(1) of the Parliamentary Commissioner Act 1971 (PC Act), and be made to the Ombudsman Under the PC Act, the Ombudsman can initiate investigations on own motion (section 16(1)), or on complaint to the Ombudsman under section 17 of the PC Act, or on reference by Parliament under section 15(1) of the PC

*Act, and may report to Parliament on any matter arising in connection with the exercise of his functions.*²⁷

In his submission to the Committee on the amendments to the CCC Act (see Appendix 5), the Corruption and Crime Commissioner, Hon John McKecknie QC agreed with Mr Wauchope that “The Commission has no jurisdiction to deal with minor misconduct allegations against the [Public Sector] Commissioner.”²⁸ Earlier in his submission the CCC Commissioner wrote that “legislative amendments would be necessary” to provide the CCC or the PICCC with the power to deal with such allegations.²⁹

Finding 5

The Corruption, Crime and Misconduct Act 2015 will not provide a clear avenue for a person to lodge allegations of minor misconduct against the Public Sector Commissioner.

Recommendation 3

The Attorney General propose an amendment to the Corruption, Crime and Misconduct Act 2015 to empower the Corruption and Crime Commission to receive allegations of minor misconduct against the Public Sector Commissioner.

Oversight of the Public Sector Commissioner’s investigation of allegations of minor misconduct

On 20 May 2015 the Committee wrote to the PICCC seeking his view on whether it would assist the State’s integrity framework if the CCC Act was further amended to allow either the Parliamentary Inspector and/or the Commission to oversight the Public Sector Commissioner’s investigation of minor misconduct matters. The PICCC replied on 29 May 2015 that:

*I do not consider it necessary for the Parliamentary Inspector, or the Commission, to oversee the functions to be performed by the Public Sector Commissioner under the new misconduct framework created by the recent amendments to the Act.*³⁰

The PICCC, however, did suggest that the PSC and CCC agree to a short protocol based on one that he and the CCC Commissioner are finalising in terms of the Commission’s responsibilities to notify the PICCC of any allegations made against Commission officers

27 Mr Mal Wauchope, Commissioner, Public Sector Commission, Letter, 15 May 2015, pp2-3.

28 Hon John McKecknie QC, Commissioner, Corruption and Crime Commission, Letter, 15 May 2015, paragraph [13].

29 Ibid, paragraph [2](a).

30 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, Letter, 29 May 2015.

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under s 196(4) of the CCC Act. The wording suggested by the PICCC would be similar to that used in this draft protocol with the CCC:

*The Public Sector Commissioner is to notify the Corruption and Crime Commission of any matter or information received by it which concerns, or may concern, the conduct, by act or omission, publicly or privately, of an officer of the Public Sector Commission in an adverse manner in that it may, directly or indirectly, reflect adversely upon the person's fitness for office as an officer of the Public Sector Commission.*³¹

The PICCC submitted to the Committee that such a Protocol between the two Commissioners would achieve the objective of providing oversight of the PSC without resorting to further legislative amendment to the CCC Act. The PICCC said that such a Protocol is a matter for the two Commissioners, however, should they develop one, the current notification obligations imposed upon the Commission by s 196(4) of the CCC Act will, in turn, ensure that the PICCC is notified of any matter of the kind described which is notified to the CCC by the PSC, and this “will serve to fulfil the statutory intention behind s 196(4) in all foreseeable circumstances.”³²

Recommendation 4

The Corruption and Crime Commission should develop a Protocol with the Public Sector Commissioner, in a similar fashion to the one it has developed with the Parliamentary Inspector, to ensure that there is oversight of the Public Sector Commissioner's investigation of minor misconduct matters.

Recommendation 5

In future Annual Reports, the Corruption and Crime Commission should report on:

1. the effectiveness of the Protocol referred to in Recommendation 4 of this report; and
2. the effectiveness of its oversight of the Public Sector Commissioner's investigation of minor misconduct matters.

It is the intention of the Committee to review the effectiveness of the Protocol, including whether legislative change is needed.

³¹ Ibid.

³² Ibid.

Allegations of minor misconduct against CCC officers

CCC officers will for the first time, upon the proclamation of the remaining sections of the new CCM Act, fall under the oversight of the PSC for notifications of minor misconduct allegations. The PICCC provided his advice on this matter that:

The provision of current interest is s 196(4) [of the CCC Act] which imposes on the CCC the obligation to notify me of any allegation which concerns or may concern a Commission officer. ... but it is clear that the obligation of notification to me is only imposed on the CCC and my powers, although considerable, of oversight and to take over the matter myself, may only be exercised in relation to the CCC and its officers.

I would have no capacity to exercise those powers in respect of a matter in the hands of the PSC [Public Sector Commissioner] where a CCC officer was the subject of an allegation which may or may not amount to misconduct of any degree of seriousness, whereas, if the matter was before the CCC the notification obligation would arise no matter how serious or minor the allegation was.

...

I have had the benefit of a brief discussion of the issue with the PSC. As I understand it, as at present advised he would take the view that if any allegation is made to be dealt with by him, concerning or which may concern a CCC officer, he would think it appropriate to refer the allegation to the CCC pursuant to s 45T(1)(b), thereby generating the obligation of the CCC to notify me and to deal with the matter, if not removed to me, under my direction.

I would be content with such an arrangement, which was also canvassed with me by Acting Commissioner Shanahan SC. It would obviate the need to consider further amendment of the Act to cure what seems to me to be an unintended hiatus in the amended scheme.³³

Finding 6

Referrals by the Public Sector Commissioner (PSC) under section 45T(1)(b) of the *Corruption, Crime and Misconduct Act 2015* to the Corruption and Crime Commission (CCC) may mitigate the unintended consequence of the Parliamentary Inspector of the

33 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, Letter, 20 April 2015.

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Corruption and Crime Commission not being able to exercise his powers where the PSC is investigating an allegation of minor misconduct against an officer of the CCC.

Recommendation 6

In future Annual Reports, the Parliamentary Inspector of the Corruption and Crime Commission include a report on the effectiveness of section 45T(1)(b) referrals on his capacity to use his powers in matters involving allegations of minor misconduct against an officer of the Corruption and Crime Commission.

Evidence by Acting Commissioner Douglas

Responsibility for minor misconduct

Acting Commissioner Douglas and senior CCC staff appeared at a public hearing with the Committee on 25 March 2015 to discuss the Commission's preparation for the transfer of minor misconduct functions to the PSC, along with other matters.³⁴

Mr Douglas later provided the Committee with a written version of his opening address that outlined in more detail the Commission's preparation for these changes (see Appendix 2).³⁵

The Committee's hearing occurred while the two Acting Commissioners were overseeing a 'root and branch' process of preparing a plan to restructure the Commission, partly based on the transfer of the minor misconduct responsibilities to the PSC. The CCC's *Repositioning Report* on the proposed reorganisation was tabled in Parliament on 21 April 2015.³⁶

In his written version of his opening address provided to the Committee, Mr Douglas said that there were four key issues that the Commission was progressing with the PSC:

- i. the changes in the notification obligations on agencies;
- ii. the transfer of resources to the PSC;
- iii. a joint engagement and communication strategy for the sector; and

34 Joint Standing Committee on the Corruption and Crime Commission, *Hearing with the Acting Corruption and Crime Commissioner*, 25 March 2015. Available at: [www.parliament.wa.gov.au/Parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/7FC21ED201D2982248257E2700223474/\\$file/CCC+20150325+Public-final.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/7FC21ED201D2982248257E2700223474/$file/CCC+20150325+Public-final.pdf). Accessed on 26 May 2015.

35 Mr Neil Douglas, Acting Commissioner, Corruption and Crime Commission, Letter, 25 March 2015.

36 Corruption and Crime Commission, *Report on an Administrative Matter Relating to the Functions of the Commission Pursuant to Section 88 of the Corruption and Crime Commission Act 2003* ("the *Repositioning Report*"), 21 April 2015. Available at: www.ccc.wa.gov.au/Publications/Reports/Published%20Reports%202015/Corruption%20and%20Crime%20Commission%20Repositioning%20Report.pdf. Accessed on 26 May 2015.

- iv. the Commission's access to PSC data that ensures Government is provided with a comprehensive view of the scope of misconduct and corruption across the sector.³⁷

Mr Douglas confirmed the high level of activity and knowledge transfer that was taking place between the Commission and the PSC, particularly at senior officer level, in the face of much uncertainty about the impact of the changes to the CCC Act on both agencies, and in the face of a tight deadline. At the time of the hearing, Mr Douglas said that the Commission expected that there would be a transfer of resources but the difficulty the Commission faced was that in the past it had not had to separate notionally minor misconduct activities from serious misconduct ones. Mr Douglas said that “[w]e are working with the Public Sector Commissioner to have a rational basis for determining what is a reasonable transfer of resources.”³⁸

Deputy Commissioner Barrett from the PSC had earlier told the Committee that he expected the PSC might need to manage between 3,500 to 4,000 notifications in 2015-16³⁹, or between 48-55% of the notifications the CCC received in 2013-14. The CCC’s ‘Repositioning Report’ tabled in Parliament on 21 April 2015, however, said that the Commission “anticipated that up to approximately one quarter [or about 1,800] of these allegations will fall within the minor misconduct jurisdiction to be transferred to the Public Sector Commission”.⁴⁰

In the 2014-15 State Government Budget papers, the Treasurer reported that the estimated notifications the CCC had actually received in 2014-15 was only 5,455.⁴¹ If the PSC was to manage 25% of this level of notifications, then that would mean a total of about 1,260 notifications per annum, less than half the earlier estimate given to the Committee by Deputy Commissioner Barrett of 3,500-4,000.

In a later closed hearing, Mr Douglas told the Committee that the Commission’s “role in investigating minor misconduct was limited in any event in the past. Its focus was on

37 Mr Neil Douglas, Acting Commissioner, Corruption and Crime Commission, Letter, 31 March 2015, paragraph [14].

38 Mr Neil Douglas, Acting Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 25 March 2015, p15.

39 Mr Alan Barrett, Director, Public Sector Commission, *Transcript of Evidence*, 11 March 2015, p5.

40 Corruption and Crime Commission, *Report on an Administrative Matter Relating to the Functions of the Commission Pursuant to Section 88 of the Corruption and Crime Commission Act 2003* (“the Repositioning Report”), p2, 21 April 2015. Available at: www.ccc.wa.gov.au/Publications/Reports/Published%20Reports%202015/Corruption%20and%20Crime%20Commission%20Repositioning%20Report.pdf. Accessed on 29 May 2015.

41 Department of Treasury, *2015-16 Budget Papers- Division 38 Corruption and Crime Commission*, 14 May 2015, p454. Available at: http://static.ourstatebudget.wa.gov.au/15-16/bp2/02_part_09_corruption_and_crime_commission.pdf. Accessed on 29 May 2015.

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the more serious [allegations]. So, to that extent, there is not a significant change” to the Commission’s activities with the transfer of the misconduct functions to the PSC.⁴²

The move by the CCC to an “intelligence-led and strategic approach”, as outlined in its ‘Repositioning Report’, will mean fewer investigations will be undertaken by the Commission but those that are undertaken will “focus more on the matters where we are going to make the greatest difference to the sector.”⁴³

The CCC’s ‘Repositioning Report’ said that a key feature of its new approach to its “business is that it will not seek to focus on responding directly to each individual allegation received, reported or notified to it, but rather seek to engage identified corruption and serious misconduct ‘hot spots’ by targeted investigations of strategic value.”⁴⁴

The CCC’s prevention and education activities

In terms of the CCC’s prevention and education activities, Mr Douglas said that this would still be an important focus of Commission activity. While section 17, ‘Prevention and education function’, of the CCC Act will be deleted Mr Douglas said “it will be replaced by three sets of provisions dealing with prevention and education in relation to police misconduct, our prevention function in relation to or arising out of our serious misconduct functions, and the new capacity development function.”⁴⁵

Sections 21AA(1)-(3) of the new CCM Act outline the Commission’s prevention and education functions in regard to WA Police. The new section 21AB(1) provides the Commission with a capacity development role in regard to all public authorities, in cooperation with the Public Sector Commissioner. Going further, section 21AB(3) says that, “[i]n performing the capacity development function, the Commission may consult, cooperate, and exchange information, with the Public Sector Commissioner.”⁴⁶

42 Mr Neil Douglas, Acting Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 15 April 2015, p6.

43 Ibid.

44 Corruption and Crime Commission, *Report on an Administrative Matter Relating to the Functions of the Commission Pursuant to Section 88 of the Corruption and Crime Commission Act 2003* (“the Repositioning Report”), p7, 21 April 2015. Available at: www.ccc.wa.gov.au/Publications/Reports/Published%20Reports%202015/Corruption%20and%20Crime%20Commission%20Repositioning%20Report.pdf. Accessed on 29 May 2015.

45 Mr Neil Douglas, Acting Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 25 March 2015, pp16-17.

46 Parliament of Western Australia, Corruption and Crime Commission Act 2003 *Incorporating the amendments proposed by the Corruption and Crime Commission Amendment (Misconduct) Bill 2014 Pt. 2 (Bill No. 57-1B)*, 2 December 2014, p24. Available at: [www.parliament.wa.gov.au/Parliament/Bills.nsf/CB997DFC0B135C2E48257CAE0009FA1D/\\$File/BB057-1.pdf](http://www.parliament.wa.gov.au/Parliament/Bills.nsf/CB997DFC0B135C2E48257CAE0009FA1D/$File/BB057-1.pdf). Accessed on 26 May 2015.

Mr Douglas confirmed to the Committee the importance of the CCC maintaining an education and prevention role with government agencies and working with the PSC as it assisted its intelligence gathering processes to identify serious misconduct:

It is a new description, of course, capacity development. The cooperation of the Public Sector Commissioner is actually expressed in two ways; one is discretionary and the other is mandatory. Let us take mandatory. The Commission cannot embark on that, of course, without the cooperation of the Public Sector Commissioner. Once it has that cooperation, there is an issue of to what extent can it carry out that function. There are only two ways—this is in the Act—to carry it out as opposed to the current nine ways that the Commission can carry out its prevention and education function. It is a matter of working through in practical examples what impact that will have.

...The amendments now include part of the changes to section 7B, how the Act's purpose is to be achieved. The prevention and education function is being carried out by both the Commission and the Public Sector Commissioner. Again, that emphasises the need for cooperation between the two. As part of that, what we regard as so important is the intelligence function. Unless the Commission has access to the intelligence it currently has as to what is going on in the sector, which underlay our 'Misconduct Intelligence Assessment Report', which will be tabled tomorrow, the ability to more effectively use that prevention and education function will be diminished. We need access to information in the future that will be retained by the Public Sector Commissioner. We need information about allegations that will not in the future come to the Commission.⁴⁷

During the hearing, Mr Douglas identified that the most important factor the CCC was then considering as an outcome of the changes to the CCC Act was the difference between minor misconduct and serious misconduct, and the extent of the overlap between the two:

At the heart of this issue of implementing the amendments that take effect this year is that distinction between minor misconduct and serious misconduct. It seems to me that the [Corruption and Crime Commission Amendment (Misconduct)] Act was framed on the basis that it would be one or the other, and in that case there would be the issue of determining that in a simplified way to enable agencies to

47 Mr Neil Douglas, Acting Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 25 March 2015, pp16-17.

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*know whether particular conduct came within one or the other, so that they would know who to refer it to in the first instance.*⁴⁸

48 Ibid, p13.

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The distinction and overlap between ‘minor’ and ‘serious’ misconduct

The amended [CCC] Act appears to be based on the proposition that particular conduct can be characterised either as serious misconduct or minor misconduct.

Mr Mal Wauchope, Public Sector Commissioner.

Introduction

In its initial hearing with the Public Sector Commission, Deputy Commissioner Barrett, responsible for managing the transition within the PSC to enable it to become responsible for minor misconduct, gave evidence to the Committee that their work with the CCC had:

...largely been on understanding the process, and particularly that distinction between minor and serious [misconduct] and how judgements will be formed, and how some of the cooperative arrangements will work for the PSC to escalate matters that may have elements of being serious, and thinking about how those protocols will work.⁴⁹

Subsequent to this hearing, the Committee requested a submission from the PSC, the CCC and the PICCC on this issue, as well as on whether the amendment to the CCC Act allowed for any oversight of minor misconduct allegations made against the Public Sector Commissioner. These submissions are contained in Appendices 4-6 below. Given the complexity of the distinction between ‘minor’ and ‘serious’ misconduct, and which agency should handle particular notifications, the PSC sought advice on these matters from the State Solicitor’s Office and the CCC sought independent advice from senior counsel, Mr Christopher Zelestis QC.

Acting Commissioner Douglas also emphasised the importance of the distinction between minor and serious misconduct in his submission to the Committee. He said that from the Commission’s perspective, it was imperative that there be a shared understanding between the PSC and the CCC about the meaning and application of these concepts. Mr Douglas said that this has been a primary focus of the Commission since the *Corruption and Crime Commission Amendment (Misconduct) Bill 2014* was passed in December 2014. He explained that this confusion over these terms has

49 Mr Alan Barrett, Director, Public Sector Commission, *Transcript of Evidence*, 11 March 2015, p13.

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“arisen partly because of the limited involvement by the Commission in drafting the amendments. The Commission was not privy to the Cabinet proposal or the drafting instructions concerning the transfer of the minor misconduct function.”⁵⁰

In the PSC submission to the Committee, Mr Wauchope noted that the purpose of the *Corruption and Crime Commission (Amendment) Misconduct Act 2014* was to focus the work of the CCC away from minor misconduct of public officers, other than in relation to reviewable police action, and towards serious misconduct and corruption. He said that maintaining the existing separation and definitions of between ‘minor’ and ‘serious’ misconduct contained in the *Corruption and Crime Commission Act 2003* was selected as the appropriate legislative approach to achieve this, rather than an alternative of inserting a new definition of these terms.⁵¹ Mr Wauchope said the new arrangements would allow an opportunity to apply definitions and processes that have been in operation for more than a decade, and to build on the meaning of these terms that has developed in courts and administration since the CCC Act was enacted in 2003.

Mr Wauchope said:

*The amended Act appears to be based on the proposition that particular conduct can be characterised either as serious misconduct or minor misconduct. ... However, one of the matters that needs careful analysis is the extent to which conduct may be characterised as both serious misconduct and minor misconduct. The broad scope that the courts have given to the meaning of “corrupt”, as used in paragraphs (a) and (b) of section 4 [of the CCC Act], supports the conclusion that there may well be **an extensive overlap between serious and minor misconduct**. (emphasis added)*⁵²

In introducing the amending Bill to the Legislative Council, the Attorney General, Hon Michael Mischin MLC, said that the amended Act will refocus “the CCC as the State’s pre-eminent corruption-fighting body.” The Attorney General’s speech supports Mr Wauchope’s evidence to the Committee that the Bill is structured in a way where notifications might easily be characterised as either minor or serious misconduct:

This Bill is aligned with the Liberal Party’s 2013 public sector management policy in aiming to provide greater focus on achieving better outcomes in public sector performance. The CCC’s priorities will be redirected from minor misconduct matters to its core police oversight role and to more serious misconduct matters. Matters of

50 Mr Neil Douglas, Acting Commissioner, Corruption and Crime Commission, Letter, 31 March 2015, p1.

51 Mr Mal Wauchope, Commissioner, Public Sector Commission, Letter, 15 May 2015, p4.

52 Ibid.

*minor misconduct comprise the largest number of disciplinary issues concerning public bodies and officers. As the Public Sector Commissioner already has a strong presence in advising, educating and training on disciplinary matters, the transfer of minor misconduct and prevention and education functions from the CCC will complement his current responsibilities.*⁵³

Definition of minor misconduct

Minor misconduct will be defined in amended section 4(d) of the CCC Act as being misconduct by a public officer (who is not a police officer) that:

- a. adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct; or*
- b. constitutes or involves the performance of his or her functions in a manner that is not honest or impartial; or*
- c. constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or*
- d. involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person,*

*and constitutes or could constitute a disciplinary offence providing **reasonable grounds for the termination of a person's office or employment as a public service officer** (emphasis added) under the Public Sector Management Act 1994 (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct).*⁵⁴

The advice provided to the CCC by Mr Christopher Zelestis QC was that the termination of a public officer's employment under the PSM Act may occur in two circumstances:

53 Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 16 October 2014, p7408.

54 AustLII, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/s4.html. Accessed on 27 May 2015.

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First, where an officer disobeys a lawful direction concerning the office or position to be held by the officer, or obstructs a selection process, the officer must be dismissed: s.82A(3)(a). Secondly, if an officer disobeys or disregards a lawful order, contravenes a provision of that Act or of any public sector standard or code of ethics, or commits an act of misconduct (which is not defined), or is careless in the performance of his or her functions or commits an act of victimisation within the meaning of s.15 of the Public Interest Disclosure Act 2003(WA), the officer may be dismissed: s.82A(3)(b)(i).⁵⁵

While the definition of misconduct has been contained in the CCC Act since 2003 (the original subparagraph (v) was deleted by the CCCA(M) Act), the difficulty in interpreting it can be seen from the following exchange during Mr Wauchope's hearing with the Committee about what might constitute minor misconduct within an agency such as the Department of Corrective Services:

The CHAIRMAN: *Not yet, okay. Would it be fair— just to put it in lay terms— that if someone was to complain that a Department of Corrective Services officer was rude with a visitor who was arriving at a prison to visit somebody, that would be something that would fall under minor misconduct and be dealt with by you, whereas obviously somebody trying to conceal or smuggle some goods into the jail, that would be something that CCC would handle, and quite possibly the WA Police?*

Mr Wauchope: *Yes.*

Hon ADELE FARINA: *Sorry, can I just clarify that answer? If it is a complaint against someone being rude, that would not constitute minor misconduct because it would not be likely to lead to dismissal.*

Mr Wauchope: *No.*

The CHAIRMAN: *So is this one of those matters then, Commissioner, that you were talking about earlier that is more of a HR type of thing—*

Mr Wauchope: *It is HR, we would expect.*

The CHAIRMAN: *Can someone help me, give me an example of something you think might be minor misconduct to the Department of Corrective Services that is not so minor that it is HR, that we really do*

55 Mr Christopher Zelestis QC, *Corruption and Crime Commission: Re: Distinction Between Serious Misconduct and Minor Misconduct*, Memorandum of Advice, 13 April 2015, p4.

not even want them to be bothering you with, or not so serious that it should be with the CCC or the WA Police?

Mr Wauchope: *The danger is I could be speculating, Chair, but there could be issues around how rostering is done, whether there have been any deals that have benefited individuals, in which case people are using their office to benefit themselves. Most likely that would end up in CCC territory, because I think it would probably head towards— if it was a systemic kind of issue.*

The CHAIRMAN: *You are talking about, say, somebody who prefers to do day shifts rather than night shifts or something like that, and so they have done—*

Mr P.B. WATSON: *Or extra shifts.*

The CHAIRMAN: *—a deal with their supervisor to make sure that they constantly get the day shifts?*

Mr Wauchope: *Mr Warner suggested there could be an altercation between two employees. Because you have a mixed environment, you have got a mixture of public servants and prison officers in the same workplace at times, it is a bit more complex than a normal department.*⁵⁶

In his opening address to the Committee, Acting Commissioner Douglas also identified another area of potential for confusion for public sector staff as to whether they should make a notification of minor misconduct to the PSC. This is the difference in definitions of minor misconduct between the amended CCC Act and other legislation.

56 Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, 11 March 2015, pp19-20.

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Mr Douglas said that there is a broad range of conduct (for example, dishonesty or breach of trust) that constitutes reasonable grounds for a person's termination of employment:

Within that range, the level of seriousness may vary considerably. At the higher end of the level of seriousness, it would seem odd, as a matter of ordinary language, to describe the relevant conduct as “minor misconduct”. Yet that is how the amended [CCC] Act would operate. One of the issues that is currently being reviewed is the extent to which conduct of that type would also constitute “serious misconduct”.⁵⁷

The PICCC's submission added a further refinement of the law about minor misconduct based on a recent High Court ruling in relation to a NSW ICAC investigation:

The person must be a public officer when the [minor misconduct] occurs, but they need not, under all the paragraphs of s 4(d) [of the CCC Act], be acting in their office at the relevant time.

However, the conduct must be adversely connected in the ways described in s 4(d) to the office which is held. This was the issue with which the [High Court] decision in Cuneen was concerned, rather than directly with the question of what may constitute corruption within the meaning of the [ICAC] Act.⁵⁸

Definition of serious misconduct

Under the amendments to the CCC Act, the CCC retains its exclusive powers and responsibility for investigating all allegations of serious misconduct within WA Police and other sections of the State's public service (including local government and universities). Serious misconduct is defined in the CCC Act in section 3 as “misconduct of a kind described in section 4(a), (b) or (c)”. These parts of section 4 are:

(a) a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer's office or employment; or

(b) a public officer corruptly takes advantage of the public officer's office or employment as a public officer to obtain a benefit for himself

57 Mr Neil Douglas, Acting Commissioner, Corruption and Crime Commission, Letter, 31 March 2015, paragraph [9].

58 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, Letter, 20 April 2015, p2.

*or herself or for another person or to cause a detriment to any person;
or*

*(c) a public officer whilst acting or purporting to act in his or her official capacity, **commits an offence punishable by 2 or more years' imprisonment.***⁵⁹ (emphasis added)

The PICCC, Hon Michael Murray QC, in his submission to the Committee agreed with the advice provided by Mr Zelestis QC to the CCC about serious misconduct that “in a general sense, serious misconduct comprises conduct which represents a more significant and reprehensible departure from duty than does minor misconduct.” He noted that under section 4(c) of the CCC Act a very large number of offences are:

*...punishable by two or more year's imprisonment and are characterised as serious misconduct merely because they are committed by a public officer 'whilst acting or purporting to act in his or her official capacity'. If, on a preliminary inquiry, it is found that there is credible evidence which may be capable of proving such an offence, the matter falls within the jurisdiction of the CCC.*⁶⁰

The evidence and submissions provided to the Committee from the PICCC, PSC and CCC were consistent in that there was a common understanding of what was serious misconduct, and that the CCC was responsible for handling notifications about serious misconduct. The difficulty raised with the Committee by all parties, as stated by the new CCC Commissioner, Hon John McKecknie QC, was that “[t]here is an inescapable degree of overlap between serious and minor misconduct and some complaints may involve allegations of both.”⁶¹

Finding 7

There is a substantial degree of overlap of conduct that can be defined as either minor or serious misconduct under the *Corruption and Crime Commission Act 2003*, and many notifications will contain allegations involving both types of misconduct.

Overlap between minor and serious misconduct

The difficulties posed by notifications of misconduct that might contain elements of both minor and serious misconduct, and which agency might be responsible for investigating the allegation, was recognised during the second reading debate in

59 AustLIi, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/s4.html. Accessed on 27 May 2015.

60 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, Letter, 20 April 2015, p3.

61 Hon John McKecknie QC, Commissioner, Corruption and Crime Commission, Letter, 15 May 2015, paragraph [39].

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Parliament on the *Corruption and Crime Commission Amendment (Misconduct) Bill 2014*.

For example, the Hon Adele Farina MLC told the Legislative Council that:

*Dividing the function of oversight for misconduct between two agencies, the Corruption and Crime Commission and the Public Sector Commission, runs the risk of confusion. ... This will pose significant confusion for some in the community in determining whether to report the misconduct to the CCC or to the Public Sector Commission, and in determining whether the matter is likely to constitute minor or serious misconduct, which may lead to complaints being lodged with both bodies, the CCC and Public Sector Commission, out of an abundance of caution.*⁶²

The Attorney General disagreed with Ms Farina and pointed to other sections of the Bill that allowed the PSC and CCC to consult each other over matters such as this:

*Having regard to those provisions [to consult each other], the Government considers that the Bill in its current form gives the CCC and the Public Sector Commissioner ample capacity to adequately and properly investigate an event involving both serious and minor misconduct on the part of police and prison officers.*⁶³

Mr Wauchope stressed in his evidence to the Committee that he did not want staff to send notifications about an allegation to both him and the CCC:

*I absolutely agree with you and what I would not want is exactly what you suggested people might do, which is flick it off in both directions. I would rather them make a mistake and send it to the wrong place and for us to sort it out, rather than it going backwards and forwards.*⁶⁴

In his opening address to the Committee, Acting Commissioner Douglas provided different advice, although he agreed with Mr Wauchope that both agencies were “keen to minimise the impost on notifying authorities and, within the constraints of the amended Act, the potential for double-handling and double-reporting of matters”, however:

62 Hon Adele Farina MLC, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 2 December 2014, p9072.

63 Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 2 December 2014, p9082.

64 Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, 11 March 2015, p20.

*[15]...the amended Act would require that where conduct constitutes both serious misconduct and minor misconduct it is reportable, or in some instances, **must be notified, to both the Commission and the PSC.** (emphasis added)*

[16] Based on further legal advice and a shared view between the Commission and the PSC, ... It is envisaged that there will be no penalty if an agency notifies inappropriately.

[17] The main issue from my perspective is that a matter is reported or notified. The assessment and management of that allegation is then a matter for the two agencies, and processes and protocols will be put in place to enable the allegation to be dealt with in line with legislative requirements.⁶⁵

The submission from the CCC Commissioner, Hon John McKecknie QC, offered a way forward, based on advice he had received about the implications of the new Act from Mr Zelestis QC in regard to the use of section 42(2) of the CCC Act, which states:

42 . Commission may direct appropriate authority not to take action

...(2) The Commission may, by written notice, direct an appropriate authority —

(a) not to commence investigation of a misconduct matter or, if an investigation of the matter has already commenced, to discontinue the investigation; and

(b) to take all reasonable steps to ensure that an investigation of a misconduct matter is not conducted by an officer of the appropriate authority.⁶⁶

Mr McKecknie said that the powers in this section of the CCC Act “is not limited to serious misconduct and could extend to complaints that allege both types of misconduct.”⁶⁷

The PICCC had doubts with the advice provided by Mr Zelestis QC to the CCC about the use of such section 42 notices to resolve issues with a notification that may involve

65 Mr Neil Douglas, Acting Commissioner, Corruption and Crime Commission, Letter, 31 March 2015, paragraphs [15]-[17].

66 AustLII, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/s42.html. Accessed on 27 May 2015.

67 Hon John McKecknie QC, Commissioner, Corruption and Crime Commission, Letter, 15 May 2015, paragraph [40].

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both minor and serious misconduct, and he advised the Committee that he was discussing this issue with the CCC:

...I should say now that I have grave doubts whether the power might be legitimately used in an attempt to deal with an issue which the amended Act deals with in different provisions. That was not its purpose.

The equivalent provision to s 33 where a matter is commenced before the PSC is s 45M and the reference to s 45T is noteworthy. It is clear, I think, that the word 'may' when first used in s 45T(1) is an empowering, not a discretionary, 'may'. When s 45T(1)(a) or (b) apply, the PSC should make the reference to the CCC. It cannot be the case, for example, that the PSC, faced with the situation that it is appropriate to refer the allegation to the CCC, may decline to do so in the exercise of discretion. As s 45T(3) makes clear, that would be the case quite apart from the duty to notify the CCC of suspected serious misconduct under s 28(2).⁶⁸

The PICCC also provided advice to the Committee that legal precedents provided that “the question of the proper characterisation of the conduct [as serious or minor misconduct] will usually turn on the mental element, the intention or purpose with which it is accompanied.”⁶⁹

Mr Wauchope said in his submission to the Committee that he was committed to working with the CCC to achieve a shared understanding of the meanings of ‘minor misconduct’ and ‘serious misconduct’, and the overlap between the two, in a way that is “both robust at law, and able to be applied in practice in a workable and reasonable way.” He and Commissioner McKechnie were working towards taking a consistent approach in each respective Commission’s set of guidance materials to minimise confusion with a view “to helping identify the relevant body to which an allegation should be referred, and will be instrumental in supplementing the practical application of the statutory terms.”⁷⁰

Guidelines for the identifying and notifying of minor and serious misconduct allegations

Both Mr Wauchope and Acting Commissioner Douglas told the Committee that the two agencies were working together to produce joint notification guidelines to assist staff

68 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, Letter, 20 April 2015, pp3-4.

69 Ibid, p3.

70 Mr Mal Wauchope, Commissioner, Public Sector Commission, Letter, 15 May 2015, p5.

and agency managers understand their responsibilities under the CCM Act.

Mr Wauchope said that he had also discussed the guidelines with the State Solicitor's Office. He said that the PSC was planning a "good education program" but "I imagine early on, we are going to have a bit more greyness than we would like".⁷¹

In his opening address for the Committee (see Appendix 2), Mr Douglas said the objective for the Commission is to:

*...come up with workable and simplified concepts and examples relating to serious and minor misconduct, acceptable to both the PSC and the Commission. These will guide notification and assessment processes used by the two agencies including the decision for each agency to refer allegations to the other where a matter is not clearly one or the other or where a matter, initially assessed as minor, on further enquiry, may constitute serious misconduct. This has been flagged in discussions with the PSC and we are working towards an effective solution that will require ongoing communication and collaboration between the two agencies.*⁷²

The CCC is empowered to issue guidelines about notifications under section 30 of the CCC Act, and the PSC is given similar powers under section 45J of the, as yet unproclaimed, CCM Act.

In a later closed hearing, Mr Douglas told the Committee that the CCC had received advice from Mr Zelestis QC which "cautions against producing guidelines, at least without reference to that [much of what was considered to be minor misconduct would also be serious misconduct], and indicates that there is an issue here."

Mr Douglas considered that it was Parliament's role to clarify the issue of the overlap between minor and serious misconduct, but:

*...the approach we will be taking is to refine the advice we give to agencies about what they are required to do. So those agencies must under the [CCM] Act report serious misconduct to the [Corruption and Crime] Commission, regardless of what they do with minor. If we establish what we regard to be the scope of serious misconduct, then that is the obligation of agencies. It may be that there is very little left in terms of minor [misconduct].*⁷³

71 Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, 11 March 2015, p20.

72 Mr Neil Douglas, Acting Commissioner, Corruption and Crime Commission, Letter, 31 March 2015.

73 Mr Neil Douglas, Acting Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 15 April 2015, pp19-20.

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Mr Wauchope told the Committee that he would provide the Committee with a copy of the guidelines once they have been finalised.⁷⁴ The CCC Commissioner later wrote to the Committee to say that the CCC:

*...is working closely with the PSC in order to publish by 1 July 2015 a joint information resource to assist agencies to determine which agency allegations of misconduct should be reported. Attached to that resource will be the document entitled Guidelines for Notification of Serious Misconduct produced by the CCC pursuant to the CCC Act (s. 30).*⁷⁵

Finding 8

The Public Sector Commission and the Corruption and Crime Commission are working collaboratively to produce notification guidelines by 1 July 2015 for public sector agencies and their staff with the aim to clarify their responsibilities under the *Corruption, Crime and Misconduct Act 2003* for identifying and reporting allegations of minor and serious misconduct.

There has been no information provided to the Committee on the timing of the joint engagement and communication strategy program to be used by the PSC and CCC to educate the 138,000 public servants in Western Australia⁷⁶, as well as those employed in the State's local governments, universities and Government Trading Enterprises, on the new arrangements for reporting minor misconduct to the PSC, and guidelines of what might be 'minor' or 'serious' misconduct.

Recommendation 7

Proclamation of the remaining sections of the *Corruption and Crime Commission Amendment (Misconduct) Act 2014* take place only once the joint engagement and communication strategy to be used to educate the 138,000 public servants in Western Australia, as well as those employed in the State's local governments, universities and Government Trading Enterprises, on the new arrangements for reporting minor misconduct to the Public Sector Commissioner is ready for implementation.

74 Mr Mal Wauchope, Commissioner, Public Sector Commission, *Transcript of Evidence*, 11 March 2015, p20.

75 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 3 June 2015.

76 Public Sector Commission, *State of the WA public sector 2014 - Measuring up: The public sector at a glance*, 20 November 2014. Available at: https://publicsector.wa.gov.au/sites/default/files/documents/state_of_the_wa_public_sector_2014_measuring_up_the_public_sector_at_a_glance.pdf. Accessed on 2 June 2015.

Appendix One

PSC public hearing transcript- 11 March 2015

Transcript of Evidence taken at Perth Wednesday, 11 March 2015

Mr Malcolm Wauchope, Commissioner, Public Sector Commission;

Mr Lindsay Warner, Director, Public Sector Renewal, Public Sector Commission; and

Mr Alan Barrett, Director, Public Sector Commission.

The CHAIRMAN: ...Commissioner, can I thank you for your attendance today to assist the Committee, and invite you, if you wish, to make any opening remarks with regard to the transitional arrangements that are being made between yourself and the CCC pursuant to the legislative changes.

Mr Wauchope: Thank you, Chair. If I could spend a few moments just doing that, that would be good. I would not mind just giving a bit of the background to the existing Public Sector Commission functions, talk about the initiatives that we are undertaking in relation to the transition, and then move into some of the areas that we are trying to work on in terms of being ready to take on the function.

My role was created in December 2010. It is an independent office and I am required to act independently under section 22 of my Act [*Public Sector Management Act 1994*]. I report to the Parliament, but I also have a relationship to government. We basically have, I guess, two broad functions, which I think are consistent with the kinds of functions that we will be taking on with the transfer of functions from the CCC. We have an assist function, where we assist agencies to be able to perform, and that includes capacity building, and we also have a monitoring or an oversight and reporting function, and we report to Parliament in at least two reports a year, but frequently more reports than that.

You may appreciate that there are some special powers that exist under the *Public Sector Management Act 1994*⁷⁷. We have powers under section 24H to undertake special inquiries. We have had four of those since the Act [*Public Sector Reform Act 2010*⁷⁸] was passed in 2010. Those powers have been used on four occasions by other individuals. That was the two bushfire reviews by Mick Keelty; the review by Bryant Stokes into the Peel Health Campus; and the review by Hon Peter Blaxell in relation to

77 AustLII, *Public Sector Management Act 1994*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/psma1994235/. Accessed on 23 March 2015.

78 AustLII, *Public Sector Reform Act 2010*, nd. Available at: www.austlii.edu.au/au/legis/wa/num_act/psra201039o2010267/. Accessed on 23 March 2015.

Katanning Hostel. So, those powers under that particular provision of the Act have been used on those occasions.

I am also the employer of 80 CEOs. That number goes up and down depending on what government does with machinery of government changes. They are employed under section 45 of the *Public Sector Management Act*. Beyond the *Public Sector Management Act*, I do wear some hats in relation to the Public Interest Disclosure legislation. I am a named authority in relation to that Act and have a responsibility around education in relation to that particular piece of legislation. That extends my responsibilities out to public universities, local government and the GTEs, so effectively beyond the mainstream of the public sector.

In terms of our capacity building, we have been focusing on a number of areas over the years. We have a graduate future leaders program, and in the last three years we have put through more than 200 new graduates from across the public sector. We have a suite of leadership courses, and, again, we have put through almost 200 senior executive officers in the last three years there. I guess, most importantly, since 2007 we have run a program called the 'Accountable and Ethical Decision Making' program [AEDM]. That was born out of the CCC inquiries in that period, when the then-Premier, Alan Carpenter, requested, or directed, that a program be developed in response to that. Over the last three years, we have undertaken that Program across the public sector and covered about 43,000 employees.

With key training, we have done something like 650 officers in the last three years, and, as I said, that takes us into local government and the universities. We have increasingly been involved in doing capacity building with government boards, and we have produced some products called 'Board essentials', which we have available for boards to essentially address their governance issues, and we have developed a program called 'Foundations of Government HR', which brings together HR practitioners across the public sector to build their capacity. So we have been very busy, I guess, around that kind of education-prevention function, which we are dealing with in a capacity-building way.

In relation to the oversight function, last financial year we finalised something like 105 breach of standard claims. It is mainly around the recruitment standard that the breaches occur. We have had 80-odd matters of referral. These are matters that come to us by allegations, often anonymous, and often relating to individuals or agencies. We dealt with 83 of those last year. We have dealt with 14 Public Interest Disclosures. We have an online complaints system that has dealt with over 1,000 matters, and we have had almost 3,000 calls through our advisory line. So there is a fair bit of contact in and around the public sector in terms of behaviour-type issues and finding out what is happening in the public sector.

We have undertaken a number of high-profile reviews and investigations and examinations. I guess the most recent one is the Healthway investigation, which was undertaken by Mr Barrett. We do not do a lot of those, but we might do one or two of those a year depending on the circumstances, and often they will be tabled in Parliament, so they become part of the public domain.

In terms of the transfer of the CCC functions, as Mr Barrett indicated, he is now the Director of the Transition Unit. We have set up a small unit of Public Sector Commission people to work with the CCC staff in preparation for the transfer. The date of transfer is a bit uncertain at the moment. The Premier has indicated that his preference would be for this financial year. We are working towards that, but it is not clear whether we will be able to make that or not at this stage. We have established an interim organisational structure in the PSC to take on this new function. I see this as the first stage of perhaps two stages. We did not see it as a bolt-on of a new function coming in. So we recognised that we needed to re-examine how we are organised and how we are going to conduct this new business in conjunction with our pre-existing business.

Given the importance of the transfer of the function, I have taken my two Deputy Commissioners offline to work on two specific work streams, with one Deputy dealing with the notifications and assessments side of the business, and the other Deputy looking at the capacity building work and the prevention–education program. So they are offline for the time being until we get through this program, and Mr Barrett has a dedicated team in relation to the transition.

Importantly, we have recognised that we do not know a lot about some of our new clients. We have not had a lot to do with local government and we have not had a lot to do with the public universities or the GTEs. So we are trying to build our own knowledge and capacity around that. We have recently had a number of seminars run around local government, basically ‘local government 101’, which we have put pretty much the whole of the Commission’s staff through, and we are about to run what we are referring to as a master class, which will be going into a bit more detail for the people who will be more closely involved with the function. So pretty well everyone in the Commission will have some understanding, and there will be another group of people who will be, if you like, at a higher level of understanding and capacity.

We are about to do the same with the public universities, and down the track we will be doing something similar with the GTEs, recognising that the GTEs are very broad in terms of the kinds of functions that they undertake.

We also have what I consider to be probably the most important exercise, and that is that we recognise that we need to develop some new products. The products that we have put out for the public sector have worked well, but I recognise that that is not going to be a product that will work for local government, because they have a

different statutory framework, and it will not work for the public universities. The high-level values and principles program I think will work, but we will have to drill down and have products and delivery mechanisms that relate to those particular client streams. So that is where a lot of our focus is going at the moment.

Chair, that is pretty much, I guess, a bit of an overview of where we are at.

The CHAIRMAN: Commissioner, that is very helpful. Thank you for that. I might just divide our dialogue this morning into dealing with misconduct, first, and then look at education, second. Dealing with misconduct, I hear from you that your agency, if you like, has some experience in doing investigations. It does not have to do a great number of them but has had to do some. In fact, I think from your statement you mentioned a figure of 83 inquiries or complaints that you had to look into.

Mr Wauchope: Chair, they were matters of referral, so they were not necessarily involving us going into what you would call detailed investigations. But they might have been referred back out to agencies to explain actions that had been taken by the agency, but we do very few of what I call major investigations. Healthway was an example. Lindsay, some of the other ones we have had?

Mr Warner: There have been some other reports tabled in relation to some matters affecting ministerial relationships.

Mr Wauchope: There was one we did that was tabled in relation to the Department of Training and Workforce Development and the relationship with the Minister's office. Carson Street: you might recall there was an issue around Carson Street in a report that had been put out by the Education Department. They fall into those kinds of categories. We have people who have got pretty good skills around those kinds of investigations. We have also assisted government departments in doing their investigations when they do not have the capacity or where there is a conflict of interest or where the seniority of the people is such that it would not be appropriate for the agency to do it itself. In that capacity we are not investigating them; we are assisting them to investigate.

The CHAIRMAN: Would any of those things be around what I would describe as discipline matters?

Mr Wauchope: Most of them would be around discipline matters. They are invariably looking at behavioural issues and quite often fall into what we would regard as HR kind of issues, which probably should be dealt with in an HR manner. The *Public Sector Management Act* is quite prescriptive— less prescriptive now than it was but it is still reasonably prescriptive— about how agencies address suspected breaches of discipline. The 2010 amendment offered explicitly more options than going into a full-blown investigation process.

CEOs can now look at a matter and decide whether or not its level of importance warrants a discipline process or whether it can be dealt with by what is referred to in the Act as “improvement actions”, which is typically counselling, additional training *et cetera*. We were hoping to free up some stuff around the less important things and have them dealt with quickly in an HR way.

The CHAIRMAN: I am trying to get an understanding around the existing capacity within your organisation for handling minor misconduct investigations. There appears to be some investigative skills, experience, particularly around, as you say, HR-type things— discipline matters. It is a fine line, is it not, between what is a discipline matter, what is a minor misconduct matter and what is a serious misconduct matter? We have discussed many times in this Committee that there is no official definition of “corruption”. All of these things are in degrees, I guess. I just want to get a better sense as to how you feel your agency has got sufficient capabilities in this area?

Mr Wauchope: Chair; I think we have got some very good skills. One look at the Healthway report and one would take the view that it was a very well prepared report, and we have a handful of people who do this— not every day, but they do it amongst other duties that they have and they have had a fairly long track record of doing it, so they have had a number of years of doing it. Could we investigate 4,000 matters per year as an investigator? The answer is no, but nor could the CCC.

Where we are coming from is to try to get things back to where they should be dealt with quickly and early, particularly when we are at that minor scale of behaviour, to get on with it and to be able to report to us so that we do not lose any of the information that gets captured. We want to make sure that is retained and enhanced, but that we get some activity happening, agencies taking some responsibility for their own issues.

The CHAIRMAN: Yes. Do have you a sense as to the volume you are likely to be receiving? You talked about 83. I think we are looking at a far greater volume of things coming your way in the near future?

Mr Wauchope: Chair, it is a hard one. Mr Barrett has had a stab at it based on, I guess, the total number of notifications that the CCC currently get, which is over 7,000, I think.

Mr Barrett: Based on information in the [CCC’s] Annual Report, it would appear that about 43% of matters reported relate to police misconduct, so we sort of put them to one side, and then we are left to try to make an estimate of the rest— how many would satisfy the definition of minor misconduct; how many are serious [misconduct]. That is something that we are working through with the working group with the CCC. They do maintain some data, particularly over the last couple of years, where they, in their initial assessment, consider whether it meets (a), (b), (c) or the subsections of (d)

[of section 4 of the CCC Act]. That is to be worked through and is a key issue for us to understand the volume of matters.

The CHAIRMAN: Yes. Obviously, I am conscious of the fact that it is 11 March and we are talking about being up and running for, say, 1 July. So what is our current understanding? I appreciate there is an ongoing dialogue. Are we talking in the hundreds or are we talking in the thousands?

Mr Barrett: My estimate, if the notification guidelines were to stay pretty well the same— and at the moment there is a strong expectation among public sector agencies we have spoken to that almost everything gets reported, even if it does not reach that sort of statutory threshold that implies a matter that could reasonably result in termination— so, if it was to remain the same, I think we could be looking at 3,500 to 4,000 notifications.

Based on the information provided to date, what I have learnt in the experience from the CCC is that they do not invest a great deal of resources in doing detailed assessments or conducting their own investigations of the minor matters. Mostly, they record the data, and that is important in understanding patterns, issues and potential hot spots, but mostly those matters are referred back to the employing authority to deal with —

The CHAIRMAN: Indeed.

Mr Barrett: — in the same kind of manner that we do.

The CHAIRMAN: So, Commissioner, would it be your intention to follow that same kind of model?

Mr Wauchope: Chair, absolutely. We believe that agencies should be able to deal with these matters themselves, but we would like to get them to deal with them early. Typically, when they are HR kind of issues, the longer they go, the more they fester and they become open to being that bigger problem to that kind of problem. So we would want to be putting it back in their hands. Now, I acknowledge that some of the smaller agencies probably do not have the capacity and will require assistance, but when you are talking about big agencies, they should and do have the capacity to deal with it.

The CHAIRMAN: Yes. I guess, Commissioner, you might not be able to answer this question because you just have to do the job that you are asked to be done, but it just strikes me, listening to what is being said this morning, that perhaps nothing is going to change? If the CCC does not have the capacity to look at these minor misconduct matters and largely refers them back to the originating agency to look into, quite understandably, and probably appropriately, and your organisation is going to do

exactly the same thing, it does make me wonder why we bother doing this whole thing in the first place?

Mr Wauchope: Chair, I think we probably do have a point of difference between us and the CCC. What we are looking at doing is making sure that matters that are notified to us and then require assessment, at that point, meet the definition of “minor” and do not capture everything that becomes part of the HR dross, so to speak. There will be fewer of those matters coming to us for assessment initially, and more matters being dealt with by the agencies according to the guidelines that we would issue. I am stressing that we are still in the process of formulating those guidelines and discussing them with State Solicitor’s Office *et cetera*, but that would mean that there would be more matters that would be handled at the first port of call by the agency, and it would report to us later on— maybe twice a year, once a year, whatever. They would still get captured, but there would be a different pathway, a different workflow.

The CHAIRMAN: Using this 4,000 allegation number for the purposes of this exercise, I am hearing from you that at the moment some of those 4,000 probably do not reach the threshold of being minor misconduct and probably should not be reported; they should be dealt with in-house as an HR matter?

Mr Wauchope: Chair, I still think they should be reported, but down the track after they have dealt with them so that we still capture that there are issues and what the outcome was, but it will not be captured at that early point of entry for notification and assessment. I might add that last year the Queensland Public Service Commission took on the minor misconduct function from the then-CMC [Crime and Misconduct Commission]; admittedly, it did not take on local government or universities *et cetera*. But their experience was that a lot of it was HR kinds of issues at the minor end of the scale. So, again, we are taking that as some guide; it will not necessarily be replicated in WA, but it is some sort of indicator.

The CHAIRMAN: I have got some questions about universities and so forth, but I might just ask members if they have any questions at this point.

Mr P.B. WATSON: Commissioner, I was just wondering when you refer them back to the agencies, if there is a culture in the agency where this thing continues to happen, do you pick that up? It is all right to hand it back and say there is an issue there, but if you have a culture in some of the agencies that probably we have seen over the years, is that a worry to you?

Mr Wauchope: Member, it is. We currently pick up intelligence around agencies. I will not mention particular agencies at the moment, but there is a handful that, if you like, are on our watching brief that have a pattern of behaviour. They can have high levels of breach claims or we can get lots of matters of referrals. As I said, they are often

anonymous, but my view is that if you are getting enough smoke, there is bound to be some fire. We often get intelligence coming through other means— other agencies, interactions with those agencies— and sometimes it is very public, obviously.

We have had some obviously very public issues with some agencies, and unfortunately at that point there has obviously been some stuff happening further back down the track. But, yes, we would not assume every agency would deal with matters in the way we would expect them to; that is why we want to actually spend a lot of time front-end getting some capacity building around that. I agree, cultures are cultures and they can be difficult to shift over time.

Mr P.B. WATSON: Do you go in and train the staff? You were talking about your leadership courses and your graduation and leadership. Would you, as the Commissioner, organise for that culture probably to be eradicated by training the staff better? Is that part of your brief?

Mr Wauchope: Member, it is. We certainly offer that training, and the Accountable and Ethical Decision Making training is actually mandated; it is supposed to be conducted by every agency. Every CEO appointed in place since 2007 has been through that program, barring a small number that we are about to do. We basically do them in small numbers. I have attended every one of those, and the interesting thing at those programs— they are very much around scenarios— is that you get a range of responses to issues, and that gives you an insight, too, in how the decision-making occurs in those agencies. So we are fairly active in agencies, but we cannot be in every agency at every time.

Hon ADELE FARINA: Under the *Public Sector [Management] Act* you are responsible for the employment of CEOs, and now under these legislative amendments to the CCC Act you have an oversight of CEOs. To me that presents a potential conflict of interest, and I was just wondering how you are proposing to deal with that?

Mr Wauchope: Member, I guess I already would have that conflict of interest because I am the employer but also responsible for the management and, I guess, ultimately the discipline of the CEOs, so in that sense it does not change. But it would be the same as any employer, be it private sector or not-for-profit: ultimately, the employer is responsible for the behaviour of their employee.

So these CEOs who are employed under section 45 [of the *Public Sector Management Act*] are legally my employees so I am responsible for their behaviour, which would include things like their professional development right through to if they are not actually performing, maybe there is performance management stuff, or, indeed, if you are actually engaging in inappropriate behaviour, then potentially discipline. So the CCC functions coming across would not change that; that already occurs.

Hon ADELE FARINA: You would accept, though, that in a case where there is a complaint against a CEO whose appointment you recommended, that that complaint might in turn, if it was found to be held, reflect poorly on your initial recommendation and poorly on you, so I think there is very clearly a conflict of interest issue here. I would really like to understand how you are proposing to deal with it and what greater level of transparency is going to be made available to the public to reassure the public that complaints against CEOs will not be brushed under the carpet out of concern of embarrassment?

Mr Wauchope: As you would appreciate, my relationship there only obviously goes to the 80 CEOs employed under section 45. I am bound by the provisions of the *Public Sector Management Act* to behave in the same way and comply with the code of ethics and code of conduct as any other person in the public sector. So my behaviour is open to scrutiny, and if I was not dealing with a CEO appropriately then that would be, as I said, basically able to be scrutinised.

Hon ADELE FARINA: By whom?

Mr Wauchope: Ultimately Parliament, because I do report to Parliament.

Hon ADELE FARINA: Yes, but that assumes there is the level of knowledge and access to information to be able to make those judgement calls. If complaints against CEOs are not being publicly notified, how do we know how many complaints you have received and how you have actually dealt with those complaints?

Mr Wauchope: Currently, if a complaint is made, for example, under the Public Interest Disclosure legislation⁷⁹, you would not know because I am bound by that legislation not to disclose. So already there are, if you like, those imperfections in terms of total knowledge and awareness. But I do go back to the point that I am bound by the principles and the statutory provisions of the *Public Sector Management Act*, and I would be required to behave in accordance with that.

Hon ADELE FARINA: So if someone lodged a complaint against a CEO and felt that the Commission had not adequately dealt with that complaint, and felt that that complaint had been diluted or brushed under the carpet, where is their avenue to progress the matter further? Do they lodge a complaint with the CCC?

Mr Wauchope: I guess they could if they thought there was a breach of the test for the CCC, but they could also go to the Ombudsman because what I would have been doing was an administrative action, which would be subject to scrutiny by the Ombudsman. At the end of the day, they can also go to the members of Parliament.

79 AustLII, *Public Interest Disclosure Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/pida2003295/. Accessed on 23 March 2015.

The CHAIRMAN: Member, if I can just assist at this point, is there a section under the new amendments— it is just escaping me at the moment. I have in the back of my mind that you are not permitted to take on a complaint that is made against yourself?

Mr Wauchope: That is correct, I cannot.

The CHAIRMAN: So if somebody was complaining about the appointment of one of these CEOs, then you would be obliged to send that to the CCC?

Mr Wauchope: That is a good question, Chair; I would like to reflect on that.

Hon ADELE FARINA: Not under the new definition, because the CCC only gets to look at serious misconduct. It would have to fall under a serious misconduct definition.

Mr Wauchope: Chair, could we take that on notice?

The CHAIRMAN: Yes, we will make the first question on notice— sorry, Member, to interrupt.

Hon ADELE FARINA: I still do not feel that I have an answer in terms of greater public transparency, because I think there is concern and a reluctance amongst people in the public service to lodge complaints against their superiors because the ramifications can be quite significant. Even with the whistleblower legislation [*Public Interest Disclosure Act 2003*], the reality is that the people who do whistle-blow are subjected to impacts somewhere along the way. No matter how much legislative framework we try to put around to protect those people, the protections do not seem to work in practice.

If there is a concern that the [Public Service] Commission is not giving due weight to complaints made against CEOs, there needs to be greater transparency to give the community confidence that that is not the case and that these are being dealt with. I do not hear anything in what you have said this morning that gives me any greater confidence that this greater transparency proposed in your processes will give the community that reassurance that complaints are being dealt with, with the appropriate weight.

Mr Wauchope: I can only undertake to have a look at the Member's issue and respond as part of that.

The CHAIRMAN: Are you happy for that to be taken as part of that same question on notice or is it a separate issue? Commissioner, I am looking at section 45G [of the *Corruption and Crime Commission Amendment (Misconduct) Act 2014*], which I understand is not in force as yet, but when it is in force, it says:

The Public Sector Commissioner must not receive or initiate an allegation about a person in the person's capacity as any of the following —

It then sets out six different categories. I might just say as an aside that I always find it odd when legislation says that “the Public Sector Commissioner must not receive”. “Receive”, I think, is actually defined elsewhere in the [CCC] Act, but on the ordinary reading of the word “receive”, it is a bit hard to stop someone from sending you something. Nevertheless, I notice there that it talks about, obviously, your own position, “the holder of the office of Commissioner”, but then (b) says, “an officer of the Commission”. Can you clarify for me whether these 80 CEOs are officers of the Commission?

Mr Wauchope: I would not have thought so, Chair. Mr Warner has suggested that an officer of the Commission in this case is the Commission, and that is the CCC.

The CHAIRMAN: The CCC; very good. So that would actually be [Section 45G] (a) and then it is (c) that deals with your position, the Public Sector Commissioner, the Parliamentary Inspector, an officer of the Parliamentary Inspector and then the [holder of a] judicial office. I look forward to the response to that question on notice, because certainly what we would not want is a situation where there is a gap in the misconduct system. We have taken that on notice. Members, are there further questions under the misconduct area?

Hon ADELE FARINA: Commissioner, could you please outline the current process that is engaged by the Commission when you receive a complaint against a CEO?

Mr Wauchope: Chair, it depends on which route it comes through. If it is under the Public Interest Disclosure legislation, we go through a process of seeing whether it meets the test of a genuine PID. I have not got those matters in front of me, but it is basically a checklist of items. If it meets those tests, then we would assign an appropriate officer— usually a senior officer— to examine the matter.

Depending on the matter— sometimes there are a range of allegations— there would be a requirement then to interview witnesses and interview, obviously, the person who the allegations were made against, and go through a process of natural justice. Quite often that takes some time, in terms of the effluxion of time.

Ultimately, then, you get to an outcome that determines whether the PID allegations have been found or not, and an appropriate opportunity for the person whom the allegations have been made against to respond to the conclusions of the investigator and then there would be appropriate action, depending on what it was.

If there was something found, whether it was something that warranted disciplinary action, you would then move from a PID process through to a disciplinary process under the *Public Sector Management Act*. And then, of course, there is a range of penalties in the *Public Sector Management Act*, ranging from reprimand through to dismissal.

That would be if it came through a PID process. If someone had raised some sort of complaint or an allegation— a complaint about a CEO could be anything; it could be that the agency was not responsive and they are holding the CEO responsible for that. But if it was an allegation coming through a different pathway to the PID process, then we would do some preliminary investigations ourselves and then probably require the CEO to respond to the matter before we decided to take it any further. Mr Barrett has done some of these, so perhaps he might want to —

Mr Barrett: Certainly, there is a bit of a structure to the way that we process what we refer to as “matters of referral”. As the Commissioner has explained, the facts and circumstance are talking about a matter that has not been lodged as a Public Interest Disclosure, because there are very structured steps for doing that. If, perhaps, it is an allegation that goes to the principles of human resource management under section 8 [of the *Public Sector Management Act*] and there is a concern raised, there are a number of ways that we can explore the facts and circumstances without drawing on the formal authority to conduct an investigation or a review under those specific sections under the *Public Sector Management Act*.

Now, if that suggests *prima facie* that the CEO has something to, I suppose, account for personally, and we are talking about minor issues or potential small breaches of those principles of human resource management under section 8, a “please explain” or an interview with the CEO might be undertaken. The number of those is quite low— very low, in fact. It is more likely that a complaint holds the CEO accountable as the employer and as the responsible authority for HR transactions done at a Director level or an Executive Director level.

It might well be that the CEO has signed off on that transaction and is accountable, I guess, for the transaction, but whether they are personally involved— it is those kinds of things that would influence the approach that we took and whether or not it is reasonable to get a “please explain” from the CEO or perhaps approach the Director of HR to ascertain whether there is a suspected breach of discipline that would require the Commissioner to respond as the employer.

Hon ADELE FARINA: So there appears to be some filtering that occurs in the Commissioner’s office before a decision is made to actually assign a departmental officer to undertake an investigation. Is that what you are saying?

Mr Wauchope: Chair, can I just make a comment there, as Mr Warner reminded me, the matter would actually involve an assessment under section 28 of the CCC Act, whether or not we should be notifying the CCC. One of the early decisions that we would make is: “is this notifiable to the CCC”? We would then refer it to the CCC. Often, we would maybe have a phone call and say, “Are you comfortable with us starting to do some work around this?” That early assessment would involve seeing whether it met that test to notify the CCC.

Hon ADELE FARINA: I will re-put my question. From what I understood you to say, there seems to be some filtering some preliminary assessment, that goes on in the Commissioner’s office before a decision is made to assign the investigation to a departmental officer to undertake?

Mr Wauchope: I would say that is not necessarily filtered in my office. It would go down to the area of the Commission that looks after these matters and they would form a view and advise me accordingly. I do not always agree with it; I mostly do. The initial filtering or assessment is not done by myself or the people within my offices; it is done by the area that Alan [Mr Barrett] is substantively attached to.

Hon ADELE FARINA: What about in the case of an allegation that is made anonymously? What weight is given to that, because you have indicated that you would actually talk to the complainant, and in that case, if it is an anonymous complaint, you cannot talk to the complainant because they have not identified themselves?

Mr Wauchope: Agreed. It is interesting. Under the PID legislation, even prior to the changes in 2012, we always acted on the assumption that an anonymous PID was a genuine PID and went through all the tests, even if you could not go back to a complainant. That was made explicit after the 2012 amendments. In relation to those anonymous matters, mostly we would be asking the CEO a question: “We have had this allegation or this complaint or this comment made, could you please respond to me with your understanding?”

So we do enquire [of] the CEO, almost on all occasions, when we get something like that. If it is clearly vexatious or frivolous and there is a history of something that has been and gone, we probably would not, but if it is something that looks like it has got substance, we would certainly be asking the CEO to respond.

Hon ADELE FARINA: Could you give the Committee figures on how many complaints against CEOs you received in the last year and how many of those were referred to the CEO for comment and then were considered resolved or dismissed on the basis solely of the CEO’s reply?

Mr Wauchope: Chair, if I can take that on [notice]?

The CHAIRMAN: Yes. You mentioned earlier, Commissioner, when your appointment started. Just refresh my memory on the date?

Mr Wauchope: It was on 1 December 2010.

The CHAIRMAN: Would it be too onerous to ask for that same data for that entire period of time over the last five years?

Mr Wauchope: We could certainly try to get that information for you.

The CHAIRMAN: That will be the second question on notice.

Hon ADELE FARINA: Just one more question on this line of questioning. Are there any circumstances in which a complaint against a CEO would be referred to that agency for investigation?

Mr Wauchope: If it was about the CEO personally, I cannot imagine— we would do it. We would be looking at it. This is where it gets tricky, because you actually have to involve people in that agency to obtain the evidence, or test the evidence. You mentioned before, Member, the problem around whistleblowers and protections and the like. You can do as much as you possibly can around that, but when it is a small agency in particular, people go, “Eeny, meeny, miny, moe—I think it is that”. So, that is always the risk.

Hon ADELE FARINA: If it is the case that once you receive an allegation against the CEO you put that allegation to the CEO and provide the CEO with an opportunity to respond, and if you are not satisfied with the CEO’s response and you do think it warrants an investigation, and you then do need to involve officers from that agency to assist with that investigation or at least to answer questions in relation to that investigation, you have already alerted the CEO to the fact that there is an investigation. Does that not put those public servants in harm’s way, and also lead to the possibility that the CEO could use his position or her position to influence that investigation?

Mr Wauchope: Look, it is difficult, even when it comes through the PID, but, at the end of the day, once the discussion has been had with the CEO, then they are going to be thinking that someone has dobbed them in or whatever— that is, unfortunately, life. At the end of the day, you cannot deal with a matter without actually talking to people, and we try to do that, as I am sure the CCC does, in a way that is as discreet as possible and trying to protect people. In many respects it is much better if they do use PID, because there is a statutory framework to that and there are fairly significant penalties if people breach the Act. At least that puts the bar up there a bit in terms of people having to behave appropriately, but people are people. Different people will respond differently and it is our responsibility to try to manage that as best we can.

Hon ADELE FARINA: Do you not see it as a deterrent to the making of a complaint if public servants know, “If I make a complaint against my boss, the Commission is going to talk to my boss and tell them that this complaint has been made and they will know the detail of the complaint and then I am vulnerable, so I’ll just keep my mouth shut and won’t raise a complaint, even though I believe the CEO is involved in activities that constitute misconduct”?

Mr Wauchope: I guess people can be discouraged from making complaints or blowing the whistle, but I cannot see how you can examine a matter without going back to talk to the people who are involved. I am not sure how you would actually examine the matter.

Hon ADELE FARINA: You could actually examine the matter first and then put the allegations to the CEO once you are a fair way down your investigation, which is the process that police use usually.

Mr Wauchope: If it was of that serious nature, it would be with the CCC, in any event, and I guess they would be using whatever exceptional powers they have to deal with it. When we are talking about other minor misconduct, I think that would not be warranted anyway.

Hon ADELE FARINA: Which then leads me to the definition of “minor misconduct”, which concerns me, because the definition basically says that it constitutes minor misconduct if it is likely to result in termination. To me, that is at the very, very high end of minor misconduct, and there is a huge amount of minor misconduct that would not necessarily lead to termination.

So, I have a concern that there is a whole lot of misconduct, which would constitute minor misconduct, which the Commission does not actually have the power under the amendments to the legislation to look at anyway. Who is looking at that and who is making sure that that is being attended to appropriately? I will leave it at that for now, and then I will come back to the second part of my question.

Mr Wauchope: Under the definition, yes, you are quite right. We always believe that minor misconduct is not that minor, because it is possibly going to result in termination of employment. But, as I indicated earlier in the session, we will be requiring public authorities still to report to us on matters that they have dealt with and how they have dealt with them. So, at the end of the day, we have a pattern of behaviours and knowledge about how agencies are handling that and we can form a view about whether or not they are handling it appropriately. I do not think any system is perfect, but I think that would actually go a long way to satisfying, if you like, the information issue.

Hon ADELE FARINA: I am not satisfied with that. I have had a number of employees in local government come to my office concerned that they have raised issues within their organisation and lodged complaints and that those complaints have just been swept under the carpet and have not been dealt with at all. If you were to assume that at some level that is happening in government agencies as well, you will not be alerted to it because it has been swept under the carpet.

Mr Wauchope: I think the local government example is a bit different. I think part of the problem there is the tension between the elected officials and the paid officials. I have been talking to local government quite a lot in the last four to five weeks and the common conversation I have had— because, as you realise, my oversight will only be in relation to the non-elected people, the paid officials— there is this concern about the compliance with section 28 of the CCC Act and how that might play out when your contract comes up for consideration by the Council if you are making a notification in relation to an elected officer.

Hon ADELE FARINA: I suggest you need to talk to lower levels in local government, not just the senior executive level, and I think you will find that the problems in local government are within the employed division of staff and they are quite significant.

Mr Wauchope: So, Member, you are saying that that problem already exists; it is not necessarily one that would —

Hon ADELE FARINA: No, but what worries me is what mechanisms we have actually got to start fixing some of these problems, and I do not think we have got one yet, with these legislative changes, and I think that if you are just talking at senior executive level, that you are not picking up on it either.

The CHAIRMAN: I think the Deputy Chairman has got a question on resourcing.

Mr P.B. WATSON: Yes, Commissioner, will you be getting any additional resources from the Government or from the CCC?

Mr Wauchope: My friends from the CCC are sitting in the room today.

Mr P.B. WATSON: I noticed that. That is why I asked.

Mr Wauchope: Part of the transition, and role that Mr Barrett has, is to work with the CCC to identify what resources should come with the [minor misconduct] function. That is still on foot. It has not been concluded at this point in time and it would be one of the issues that would be a factor in determining when the proclamation occurs, because, quite clearly, I cannot really take a function on without adequate resources to address that.

Mr P.B. WATSON: So will the Government be giving you any more additional funding?

Mr Wauchope: I would doubt it.

Mr P.B. WATSON: You would doubt it?

Mr Wauchope: I would doubt it.

The CHAIRMAN: So, your understanding is that it would be more likely a redistribution between your office and that of the CCC?

Mr Wauchope: Yes.

Mr P.B. WATSON: The CCC have always told us they are under-resourced so if they are giving you less money, or they are giving you some of their money and they cannot do the resourcing that they want to do, do you think you are going to have the capacity to do your job in the proper fashion if you have not got the proper funding?

Mr Wauchope: Look, I would be in a better position to tell you that in probably a few weeks' time. A couple of things have been difficult. I think the CCC has had a lot of other matters to deal with, they have had long-term Acting Commissioners and CEOs *et cetera*, which has been one issue, and we are expecting a new Commissioner to be appointed soon-ish, and when that person is appointed, I really would like to have a conversation with them about how they see the Bill [*Corruption and Crime Commission Amendment (Misconduct) Act 2014*] tracking, so, having said that, the Acting Commissioners have been fantastic; they have been pushing things through quickly and dealing with the matter as a priority, but there is that uncertainty at the moment.

The CHAIRMAN: Have you been given any indication as to when the new Corruption and Crime Commissioner might be appointed?

Mr Wauchope: I do not know.

The CHAIRMAN: I could not resist!

Mr N.W. MORTON: Would resourcing and FTE *et cetera* be your biggest concern about not meeting the 30 June handover?

Mr Wauchope: It would be one of the issues, and I am not saying that we need a massive amount of resources, so I do not know, but going to the other Member's point around local government— and I agree that a lot of the risks are certainly outside Perth as well; I mean, you have got regional issues— I would like some resources to be able to get out into the regions and actually have that more direct discussion with people. I have been out twice in the last couple of weeks, and you do pick up a different picture of what is going on out there when you actually go and talk to people.

Admittedly, I have not been talking to the lower level people, but even so you get a sense of the environment in which it is operating and whether it is operating in a good space or not. So, to answer your question, look, I do not know how many resources, or what resources we would want, but I particularly would like some resources to have some capacity to have presence in the regions.

The CHAIRMAN: I want to just pick up on the areas where you indicated that you have not had your organisation— your Commission— has not had a lot of experience, and that was around, as I heard you speak earlier, local government, universities and the GTEs.

Mr Wauchope: That is correct, yes.

The CHAIRMAN: Can you just indicate to the Committee what kind of conversation is happening with the CCC around that particular skill set, mindful of actually the good and substantial work that the [Corruption and Crime] Commission have done, particularly over the last few years, around the issue of local government.

Mr Barrett: The focus of the discussions with the working group has largely been on understanding the process, and particularly that distinction between minor and serious [misconduct] and how judgements will be formed, and how some of the cooperative arrangements will work for the PSC to escalate matters that may have elements of being serious, and thinking about how those protocols will work.

In terms of understanding the operating frameworks in compliance environments, the familiarisation sessions that have been run already for local government have really honed in on the compliance framework as it affects those agencies. So, if we are receiving a notification of misconduct or someone acting not-honestly and things, we need to have an understanding of what their compliance framework is.

We have got a fair bit of experience now, in terms of understanding the broad operations of things like State Records Acts and of things like State Supply [*Commission Act 1991*]. Certainly we understand codes of conduct, codes of ethics in that landscape very well, because it is already our business.

Understanding how those principles play out in different accountability frameworks is where our focus is at the moment. I think when it comes down to actually then making an assessment, part of the conversation with the CCC would be about what kind of historical data we might have access to. The Act [*Corruption and Crime Commission Amendment (Misconduct) Act 2014*] provides for information sharing, so I think when it comes to having received a matter in order to make an appropriate assessment of the best course of action, I think that is where the productive relationship with the CCC comes into play, because in terms of making that assessment, their history with dealing with an agency or their history of dealing with an individual matter would be critical,

and I also think and expect that the patterns and the nature of issues being reported to our agency that are minor, is actually important intelligence for the CCC in terms of their consideration of propositions and hotspots at the serious end of the scale.

The Act establishes those arrangements, or escalation, to make sure things do not fall between the cracks. I think it is the collaborative arrangements and information sharing that will help us ensure that we are making consistent judgements in thinking about matters and the information sharing. At the moment we are talking more around protocol issues and certainly looking at how to match our database and map some of the fields that we know that they capture when they do that initial screening of matters. It is at that planning stage.

The CHAIRMAN: In that conversation that you are having with the [CCC] Commission about that fine line between minor misconduct and serious misconduct, and part of that conversation being then how many matters you are likely to be receiving, has there been a conversation around how many independent investigations the CCC have conducted in matters which would now be described as minor misconduct?

Mr Barrett: Look, there has, but I can only report on my understanding of the intent of that, and until they have unpacked some of the data and provided that which ticks the box for (a), (b), (c) or (d) [of section 4 of the CCC Act] and the subcategories there, our expectation is, or my understanding is, that very few minor misconduct matters are investigated, that is, go to a full investigation.

Once again, my understanding is that there is almost this scale, in the same kind of way that we need to just do a bit of fact-checking around our matters of referral. Sometimes we may first receive a notification, they need to just apprise themselves of some facts and circumstances, which would not be classed as a full investigation, but may collect information and may conduct inquiries, so I think there are some parallels there.

My understanding is that even for minor misconduct matters that may occur within their assessment monitoring and review term. Very few minor matters, if any, it has been suggested to me, actually then progress to their investigations branch, and are subject to the more fulsome investigation.

The CHAIRMAN: Which one can understand, given the limited resourcing, that they would be focusing their attention on investigations of serious matters. Let us take local government, for example. You will, at some point after 1 July, have jurisdiction to look into allegations of minor misconduct in local government. Historically, those types of matters have not had independent investigations for the reasons we have discussed. So how much extra workload is that actually going to create for you? Obviously, there will still be the receiving, there will be the assessing and there will be the monitoring, but it

will not actually require independent investigators as such. Is your understanding the same as mine on that?

Mr Wauchope: Certainly, that is my hope that that would be the case. Look, we would expect, as with the public sector, that most of those matters would be dealt with by the relevant local authority. I think the difficulty you have with local government is— given that we still have 140 of them— you have got some very small local authorities with limited capacity, and how well they can do some of these things is questionable probably.

I just do not know at this stage, but some of them are very small when you get out into some of the regions, and we are expecting the same standard as we would of [the City of] Stirling or [the City of] Canning, or whatever. In a sense, we just do not know at this point in time, but the intent would be, as with the public sector, to have most of those things at the lower level dealt with by the relevant authority themselves.

The CHAIRMAN: I take it, then, that the situation is much the same with the universities as it is with local government?

Mr Wauchope: The public university environment— again, this is one that I freely acknowledge that we are coming from limited involvement. We have had some involvement through the public interest disclosure responsibility. I met with the four Vice Chancellors a couple of weeks ago and they were using acronyms that I have never heard of. A lot of their stuff is around academic rigour as opposed to the sort of behaviours that we are talking about in the public sector. So it is an interesting —

The CHAIRMAN: What kind of volume are you expecting of minor misconduct matters from the universities?

Mr Wauchope: From the universities? Gee, I just do not know at this stage. Unless Mr Barrett —

The CHAIRMAN: Mr Barrett, do you know?

Mr Barrett: No.

The CHAIRMAN: Would your best guess be the same as mine that they would be small in number?

Mr Wauchope: They might be small in number, possibly because— I am not sure of the level of awareness around these sort of things. In the public sector we notify— over-notify at times, I think— but whether the public universities are as aware of those requirements or not, I just do not know.

The CHAIRMAN: Probably not even necessarily the public universities? But I just find it hard to believe that an ordinary constituent of Western Australia, they have got a complaint about a university, and the first thing they think of is the Corruption and Crime Commission. I think it would be a very small number of people who would be thinking in that space. Now, admittedly, the university itself might have some obligations under the law to refer something to the CCC.

I guess, as you are doing this transition, you will find out what the numbers are. I am interested to find that out in due course myself. I suppose I will just foreshadow that we might have a subsequent conversation about that, because it would be somewhat disturbing to me if the numbers are small, and once again we are then asking you to take on, in effect, a new function, a new responsibility, a new jurisdiction, for very little gain. We may as well have just left it with the CCC in the first place.

Mr Wauchope: Chair, as I said, we do not know at this stage, but I would be more than happy to keep you abreast as soon as we find some information.

The CHAIRMAN: Okay. Members, further questions on misconduct? Otherwise, I am happy to go to education.

Hon ADELE FARINA: I have just got some more questions around the hurdle that needs to be met in terms of assessing whether it is a matter of minor misconduct, and clearly that is whether it is likely to lead to termination. How easy is it to make that assessment on receiving a complaint? I would have thought that there were some complaints where, without investigation, you would not necessarily know whether they would lead to termination or not.

Mr Wauchope: I think that is a fair comment. We are expecting, obviously, the agency themselves to be able to make that assessment initially because they are either going to notify us or not, or continue to notify the CCC if it was moving to the serious [misconduct] category. I do not know, Alan, whether you have been down that track at all? We have been drafting notification guidelines and we have been consulting on those, and we are still waiting on some advice from the State Solicitor, I believe.

Mr Barrett: Yes.

Mr Wauchope: We are. I think a lot of that will be around some clarity around the guidelines and some good education around that. I acknowledge that, in the early days, there will be, perhaps, some uncertainty, and where we will want to be providing guidance is having someone on the end of the phone able to take a phone call and give some advice.

Hon ADELE FARINA: I suppose my concern is that most employment contracts list grounds for dismissal, and they identify those as serious misconduct matters. Now we

have got a definition of minor misconduct, which says it is minor misconduct if it is likely to lead to termination, which is at odds with a standard employment contract, which would suggest that if it is going to lead to termination, it is a serious misconduct matter. So there is going to be a fair bit of confusion, and there is going to be a need for some very clear guidelines to be in place from day one. But I am hearing that you are a long way off resolving those issues in terms of these definitions?

Mr Wauchope: I think we are getting closer. I think a fair bit of work has been done in the last couple of weeks, to a point where we have got a draft where we think we would like to consult on. I think the issue around termination— I think it is termination under the *Public Sector Management Act*?

Mr Warner: Yes, that is correct.

Mr Wauchope: So it is a test that would be applied under the *Public Sector Management Act*. If a person was employed under the *Public Sector Management Act*, would it lead to termination?

Hon ADELE FARINA: And that is different than —

Mr Wauchope: Well, there will be differences from the industrial contracts that you are probably referring to, yes.

Hon ADELE FARINA: Under the legislation, the CEO of an agency is required to notify the Commission if a complaint that has been received or the conduct that has been noted falls under the definition of minor misconduct. In my view, that hurdle is very high because it is only misconduct that is likely to lead to termination. Does that mean that the Commission will investigate all of those complaints that meet that hurdle?

Mr Wauchope: No. Investigate in terms of us investigating them ourselves? No. We would be doing what I think is currently the case; they would be mostly going back into the hands of the agency, but there will be occasions when we will take that on, as I said before, where there is a conflict of interest in the agency handling it. If it is dealing with a CEO or a senior person in the agency, we would deal with it. If the agency clearly lacks capacity to deal with it— so the agency just simply does not have that sort of capacity in its organisation to do it— we would deal with it.

If it was dealing with a systemic issue that was of interest, and think back to that toner cartridge matter, then we would be looking at it. If it was something that was going to inform our prevention and education function, we would probably get involved. So there are about four or five areas where we would probably say, “Yes, we want to be involved in that ourselves”, but most of them we would hope would be dealt with by the agency in much the same way as currently occurs, and they notify us of what the outcome was of their investigation.

Hon ADELE FARINA: Are there currently processes in place that require agencies to notify the Commission of all complaints received?

Mr Wauchope: In terms of ‘the Commission’, is it the Public Sector Commission or the CCC?

Hon ADELE FARINA: Sorry, the Public Sector Commission.

Mr Wauchope: No. Currently, agencies would deal with matters themselves. If they have got an issue within their own agency, they would deal with it. If it was a matter that came to us about that agency, like a matter of referral, it would be a matter that we would be aware of and we would, as I said before, ask them the question.

Hon ADELE FARINA: So the only way that the Public Sector Commission would be aware of a systemic problem in an agency would be if it constituted minor misconduct and it was a requirement to notify you, or if a CEO decided off his own bat to notify you, because there is no legal requirement to notify you?

Mr Wauchope: There is certainly no legal requirement *per se*, but what we do have is some other intelligence sources that we actually have routinely out in the sector. We have an annual agency survey that actually asks questions around integrity and ethical behaviour in the organisation, so that is every year. We have employee perception surveys, which again, go to the individuals’ perception of behaviour in the organisation— amongst other questions. We have officer surveys. Again, we get people who are responsible— head management and agencies— we survey them. We get our HRMOIR [Human Resource Minimum Obligatory Information Requirements] data, which is a pretty good indicator of some stuff, too.

For example, one of the first things that you look at is turnover of staff in an area or an agency. If it is outside the norm for that particular industry, you start to get a bit concerned. There can be reasons for that. It could be machinery-of-government changes, it could be all sorts of things, but it is an early indicator of things.

Just on that final point, Mr Barrett has reminded me that the *State of the Sector Report*⁸⁰ that I table [in Parliament] every year also deals with this in part. There are about 20-odd pages that address this particular issue in a sector-wide sense. So, a number of sources of intelligence were used to build up the picture.

The CHAIRMAN: Commissioner, can I just move to the education function. I just want to start by talking about proposed section 21AC of the new law when it comes into

80 Public Sector Commission, *State of the sector report*, nd. Available at: www.publicsector.wa.gov.au/publications-resources/psc-publications/state-sector-report. Accessed on 23 March 2015.

force. It is entitled “Information about allegations received or initiated by Public Sector Commissioner”. It states —

For the purpose of assisting the Commission —

Of course talking about the CCC —

...in performing the serious misconduct function and the capacity development function, the Public Sector Commissioner will, if requested by the Commission to do so, provide the Commission with details about any allegation, or class of allegations, of minor misconduct received or initiated by the Public Sector Commissioner under clause 45D(1).⁸¹

I am aware from previous discussions with the CCC that they now have access to WA Police’s database of complaints and investigations— there is no doubt a formal acronym for it— but in other words their database system. Will the CCC have similar access to whatever database system you will have for this function in order to comply with this section?

Mr Wauchope: We have our own acronym as well— it is called RESOLVE. It is the same database that the Ombudsman uses and we are in the process of enhancing it to take on this additional information. My view is that if there is an easier way of the CCC getting access to the data through the database— as long as it does not compromise anything that we are doing.

The CHAIRMAN: More broadly in terms of the education function, I notice under this new law proposed section 45A details your prevention and education function. Of course, this is an area that is presently very much the province of the CCC and the CCC still have quite a bit of jurisdiction in this area themselves— of course complete jurisdiction with the police. In terms of public authorities I notice proposed section 21AB, on the capacity development function, which states that the [Corruption and Crime] Commission has the function of assisting, in cooperation with yourself, those public authorities or that public authority to increase their capacity to obviously prevent misconduct and corruption occurring. Can we get a sense as to how advanced the conversations are in that area?

I can appreciate that obviously the misconduct function is probably seen in the more pressing light, given you are going to receive all this information, whereas the

81 Western Australian Parliament, *Corruption and Crime Commission Amendment (Misconduct) Bill 2014*, 2015, p11. Available at: [www.parliament.wa.gov.au/Parliament/Bills.nsf/CB997DFC0B135C2E48257CAE0009FA1D/\\$File/Bill057-2.pdf](http://www.parliament.wa.gov.au/Parliament/Bills.nsf/CB997DFC0B135C2E48257CAE0009FA1D/$File/Bill057-2.pdf). Accessed on 23 March 2015.

education function is more of a proactive one, but nevertheless some information about that would be helpful.

Mr Wauchope: I think it is probably fair to say that both the CCC and the PSC have common goals, but perhaps a different approach to them. What we do not want to have is confused messages out in the public sector. I actually believe this function is vital to the successful overall operation and on that I agree with you, it will not be in place on day one. Typically these products take quite some months to develop.

When we developed the AEDM back in 2007, it took probably about six months and then some fine tuning, but we got a robust product that has survived the time. Regarding the work we have to do around getting the product for local government, we have mapped the accountability program for the WA public sector and that is frightening, but when you start to do it for local government it is somewhat mind boggling!

We want to make sure that our product is going to be relevant to the environment and it will not be ready on day one. It is fair to say that we probably use different language. I mean, the CCC uses, I think, “misconduct resistance”, but we talk about “capacity building” or “integrity promotion”, but we are aiming for the same outcome, which is minimising misconduct. I do not think it is beyond our capabilities for both agencies to work together in that space.

The CHAIRMAN: Would you anticipate that manifesting itself in joint seminars or conferences at any stage?

Mr Wauchope: We already do some work through the Integrity Coordinating Group. I mean, that expands to include the Ombudsman, the Auditor General and the Information Commissioner. We have actually been quite successful over the last few years in producing products that we can release for all five bodies that meet their requirements without compromising their statutory role, their independence or the message that they want to give out. So there is one around gifts, benefits and hospitality that was able to be put out by the ICG, of which the CCC was a member, and there was one around conflicts of interest.

I think it is quite possible to work in that space and I think we probably would do some joint public forums together a bit further down the track. My personal view at the moment is that it is probably a bit premature to go out and not really have a clear message, because people say, “What are we here for?” But that is just a personal view.

The CHAIRMAN: In terms of a good use of limited resources, if the CCC are already quite expert in this area of putting on these seminars and I understand, having attended a couple of them, that they are sold out; they are completely packed. So they have a good attendance and they have a good record. I understand that in the results

from the surveys they get back there is very good feedback. Would it not be good sense for you to in effect piggyback onto that process, particularly in the first initial phase while your agency is getting up to speed on misconduct stuff, not trying to delay any good work in education?

Mr Wauchope: As I said, I do not have a problem working with the CCC, but I do need to act independently in my own space. As I said, we will have our own products that we want to deliver in our own way. That does not preclude us from doing joint things with the CCC, but it would not be the exclusive forum. We are actually quite successful in getting people to turn up to our things as well.

The CHAIRMAN: In fact, when it comes to this education function, and putting aside police, which I think everyone appreciates is the exclusive problem of the CCC, is there any capacity for the CCC to do any seminars without you?

Mr Wauchope: I do not think I can stop them, but I do not know, Mr Warner, whether you had anything in mind as an instructing officer?

Mr Warner: I think that the [*Corruption and Crime Commission Amendment (Misconduct)*] Act, once it is proclaimed, by deleting I think it was section 17 and transferring that function to the Public Sector Commission, sets the Public Sector Commission up as the prime body to deliver prevention and education programs. Proposed section 21AB puts the CCC in some ways in a subsidiary role in supporting the Public Sector Commission's activities in that regard, notwithstanding that some of the intelligence that they will gather with their serious misconduct functions and working within the police space would be of enormous benefit in making sure that there is common understanding across the public sector about what is expected of individuals' behaviour and conduct and also of corporate governance arrangements.

The CHAIRMAN: Yes, I just note that section 21AB(1) states that —

...the Commission —

Which is the CCC —

*...has the function ... of assisting, in cooperation with the Public Sector Commissioner, those public authorities ...*⁸²

So, the way I read that is it does not seem to be a stand-alone function, but their job is to assist you and to cooperate with you?

82 Western Australian Parliament, *Corruption and Crime Commission Amendment (Misconduct) Bill 2014*, 2015, p10. Available at: [www.parliament.wa.gov.au/Parliament/Bills.nsf/CB997DFC0B135C2E48257CAE0009FA1D/\\$File/Bill057-2.pdf](http://www.parliament.wa.gov.au/Parliament/Bills.nsf/CB997DFC0B135C2E48257CAE0009FA1D/$File/Bill057-2.pdf). Accessed on 23 March 2015.

Mr Wauchope: Yes.

The CHAIRMAN: Anyway, that is perhaps a question for me to take up with the CCC on a later date; they might have some other interesting interpretation of that section. Members, on education, anything? Other general questions?

Hon ADELE FARINA: Can I just pick up one? I have a particular beef about the failure of government agencies to implement recommendations from CCC reports, and in particular, the Department of Local Government. I would have thought that this would have been an area in which the Public Sector Commission could play a role, and I am just wondering whether you have considered that, and whether you will consider that, because a huge amount of resources are being invested in this function of the CCC? Part of it is now going to be taken on by the [Public Sector] Commission, but if government agencies just continue to ignore recommendations that are made from reports, or tend to work at a very slow pace in terms of the implementation of those recommendations, there seems to be little benefit that is being gained over this effort.

Mr Wauchope: Certainly, Member, I have noted that, and I will have a look at it.

The CHAIRMAN: Commissioner, I want to take in the remaining time that we have to just ask you about the Department of Corrective Services. It is one agency that I choose to highlight at the moment, because I think that it is fair to say that it is a little different from many of the other agencies, and is perhaps the closest or nearest cousin to the WA Police. As we have discussed already this morning, the CCC has got the exclusive province and jurisdiction of the WA Police, but when it comes to the Department of Corrective Services, my understanding of the legislation is that this will be shared between you and the CCC, and you will need to have a look at some minor misconduct matters. Is that an agency that in your transitional arrangements you have had to give special attention to and how that might actually be undertaken?

Mr Wauchope: I think at the moment, Chair, we have not focused on the Department of Corrective Services *per se*. We have had a lot to do with the Department over the last few years; in fact, when we are talking about early signs of departmental issues, a lot of early signs came out of the Department of Corrective Services some years back around, particularly, not differentiating between grievances and disciplinary process was one of the issues that we picked up. I think, Mr Warner, there was some debate about this during the passage [of the *Corruption and Crime Commission Amendment (Misconduct) Bill 2014*] through Parliament; I am not sure where that landed in terms of —

Mr Warner: I think the situation with the Department of Corrective Services is no different to those other agencies where the role between the CCC and the PSC is split into serious and minor misconduct. Obviously, with some of the powers that

corrections officers have over the liberty of citizens, then it may be an area that both agencies need to more closely examine how we can cooperate. I am not sure; Mr Barrett might be able to explain if those matters have been expressly dealt with in the transition process to date.

Mr Barrett: Not yet.

The CHAIRMAN: Not yet, okay. Would it be fair— just to put it in lay terms— that if someone was to complain that a Department of Corrective Services officer was rude with a visitor who was arriving at a prison to visit somebody, that would be something that would fall under minor misconduct and be dealt with by you, whereas obviously somebody trying to conceal or smuggle some goods into the jail, that would be something that CCC would handle, and quite possibly the WA Police?

Mr Wauchope: Yes.

Hon ADELE FARINA: Sorry, can I just clarify that answer? If it is a complaint against someone being rude, that would not constitute minor misconduct because it would not be likely to lead to dismissal.

Mr Wauchope: No.

The CHAIRMAN: So is this one of those matters then, Commissioner, that you were talking about earlier that is more of a HR type of thing —

Mr Wauchope: It is HR, we would expect.

The CHAIRMAN: Can someone help me, give me an example of something you think might be minor misconduct to the Department of Corrective Services that is not so minor that it is HR, that we really do not even want them to be bothering you with, or not so serious that it should be with the CCC or the WA Police?

Mr Wauchope: The danger is I could be speculating, Chair, but there could be issues around how rostering is done, whether there have been any deals that have benefited individuals, in which case people are using their office to benefit themselves. Most likely that would end up in CCC territory, because I think it would probably head towards— if it was a systemic kind of issue.

The CHAIRMAN: You are talking about, say, somebody who prefers to do day shifts rather than night shifts or something like that, and so they have done —

Mr P.B. WATSON: Or extra shifts.

The CHAIRMAN: — a deal with their supervisor to make sure that they constantly get the day shifts?

Mr Wauchope: Mr Warner suggested there could be an altercation between two employees. Because you have a mixed environment, you have got a mixture of public servants and prison officers in the same workplace at times, it is a bit more complex than a normal department.

The CHAIRMAN: Okay, part of the purpose of me asking the question is, I guess, to identify that if you and I are struggling with that differentiation, I do feel a little sorry for those officers who have a statutory obligation to report things, either to yourself or the CCC, and I can understand how they might be confused at the moment as to, “Where do I send something to?” If I was them, I really could not criticise them if they said, “Well look, I’ll err on the side of caution, I will just let everybody know.”

My concern with that approach, as I say it is no criticism of the officer who might err on the side of caution, but that now wastes a lot of your time and the CCC’s time and creates duplication. So, getting our minds around what are the examples of things that you would want sent to you or things that you do not want sent to you, it is absolutely crucial. I am appreciating that you have a Director responsible for making this happen, and I just cannot emphasise enough how important that is going to be in the coming months.

Mr Wauchope: Chair, I absolutely agree with you and what I would not want is exactly what you suggested people might do, which is flick it off in both directions. I would rather them make a mistake and send it to the wrong place and for us to sort it out, rather than it going backwards and forwards.

The CHAIRMAN: Sure.

Mr Wauchope: A lot of it is around clarity around the reporting guidelines and the definitions and a good education program. I imagine early on, we are going to have a bit more greyness than we would like, but I think we will get better clarity. I have noted your comment about corrective services, perhaps we need to have a special look at that.

Hon ADELE FARINA: Just maybe something to be taken on notice, I understand that the guidelines are not drafted yet for all these areas of greyness that need to be addressed, but would the Commission provide the Committee with the guidelines as they are finalised— that is, guidelines for various aspects of the implementation of the legislation?

Mr Wauchope: When they are finalised? Yes, certainly.

The CHAIRMAN: If we can take that on notice, appreciating that you will not respond immediately on that, at some later date. Members, any final matters? Commissioner, is there anything that you would like to raise at this point?

Mr Wauchope: No thanks, Chair.

The CHAIRMAN: In which case, I want to thank you for your evidence before the Committee today. A transcript of this hearing will be forwarded to you for correction of minor errors. Any such corrections must be made, and the transcript returned within seven days from the date of the letter attached to the transcript. If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be added via these corrections, and the sense of your evidence cannot be altered. Should you wish to provide additional information or elaborate on particular points, please include a supplementary submission for the Committee's consideration when you return your corrected transcript of evidence. Thank you.

Mr Wauchope: Thank you very much.

Appendix Two

CCC opening address for public hearing

1 Introduction

1. Thank you for the opportunity to speak with you about the progress of the transfer of the minor misconduct function from the Corruption and Crime Commission ("the Commission") to the Public Sector Commission (PSC).
2. In these opening comments, I would like to focus on two key areas: the need to achieve a shared understanding of the jurisdictional issues arising from the amended legislation; and the steps the Commission has taken to work collaboratively with the PSC to ensure a smooth implementation of the amended *Corruption and Crime Commission Act 2003*, which will become the *Corruption, Crime and Misconduct Act 2003* ("the amended Act").

2 Legislative Interpretation

3. At the core of the jurisdictional issues arising from the amended Act are the concepts of "serious misconduct" and "minor misconduct". From the Commission's perspective, it is imperative that there be a shared understanding between the two agencies about the meaning and application of these concepts. This has been a primary focus of the Commission since the *Corruption and Crime Commission Amendment (Misconduct) Bill 2014* was passed in December 2014.⁸³
4. The importance of achieving this shared understanding has been illustrated in our work with the PSC to develop administrative arrangements to support the implementation of the amended Act. These administrative arrangements include:
 - advising chief executive officers of changes to their obligations;
 - the content and use of notification guidelines;
 - assessment processes;
 - the management of matters that may involve serious misconduct; and
 - sharing of information and intelligence between the two agencies.
5. This shared understanding will inform advice to the agencies and the broader public sector about changes to the reporting and notification

⁸³ This situation has arisen partly because of the limited involvement by the Commission in drafting the amendments. The Commission was not privy to the Cabinet proposal or the drafting instructions concerning the transfer of the minor misconduct function. The requirement for co-operation between the two agencies was only inserted after the Bill lapsed and the Commission was asked for input on minor changes. This is surprising given that the amended Act will be the enabling legislation for the Commission.

requirements. The Commission may use guidelines to assist in managing the reporting and notification of serious misconduct, in line with section 30 of the amended Act. It is important that the Commission's guidelines align with guidelines issued by the PSC under section 45J of the amended Act and that together they form part of a comprehensive shared communication strategy for public sector agencies and chief executives.

6. To achieve this shared understanding, the Commission has given priority to preparing an analysis of the amendments. Independent advice has been sought from senior counsel, Mr CL Zelestis, QC. It is anticipated that this advice will be available within a week.
7. The objective of the Commission is to come up with workable and simplified concepts and examples relating to serious and minor misconduct, acceptable to both the PSC and the Commission. These will guide notification and assessment processes used by the two agencies including the decision for each agency to refer allegations to the other where a matter is not clearly one or the other or where a matter, initially assessed as minor, on further enquiry, may constitute serious misconduct. This has been flagged in discussions with the PSC and we are working towards an effective solution that will require ongoing communication and collaboration between the two agencies.
8. The amended Act appears to be based on the proposition that particular conduct can be characterised either as serious misconduct or minor misconduct. In broad terms, serious misconduct is conduct that is within the terms of paragraphs (a), (b) or (c) of section 4 of the amended Act and minor misconduct is conduct that is within the terms of paragraph (d) of section 4. However, one of the matters that needs careful analysis is the extent to which conduct may be characterised as **both** serious misconduct and minor misconduct. The broad scope that the courts have given to the meaning of "corrupt", as used in paragraphs (a) and (b) of section 4, supports the conclusion that there may well be an extensive overlap between serious and minor misconduct.
9. The labelling of any conduct that comes within section 4(d) as "minor misconduct" adds to the potential for confusion. There is a broad range of conduct that constitutes, for example, dishonesty or breach of trust and that provide reasonable grounds for a person's termination of employment. Within that range, the level of seriousness may vary considerably. At the higher end of the level of seriousness, it would seem odd, as a matter of ordinary language, to describe the relevant conduct as "minor misconduct". Yet that is how the amended Act would operate. One of the issues that is currently being reviewed is the extent to which conduct of that type would also constitute "serious misconduct".
10. This issue potentially has major ramifications for the implementation of the amended Act, and underscores the importance of undertaking a careful analysis of the legal issues and ensuring that the Commission and the PSC proceed on the basis of a shared understanding of those legal issues and their implementation.

3 Work in Co-operation with the PSC

11. This leads to the second area I wish to mention, our work to date with the PSC.
12. The Commission is committed to working collaboratively with the PSC and I am delighted to record that a similar commitment has been given by the Public Sector Commissioner in his communications with the Commission, including in his most recent letter to me last week.
13. Given the challenges being faced in differentiating between minor and serious misconduct and the ongoing function of the Commission to use intelligence to detect and combat corruption and serious misconduct, it is imperative that the two agencies develop highly collaborative relationships, not only in the preparation for the transfer of the minor misconduct function but also for the longer term. In practice this may include joint case review meetings and mechanisms for the regular exchange of information relating to minor misconduct matters. Without a relationship of this type, the Commission's intelligence capacity may be compromised if visibility of misconduct across the sector is reduced. As a result, the Commission's capacity to deliver on serious misconduct and corruption outcomes for Government may be restricted.
14. There are four key issues that the Commission is progressing with the PSC. These are the changes in the notification obligations on agencies, the transfer of resources to the PSC, a joint engagement and communication strategy for the sector, and the Commission's access to data that ensures Government is provided with a comprehensive view of the scope of misconduct and corruption across the sector.

3.1 Changes in Notification Obligations

15. Both the PSC and the Commission are keen to minimise the impost on notifying authorities and, within the constraints of the amended Act, the potential for double-handling and double-reporting of matters. In this context, however, the amended Act would require that where conduct constitutes both serious misconduct and minor misconduct it is reportable, or in some instances, must be notified, to both the Commission and the PSC.
16. Based on further legal advice and a shared view between the Commission and the PSC, working definitions of serious misconduct and minor misconduct derived from sections 4(a) to 4(d) will guide agencies when determining which integrity agency they are required to notify. It is envisaged that there will be no penalty if an agency notifies inappropriately.
17. The main issue from my perspective is that a matter is reported or notified. The assessment and management of that allegation is then a matter for the two agencies, and processes and protocols will be put in place to enable the allegation to be dealt with in line with legislative requirements.

3.2 Transfer of Resourcing to the PSC

18. The Commission is close to finalising a model to determine an appropriate amount of funding to transfer the function of minor misconduct and the misconduct prevention and education function to the PSC.

19. The functions being assumed by the PSC, as part of the new legislative scheme, were not undertaken in isolation by a discrete business unit in the Commission, and quantifying the historical resourcing is taking some time to dissect in a reasonable manner. This has included an analysis of allegations data and resources expended on the prevention and education function. This historic funding view is currently being finalised.
20. The PSC has been provided with statistical information relating to the allegations received by the Commission and they are determining their requirements to service the anticipated demand. The historic funding and the proposed new business models for both agencies will then be used to inform the necessary transfer of funds.
21. It is the Commission's view that the determination of resource allocation cannot be undertaken in isolation and must take account of, and be informed by, a shared understanding of the jurisdiction.
22. It is anticipated that funding negotiations will be finalised within the next few weeks and the necessary administrative arrangements under section 25 of the *Financial Management Act 2006* to affect the resource transfer will be actioned.

3.3 Engagement and Communication Plan

23. The Commission is developing a communication strategy for the sector which will assist agency heads in understanding the Commission's new focus and its role in combating corruption and serious misconduct. This strategy includes advising chief executives of particular agencies in writing of the tabling of the Misconduct Intelligence Assessment report in Parliament on 26 March 2015, to be followed up by a forum for key chief executives.
24. The Commission is keen to ensure that its own communications to the sector concerning the transfer of the minor misconduct function aligns with that of the PSC to minimise any confusion that may arise and the risk of double notifications.
25. I acknowledge the Public Sector Commissioner's recent response to me that supports a joint communication initiative.
26. A number of options are being considered, including an early joint communication to chief executives, putting them on notice of the changes in the legislation, advising them that the two agencies are working collaboratively on its implementation, and that they will be advised of the impact on them in the coming months.

3.4 Maintain Visibility of Misconduct Across the Breadth of the Public Sector

27. A key outcome sought by the Commission is having arrangements in place with the PSC to enable the Commission to retain its access to current levels of intelligence and ensure there is no loss of visibility of misconduct across the public sector. Maintaining the current levels of visibility will include actions and conduct of chief executives which the Public Sector Commissioner has deemed to be minor misconduct. Information sharing protocols are being developed between the two agencies which, from the Commission's perspective, will ensure that it retains its current capacity to

collect and analyse intelligence concerning the extent and nature of misconduct.

4 Conclusion

28. In conclusion, I would like to restate my belief that establishing a shared understanding of the jurisdictional issues arising from the amended legislation is pivotal if the two agencies are to effectively implement the amended Act.

Neil Douglas
ACTING COMMISSIONER

Appendix Three

Submissions received

No.	Name	Position	Organisation
1	Hon Michael Murray, QC	Parliamentary Inspector	Parliamentary Inspector of the Corruption and Crime Commission
2	Hon John McKechnie, QC	Commissioner	Corruption and Crime Commission
3	Mr Mal Wauchope	Commissioner	Public Sector Commission

Appendix Four

Submission from the Parliamentary Inspector of the CCC



**PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA**

Our ref: 553/15

20 April 2015

The Hon Nick Goiran MLC
Chairman
Joint Standing Committee of the
Corruption and Crime Commission

Dear Chairman

**RE: INVITATION TO PROVIDE A SUBMISSION TO THE JOINT STANDING
COMMITTEE**

Thank you for your letter dated 27 March 2015 inviting me to provide a submission to the Joint Standing Committee upon the recently enacted, but as yet unproclaimed, amendments to the *Corruption and Crime Commission Act 2003 (WA)*. The invitation is timely, if I may say so, not only because we are at the beginning of the new regime involving the related work of the Commission (CCC) and the Public Sector Commissioner (PSC), which has an impact upon my function of oversight of the CCC, but also because of other developments to which I shall refer later.

I accept your kind invitation and advise you that I have discussed the issues as they affect my office with the Acting Commissioners, particularly Mr Shanahan SC, and with the PSC, Mr Wauchope. I have not had the opportunity as yet, of course, to discuss these matters with the incoming Commissioner, the Hon Justice McKechnie, but, again, it is timely that he should have the views I will express herein when he takes office as the Hon John McKechnie QC.

I note that, to complete the loop, I sought and was granted leave by the Committee to copy this opinion to the CCC and to the PSC. In what follows I will have regard to the matters ventilated in the discussions referred to above, to the content of an opinion dated 13 April 2015 by Mr Zelestis QC, with which I was provided by Acting Commissioner Douglas on 15 April, and to the reasons of the High Court published on 15 April in the case *ICAC v Cuneen [2015] HCA 14*, as well as to other authorities.

Corruption

As amended, the Act divides the concept of misconduct, as defined by s 4, into serious misconduct, which falls within the jurisdiction and powers conferred on the CCC, and minor misconduct, which, *inter alia*, is to be the province, of the PSC.

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In s 3(1) serious misconduct is defined as misconduct falling within s 4(a), (b) or (c) committed by a public officer, as defined by s 1 of the Criminal Code, and 'police misconduct', a term also defined in s 3(1) in such a way as to ensure that everyone connected with the W A Police is included as a possible miscreant.

Minor misconduct is defined as misconduct, relevantly for present purposes, which is not police misconduct, committed by a public officer as defined (who may, therefore, be a CCC officer) falling within s 4(d). The person must be a public officer when the conduct occurs, but they need not, under all the paragraphs of s 4(d), be acting in their office at the relevant time.

However, the conduct must be adversely connected in the ways described in s 4(d) to the office which is held. This was the issue with which the decision in *Cuneen* was concerned, rather than directly with the question of what may constitute corruption within the meaning of the Act. In the NSW Act, s 8, the terminology is almost identical to that used in our s 4(d).

In *Cuneen* the plurality of four judges held that for conduct to be properly subject to investigation and the use of its extensive powers by ICAC it must be capable, if proven, of having an adverse connection to the exercise of the public office in question, in one of the ways described by the section. At [54] their Honours said that such a more limited construction than was argued by ICAC was not only consistent with the language of the Act, but fitted into the objects and purpose of the Act and the statutory context. There was, their Honours said, no clearly expressed intention 'to override basic rights and freedoms on such a sweeping scale as ICAC's construction would entail': see *Lee v NSW Crime Commission* [2013] HCA 39; (2013) 251 CLR 196.

The term 'corruptly' is not defined by the Act. It therefore bears its common law or natural meaning – the use of the status conferred upon the person by the office held, the use of a power incidental to the office, the failure to perform a function of the office, or the refusal to do so, for a purpose foreign to that for which the power was conferred, or an improper purpose, with the intention to obtain some private advantage or benefit for the officer or another, or to cause some detriment to another: *W A v Burke, Grill and Hondros* (2011) 42 WAR 124 at [278] – [287] and [329] – [332]; *Willers v The Queen* (1995) 81 A Crim R 219, 225, 231 (a decision of the Court of Criminal Appeal).

In *W A v Burke* (No 3) [2010] WASC 110 at [74], in the context of the offence of corruption defined in s 83 of the Criminal Code, I said that for an act or omission to be done corruptly it need not be something which could not be done lawfully, but for it to be done or omitted 'corruptly', there must be 'a dereliction of duty, an element of fault, some perversion of the proper performance of the duties of office'. An act or omission will be done corruptly, even though it would otherwise be done or omitted properly in the discharge of the duties of the office, if it is done for an improper purpose and with the proscribed intent.

Serious or minor misconduct?

It can be seen, therefore, that whether conduct the subject of an allegation or other form of process by which it may be received by the CCC, or the PSC, or both agencies, is

properly to be characterised as serious misconduct within the exclusive jurisdiction of the CCC, or minor misconduct within the jurisdiction of the PSC, may depend upon what is found to have occurred upon assessment after an investigation.

The question will generally not be answered by identifying the conduct as being of the sort described in s 4(d) because that would equally place it potentially within s 4(a) or (b). I suggest that the question of the proper characterisation of the conduct will usually turn on the mental element, the intention or purpose with which it is accompanied.

I respectfully agree with the observation made by Zelestis QC at [53] of his memorandum of advice that 'in a general sense, serious misconduct comprises conduct which represents a more significant and reprehensible departure from duty than does minor misconduct', at least if the matter cannot be resolved having regard to the mental elements referred to above.

Nor should one overlook the fact that, in contrast to the course taken in the NSW Act and legislation based upon that model, by s 4(c) a very large number of offences are punishable by two or more years imprisonment and are characterised as serious misconduct merely because they are committed by a public officer 'whilst acting or purporting to act in his or her official capacity'. If, on a preliminary inquiry, it is found that there is credible evidence which may be capable of proving such an offence, the matter falls within the jurisdiction of the CCC.

Difficulty of determining which, if not both, of the CCC and the PSC should deal with a matter may arise out of the difficulty of characterisation or where there are, in truth, different aspects of the conduct of which complaint is made which may constitute serious misconduct and minor misconduct – there may be a one or the other situation or elements of both arising out of the potential for overlap created (necessarily) by the statutory definitions.

If a matter starts out before the CCC but is found to be concerned, if anything, with minor misconduct, or is found to potentially involve both serious and minor misconduct, the power in ss 33 and 34 may be used to act in cooperation with the PSC, which is an 'independent agency' as defined, or to refer the matter to the PSC.

In the opinion provided by Zelestis QC there is a reference to the potential for the CCC to use the power in s 42 to issue a notice directing the PSC, as well as other agencies (in particular the Police) not to commence or continue an investigation of a 'misconduct matter', effectively, until further notice. No distinction is made between serious and minor misconduct and the proposal would appear to be that the section could be used to secure the matter into the hands of the CCC where for any reason that was thought to be appropriate.

I am in the process of consultation with the CCC in connection with the proper use of this section and will report upon the question to the Committee in due course, but I should say now that I have grave doubts whether the power might be legitimately used in an attempt to deal with an issue which the amended Act deals with in different provisions. That was not its purpose.

The equivalent provision to s 33 where a matter is commenced before the PSC is s 45M and the reference to s 45T is noteworthy. It is clear, I think, that the word 'may' when first used in s 45T(1) is an empowering, not a discretionary, 'may'. When s 45T(1)(a) or (b) apply, the PSC should make the reference to the CCC. It cannot be the case, for example, that the PSC, faced with the situation that it is appropriate to refer the allegation to the CCC, may decline to do so in the exercise of discretion. As s 45T(3) makes clear, that would be the case quite apart from the duty to notify the CCC of suspected serious misconduct under s 28(2).

My role

The amending Act makes no change to the provisions of the Act in Part 13 which deal with my functions, duties and powers. The provision of current interest is s 196(4) which imposes on the CCC the obligation to notify me of any allegation which concerns or may concern a Commission officer. This is not the place to discuss the ambit of that provision, which will shortly be the subject of a separate report to the Parliament in the person of the Committee, but it is clear that the obligation of notification to me is only imposed on the CCC and my powers, although considerable, of oversight and to take over the matter myself, may only be exercised in relation to the CCC and its officers.

I would have no capacity to exercise those powers in respect of a matter in the hands of the PSC where a CCC officer was the subject of an allegation which may or may not amount to misconduct of any degree of seriousness, whereas, if the matter was before the CCC the notification obligation would arise no matter how serious or minor the allegation was.

Section 196(4) operates upon any allegation and one of my functions and duties is 'to deal with matters of misconduct' on the part of officers of the Commission: s 195(1)(b). There is no differentiation between serious and minor misconduct.

I have had the benefit of a brief discussion of the issue with the PSC. As I understand it, as at present advised he would take the view that if any allegation is made to be dealt with by him, concerning or which may concern a CCC officer, he would think it appropriate to refer the allegation to the CCC pursuant to s 45T(1)(b), thereby generating the obligation of the CCC to notify me and to deal with the matter, if not removed to me, under my direction.

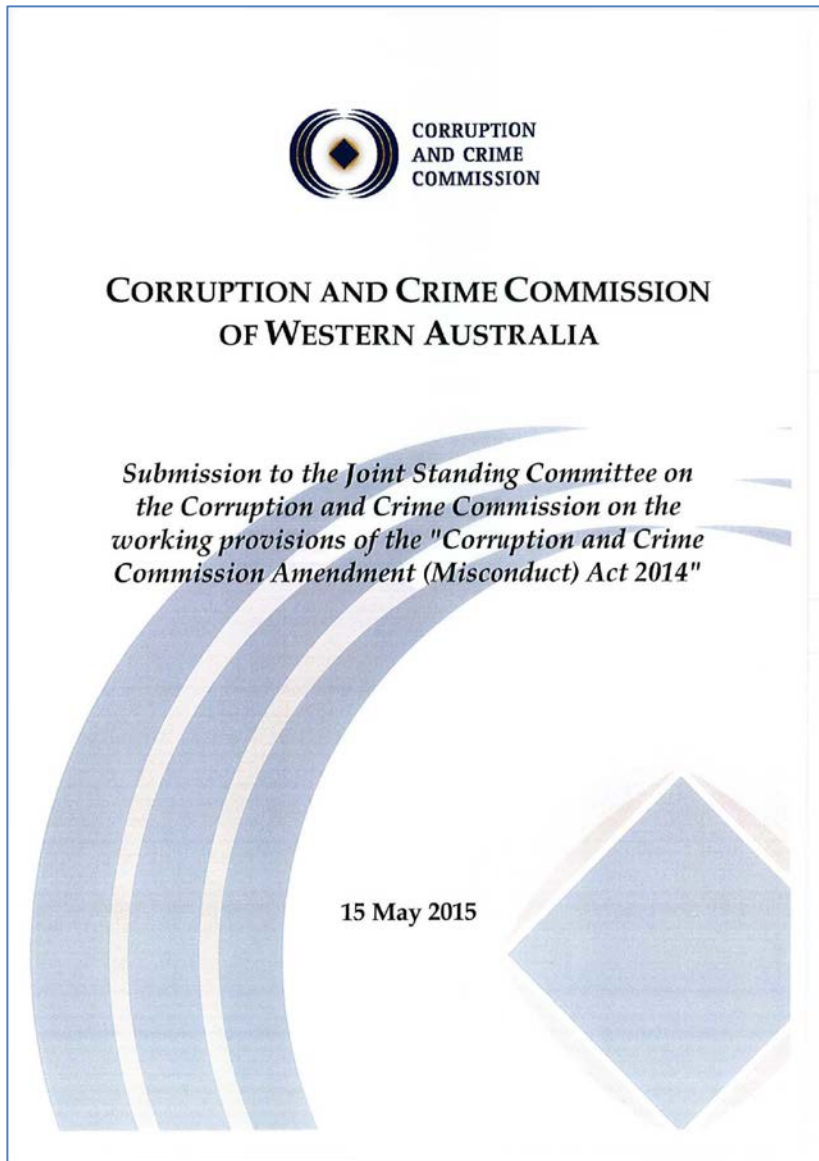
I would be content with such an arrangement, which was also canvassed with me by Acting Commissioner Shanahan SC. It would obviate the need to consider further amendment of the Act to cure what seems to me to be an unintended hiatus in the amended scheme.

Yours sincerely,


HON MICHAEL MURRAY AM QC
PARLIAMENTARY INSPECTOR

Appendix Five

Submission from the Corruption and Crime Commission



Background

[1] On 16 April 2015 the Commission received a written invitation from the Joint Standing Committee to make a submission in relation to the *Corruption and Crime Commission Amendment (Misconduct) Act 2014* (WA) (ss. 45M, 45G and 45T) ("the Amendment Act"). The JSC raised concerns about the arrangements for handling allegations of misconduct made against the Public Sector Commissioner and the scope and potential overlap of the definitions of minor and serious misconduct. To avoid confusion the person in the office of Commissioner will be referred to as the Commissioner (PS), while the Public Sector Commission will be referred to as PSC.

[2] The Commission considered the concerns articulated by the JSC in the written invitation and makes the following observations:

- (a) there is no avenue for dealing with allegations of minor misconduct by the Commissioner (PS) - legislative amendments would be necessary; and
- (b) there will be overlap between "minor" and "serious" misconduct. However, the amended Act gives the Commission and PSC flexibility to consult and cooperate, as well as to issue guidelines about the matters that should be reported, and such guidelines could assist in clarifying whether a matter should be reported to the Commission or PSC.

[3] The Amendment Act will insert a new s.45G that provides the PSC "must not receive or initiate an allegation about a person in the person's capacity as ... [*inter alia*] the Public Sector Commissioner".

[4] The issue is whether this provision, when read together with the other provisions that set out the PSC's role, leaves any avenue in the amended CCC Act for assessment and investigation of allegations of minor misconduct on the part of the PSC?

Functions of the PSC

[5] Briefly, the PSC's role in allegations of minor misconduct pursuant to the amended CCC Act, is as follows:

- (a) the PSC receives allegations of, may initiate propositions about, minor misconduct (ss. 45D and 45F);
- (b) the PSC must not receive or initiate an allegation about a person in the person's capacity as the holder of various offices, including Commissioner (PS) (s. 45G);

- (c) certain office holders⁸⁴ are obliged to notify the PSC of minor misconduct (s. 45H);
- (d) the PSC must deal with an allegation by assessing and making a decision under s. 45M and s. 45L;
- (e) the PSC may arrange for a special inquiry or investigate an allegation (s. 45O), refer the allegation to an independent agency (s. 45R), the Parliamentary Commissioner, the Auditor General (s. 45S), or the Commission (s. 45T); or take other action (s. 45U); and
- (f) the PSC may monitor and review action taken by an appropriate authority (ss. 45V and 45W), make recommendations (s. 45X) and report to Parliament (ss. 45ZA and 45ZAB).

Commission Not Empowered to Deal with Minor Misconduct by the PSC

[6] The Amendment Act will remove the Commission's jurisdiction over minor misconduct and limit the Commission's functions to serious misconduct, defined in s. 4(a), (b) or (c) by a public officer, or police misconduct (ss. 3, 4 and 18).

[7] The PSC may refer an allegation to the Commission under s. 45M(d), if the PSC considers it involves serious misconduct or "that it is otherwise appropriate to refer the allegation" (ss. 45T(1)(a) and (b)).

[8] Section 45T does not affect the obligation of the PSC under s. 28(2)⁸⁵ to notify the Commission of suspected serious misconduct of relevance or concern to the Commissioner (PS) "in his or her official capacity" (s. 45T(3)).

[9] Accordingly, the Commission may deal with allegations of serious misconduct that are relevant to or concern the Commissioner (PS).

[10] Section 45T(1)(b) does not enable the PSC to refer minor misconduct to the Commission. Section 45T(1)(b) is predicated by the words "may refer an allegation to the Commission *under* s. 45M(d)".

[11] Section 45M sets out actions the PSC may take, including referring an allegation to the Commission (s. 45M(d)), but these actions may only be taken *after* "having made an assessment of an allegation." The PSC may not make an assessment of an allegation

84 The Parliamentary Commissioner, Inspector of Custodial Services, principal officer of a notifying authority, and officer who constitutes a notifying authority.

85 Section 28 of the CCC Act imposes an obligation on the Parliamentary Commissioner, Inspector of Custodial Services, the principal officer of a notifying authority, and an officer who constitutes a notifying authority, to notify the Commission of serious misconduct which is of relevance or concern to that person in his or her official capacity.

of minor misconduct about the Commissioner (PS) because, under s. 45G, the PSC must not *receive* such allegation in the first place.

[12] The prohibition in s. 45G against receiving such allegations also limits the operation of s. 21AC, which provides that the PSC will, if requested by the Commission to do so, provide the Commission with details about any allegation of minor misconduct received or initiated by the PSC under s. 45D(1).

[13] The Commission has no jurisdiction to deal with minor misconduct allegations against the Commissioner (PS).

Parliamentary Inspector Not Empowered to Deal with Allegations of Minor Misconduct by the PSC

[14] Although strictly beyond the terms of the invitation I will comment briefly on the lack of power in the Parliamentary Inspector to play any role in respect of the PSC and minor misconduct.

[15] Section 195 of the CCC Act sets out the functions of the PI. Most of these functions expressly apply to the operation of the Commission. However, the following are broader:

(a) *to audit the operation of the Act* (s. 195(aa)); and

(b) *to audit any operation carried out pursuant to the powers conferred or made available by this Act* (s. 195(cc)).

[16] These provisions do not extend the PI's functions to include minor misconduct allegations against the PSC.

Section 195(aa): Auditing the Operation of the CCC Act

[17] If general words are used in legislation, they will be given their plain and ordinary meaning unless the contrary is shown: *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 per Dixon J at 647.

[18] "Audit" is not defined in the CCC Act. The *Macquarie Dictionary* includes, in its definition of "audit": "a calling to account". In turn, "bring (call) to account" is defined as "to demand explanation or justification of the actions of (someone)".

[19] "Operation" means "the act, process or manner of operating": *Macquarie Dictionary*.

[20] The plain meaning of the words "to audit the operation of the Act" refers to examining the way in which the provisions of the CCC Act work. It is difficult to see how

this phrase, when given its ordinary meaning, would import a power to receive, assess and investigate allegations of minor misconduct by the PSC.

Section 195(cc): Auditing Operations

[21] In this context, “operation” refers to operations such as controlled operations for which the Commission may grant authority to police officers under the CCC Act (Part 5 Division 4). Support for this is found in the origin of s. 195(cc).

[22] Section 195(cc) was inserted by the *Corruption and Crime Amendment and Repeal Act 2003* based on a recommendation by the Standing Committee on Legislation that the PI should have the ability to directly audit any operation carried out under the CCC Act, specifically, operations conducted by the police using exceptional powers granted by the CCC.⁸⁶

[23] The PSC has no express power to conduct “operations”. Even if “operations” is given a broad meaning to include, for example, assessing and investigating allegations of minor misconduct, the PSC may not *receive* allegations about minor misconduct by the Commissioner (PS). Receiving an allegation is a precondition to taking action in relation to that allegation.

Conclusion on Functions of the PI

[24] Sections 195(aa) and 195(cc) were originally enacted as part of a range of provisions establishing the PI as an accountability mechanism for the Commission. The Amendment Act, in giving the PSC jurisdiction over minor misconduct, has made no changes to the functions of the PI. If Parliament had intended to extend the PI’s role to include oversight of the PSC, it would have done so expressly.

[25] Support for this appears from consideration of the other provisions of the CCC Act (Part 13), which establish the office, functions and powers of the PI.

[26] Firstly, an office called the “Parliamentary Inspector of the Corruption and Crime Commission” is established by s. 188. The name itself indicates that the functions of the PI are limited to oversight of the Commission.

[27] Although s. 196(2) provides that the PI has “power to do all things necessary or convenient for the performance of the PI’s functions”, the powers enunciated in s. 196(3) specifically apply to ‘officers’, defined in s. 196(1) as officers of the Commission or officers of the PI.

86 See Recommendation 17, *Report of the Standing Committee on Legislation in Relation to the Corruption and Crime Commission Act 2003 and the Corruption and Crime Commission Amendment Bill 2003*, Report 21, December 2003.

[28] For example, the PI may “investigate any aspect of the Commission's operations or any conduct of officers” (s. 196(3)(a)) and require officers to supply information or produce documents relating to the Commission's operations or the conduct of officers (s. 196(3)(c)). There are no specific powers relating to officers of the PSC.

[29] The Commission must notify the PI “whenever it receives an allegation that concerns or may concern an officer of the Commission” (s. 196(4)). There is no corresponding obligation on the PSC to notify the PI of allegations against officers of the PSC.

[30] The PI may prepare a report to Parliament on “any matters affecting the Commission” and general or policy matters relating to the PI's functions. However, there is no specific power to prepare a report on matters affecting the PSC (s. 199).

[31] In summary, the PI has no scope to review actions of the PSC, specifically, to receive allegations of minor misconduct by the PSC.

[32] In his letter of 20 April 2015 providing a submission to the Joint Standing Committee about the Amendment Act the PI also noted that the Amendment Act makes no change to Part 13, which deals with his functions, duties and powers.

[33] When discussing s. 196(4) he noted:

my powers, although considerable, of oversight and to take over the matter myself, may only be exercised in relation to the CCC and its officers. I would have no capacity to exercise those powers in respect of a matter in the hands of the PSC where a CCC officer was the subject of an allegation.

Overlap Between Serious and Minor Misconduct

[34] Paragraph 3 of the invitation noted that recent Joint Standing Committee hearings identified that there might be a difficulty in describing actions by public officers as either solely “minor misconduct” or “serious misconduct”, giving rise to confusion about whether the allegations should be referred to the Commission or PSC.

The Distinction Between Minor Misconduct and Serious Misconduct

[35] The Commission is able to investigate cases of serious misconduct and the PSC is able to investigate cases of minor misconduct (ss. 7B(4) and (5)). Various provisions (some of which are discussed above) effect a division of responsibility for the two classes of misconduct (ss. 7B, 18, 24 - 44 and 45A - 45ZD).

[36] Section 3 provides that “serious misconduct” is police misconduct or misconduct of a kind described in s. 4(a), (b) or (c), in essence:

- (a) a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer's office or employment; or
- (b) a public officer corruptly takes advantage of the office or employment to obtain a benefit or cause a detriment; or
- (c) a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years' imprisonment.

[37] "Minor misconduct" is misconduct described in s. 4(d), being conduct that:

- (a) adversely affects or could adversely affect the honest or impartial performance of the functions of a public authority or public officer; or
- (b) constitutes or involves the performance of functions in a manner that is not honest or impartial; or
- (c) constitutes or involves a breach of the trust placed in the public officer; or
- (d) involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer;

and constitutes or could constitute a disciplinary offence providing reasonable ground for termination of a person's office or employment as a public service officer under the *Public Sector Management Act 1994*.

[38] Excluded from the definition of "minor misconduct" is police misconduct, conduct engaged in by a member of a House of Parliament or the Clerk of a House of Parliament, and conduct engaged in by a member of a local government or council of a local government (s. 3).

[39] There is an inescapable degree of overlap⁸⁷ between serious and minor misconduct and some complaints may involve allegations of both. However, it is evident from the Amendment Act that the Commission is intended to have exclusive powers and responsibility to deal with serious misconduct.

[40] Relevantly, the Commission may direct the PSC or an appropriate authority to:

- (a) not commence an investigation of a misconduct matter or discontinue any investigation; and

87 Refer to letter of 17 April 2015 to the Hon. Michael Mischin, MLC, Attorney General of Western Australia, a copy of which was provided to the Chairman of the JSC, attaching a copy of the advice from Mr Zelestis dated 13 April 2015 in relation to the distinction between serious and minor misconduct.

(b) take all reasonable steps to ensure that an investigation of a misconduct matter is not conducted by an officer of the PSC or appropriate authority.

[41] This power is not limited to serious misconduct and could extend to complaints that allege both types of misconduct.

[42] The PSC may refer a matter to the Commission if the PSC considers that serious misconduct is involved (ss. 45M(d) and 45T(1)). Although the word “may” is used, the PSC’s functions under the amended CCC Act are limited to minor misconduct. Accordingly, it would not be open to the PSC to refrain from referring a case of serious misconduct to the Commission because it intended to investigate the case itself.

Measures to minimise confusion about referring matters to the Commission or PSC

[43] I have met with the Commissioner (PS) and we have agreed on a cooperative and joint approach to:

- minimise confusion for reporting agencies and members of the public;
- provide an exchange of information so that the Commission and the PSC can exercise their functions appropriately; and
- issue joint guidelines.

[44] The legal framework for this cooperative approach is found in the Amendment Act.

[45] The PSC may consult and cooperate with the Commission (ss. 45A(3), 45B(2)(g), 45C(2) and 45M(b)).

[46] Similarly, the Commission may consult, cooperate and exchange information with the PSC (ss. 21AA(3), 21AB(3) and 32(3)).

[47] Each of the Commission and PSC may publish guidelines about the matters which should be and need not be reported (ss. 30 and 45J).


John McKechnie, QC
COMMISSIONER

Appendix Six

Submission from the Public Sector Commission

WRITTEN SUBMISSION TO JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

1. Allegations of minor misconduct levelled at the Public Sector Commissioner

The public hearings held by the Joint Standing Committee (Committee) with the Public Sector Commissioner, on 11 March 2015, and with Acting Corruption and Crime Commissioner Douglas, on 25 March 2015, may have revealed a 'gap' in the proposed arrangements for handling allegations of minor misconduct levelled at the Public Sector Commissioner.

The *Corruption, Crime and Misconduct Act 2003*⁸⁸ (CCM Act) distinguishes between 'serious misconduct' and 'minor misconduct'. Section 18 invests in the Corruption and Crime Commission (CCC) the function of investigating serious misconduct in relation to public officers. This serious misconduct oversight by the CCC will continue to encompass allegations of serious misconduct made in relation to the Public Sector Commissioner.

Under the CCM Act it is correct to say that the CCC has no minor misconduct oversight function in relation to the Public Sector Commissioner. The CCC's only minor misconduct function applies in relation to police misconduct, as defined in section 3, and to misconduct allegations referred to the CCC by the Public Sector Commissioner under sections 45M(d) and 45T(1)(b). Currently the CCC has oversight of misconduct both serious and minor in relation to the Public Sector Commissioner.

As observed by the [Joint Standing Committee's] Chairman, section 45G of the CCM Act provides that the Public Sector Commissioner cannot receive or initiate an allegation of minor misconduct about the Public Sector Commissioner. Neither can the Public Sector Commissioner receive or initiate allegations of minor misconduct in relation to other offices listed in section 45G. This provision partly mirrors the existing exclusions in relation to serious misconduct allegations that cannot be received or initiated by the CCC contained in section 27. Section 45G is intended to avoid the circularity and perceived conflicts of interest should a complaint be made about minor misconduct by the Public Sector Commissioner to him or herself. Minor misconduct allegations about

⁸⁸ The *Corruption and Crime Commission Amendment (Misconduct) Act 2014*, when all sections are proclaimed later in 2015, will change the name of the existing *Corruption and Crime Commission Act 2003* to the *Corruption, Crime and Misconduct Act 2003*.

PSC staff are not excluded by section 45G and hence can be received or initiated by the Public Sector Commissioner.

Other public officers also excluded from oversight of minor misconduct by the Public Sector Commissioner, and for whom other alternative oversight mechanisms exist, include:

- the Parliamentary Inspector of the CCC
- the CCC Commissioner
- CCC officers
- clerks of Parliament
- members of Parliament
- elected local government and local council members (see the definition of 'minor misconduct' in section 3 of the CCM Act)

Whilst neither the CCC or the Public Sector Commissioner have functions to oversight minor misconduct allegations levelled at the Public Sector Commissioner, a number of other bodies have functions and powers capable of allowing them to receive and investigate allegations in relation to the Public Sector Commissioner, which would encompass allegations of minor misconduct.

In circumstances where allegations are levelled against the Public Sector Commissioner which do not constitute serious misconduct of the type referable to the CCC, but which may constitute minor misconduct, the following mechanisms are available to ensure the allegations can be adequately and independently examined.

- Allegations including minor misconduct about the Public Sector Commissioner can be made to any member of Parliament, after which the member may in Parliament move a motion for suspension or removal of the Public Sector Commissioner. This could potentially commence the process provided for in section 18(3) of the *Public Sector Management Act 1994* (PSM Act), whereby the Public Sector Commissioner can be removed or suspended from office on an address from both Houses of Parliament. The Parliament's power to remove the Public Sector Commissioner is not limited by the terms of the PSM Act.
- Under section 18(4)(b) and (d) of the PSM Act, the Governor may suspend the Public Sector Commissioner from office if satisfied the Public Sector Commissioner is incompetent, for neglect of duty, or if the Public Sector Commissioner has been guilty of misconduct. Allegations of minor misconduct

can be made to the responsible Minister, currently the Premier, to commence such a process.

- Under the *Public Interest Disclosure Act 2003* (PID Act), allegations that constitute public interest information concerning the Public Sector Commissioner can be made:
 - if it is claimed that the Public Sector Commissioner has committed an offence under a written law, to the CCC or to a police officer under section 5(3)(a);
 - if the allegation relates to substantial unauthorised or irregular use of, or substantial mismanagement of, public resources, to the Auditor General under section 5(3)(b); or
 - because the Public Sector Commissioner is a public officer, to the Parliamentary Commissioner for Administrative Investigations (the Ombudsman) under section 5(3)(g).
- Both the Auditor General and the Ombudsman have jurisdiction outside the public interest disclosure regime, to receive allegations involving the Public Sector Commissioner within their respective jurisdictions.
 - The Public Sector Commissioner is an accountable authority under the *Auditor General Act 2006*. Minor misconduct allegations about the Public Sector Commissioner that may concern financial impropriety, or allege that the Public Sector Commissioner's functions are not being adequately or properly performed, would fall within the functions and powers of the Auditor General to investigate and report to Parliament.
 - Minor misconduct allegations about the Public Sector Commissioner could also constitute a 'matter of administration' for the purposes of section 14(1) of the *Parliamentary Commissioner Act 1971* (PC Act), and be made to the Ombudsman. Under the PC Act, the Ombudsman can initiate investigations on own motion (section 16(1)), or on complaint to the Ombudsman under section 17 of the PC Act, or on reference by Parliament under section 15(1) of the PC Act, and may report to Parliament on any matter arising in connection with the exercise of his functions.

As previously advised to the Joint Standing Committee, the PSC in collaboration with the CCC is preparing guidelines and other guidance materials to inform public authorities and members of the public what matters should be notified or reported to the Public Sector Commissioner. As discussed below, this material will be pivotal in

establishing a meaningful landscape as to the appropriate body to which allegations of misconduct are to be directed. The guidance materials will include information about the appropriate body to which allegations against the Public Sector Commissioner can be referred.

2. Determining whether misconduct is ‘serious’ or ‘minor’

The public hearings held by the Committee identified that there might be a difficulty in accurately describing actions by public officers as specifically being either solely ‘minor misconduct’ or ‘serious misconduct’, and therefore whether the actions should be referred to the CCC or the PSC for assessment and investigation.

A distinction between ‘serious misconduct’ and other misconduct already exists in the current *Corruption and Crime Commission Act 2003* (CCC Act). The term ‘serious misconduct’ has been separately defined in section 3(1) of the CCC Act since the Act was first passed, using the same distinction between matters described in section 4(a), (b) and (c) as serious misconduct, and section 4(d) as other misconduct. The distinction has been for the purpose of engaging the CCC's more intrusive powers in sections 101 and 148 of the CCC Act (pertaining to search and arrest warrants).

It is acknowledged that the same factual circumstances might potentially constitute both ‘serious misconduct’ and ‘minor misconduct’. There is therefore a degree of overlap between the two defined terms. In practical terms the capacity to describe suspected misconduct, which has not yet been investigated and where all the facts are not known, is to a large degree a matter of opinion on the part of the notifying authority or member of the public which must be reasonably based. Allegations of suspected misconduct are unlikely to always be solely ‘minor misconduct’ or otherwise ‘serious misconduct’.

The PSC respectfully agrees with the Parliamentary Inspector’s observation in his submission to the Committee of 20 April 2015, at paragraph 5 on page 3, that *‘there may be a one or the other situation or elements of both [definitions of serious misconduct and minor misconduct] arising out of the potential for overlap created (necessarily) by the statutory definitions’* (emphasis added). Some degree of overlap, as well as being unavoidable, can be seen to be necessary to ensure conduct does not ‘fall between the cracks’.

Notifying authorities must inevitably undertake some preliminary assessment before notifying an allegation. During and after assessment by the CCC or by the Public Sector Commissioner more facts or suspicions could arise, resulting in a change of characterisation of the alleged misconduct. The categorisation of suspected misconduct is therefore not fixed but mutable, and may change upon assessment, and during and after investigation.

In addition, under the CCM Act the CCC and Public Sector Commissioner are empowered to:

- issue guidelines to set out matters which do not need to be notified to the CCC or PSC, but reported upon instead (sections 30 and 45J),
- cooperate, communicate and consult with each other (sections 7B(6), 21AA(3), 21AB(3) and 21AC; sections 32(3) and 34; and sections 45A(3) and (4) and 45B(g)), and
- refer notified matters to the other body where appropriate (sections 33(1)(c), 45M(d) and 45T).

As the Parliamentary Inspector observed in his submission to the Joint Standing Committee:

If a matter starts out before the CCC but is found to be concerned, if anything, with minor misconduct, or is found to potentially involve both serious and minor misconduct, the power in ss 33 and 34 may be used to act in cooperation with the PSC, which is an 'independent agency' as defined, or to refer the matter to the PSC. (paragraph 6, page 3)

Pursuant to section 42 of the CCM Act, the CCC can also direct the Public Sector Commissioner not to deal with a matter notified to the Public Sector Commissioner where, for example, the CCC considers that there may be serious misconduct involved.

It is noted that the purpose of the *Corruption and Crime Commission (Amendment) Misconduct Act 2014* was to refocus the CCC away from minor misconduct of public officers, other than in relation to reviewable police action, and towards serious misconduct. The Public Sector Commissioner is to assume primary responsibility for minor misconduct. The existing separation between 'minor' and 'serious' misconduct contained in the *Corruption and Crime Commission Act 2003* was selected as the appropriate vehicle to achieve this, rather than the alternative of inserting a new definition of these terms, so as to maintain the status quo in relation to the overall breadth of misconduct that is oversighted. It is submitted that the new arrangements involve an opportunity to apply terms that have been in operation for a reasonable period of time, and to build on the meaning of those terms that has developed in courts and administration during that time.

The PSC considers as significant the observation of the Parliamentary Inspector (paragraph 2, page 3 of his submission to the Joint Standing Committee) that *'the question of the proper characterisation of the conduct [as serious or minor misconduct] will usually turn on the mental element, the intention or purpose with which it is*

accompanied.’ If the characterisation of a matter cannot be resolved having regard to the mental elements, the Parliamentary Inspector agreed with the observation made by Zelestis QC that ‘in a general sense, serious misconduct comprises conduct which represents a more significant and reprehensible departure from duty than does minor misconduct.’

The PSC is committed to working with the CCC to achieve a shared understanding of the meanings of ‘minor misconduct’ and ‘serious misconduct’ in a way that is both robust at law, and able to be applied in practice in a workable and reasonable way. Commissioner McKechnie and the Public Sector Commissioner have had some early discussions in this regard and the two agencies are presently working towards consistency in the approach to be taken in each respective Commission's set of guidance materials. The guidance materials will assist notifying authorities and individuals to understand how these terms operate in practice, with a view to helping identify the relevant body to which an allegation should be referred, and will be instrumental in supplementing the practical application of the statutory terms.

It is also noted that the PSC will enter into arrangements with the CCC under which the PSC will provide the CCC with access to data and information obtained in the course of performing the PCS’s misconduct function, to assist the CCC in performing its serious misconduct function.

Appendix Seven

Committee's functions and powers

On 21 May 2013 the Legislative Assembly received and read a message from the Legislative Council concurring with a resolution of the Legislative Assembly to establish the Joint Standing Committee on the Corruption and Crime Commission.

The Joint Standing Committee's functions and powers are defined in the Legislative Assembly's Standing Orders 289-293 and other Assembly Standing Orders relating to standing and select committees, as far as they can be applied. Certain standing orders of the Legislative Council also apply.

It is the function of the Joint Standing Committee to -

- a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission;
- b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and
- c) carry out any other functions conferred on the Committee under the *Corruption and Crime Commission Act 2003*.

The Committee consists of four members, two from the Legislative Assembly and two from the Legislative Council.