

CORRUPTION, CRIME AND MISCONDUCT AMENDMENT BILL 2023

EXPLANATORY MEMORANDUM

The Corruption, Crime and Misconduct Amendment Bill 2023 (the Bill) amends the *Corruption, Crime and Misconduct Act 2003* (CCM Act) to reform the process for the appointment of the Corruption and Crime Commissioner (Commissioner) and establish the new position of Deputy Commissioner of the Corruption and Crime Commission (Commission).

Given that the Deputy Commissioner may perform such functions of the Commission under the CCM Act as the Commissioner directs, the Bill amends the CCM Act to extend requirements that apply to the Commissioner to the Deputy Commissioner as appropriate.

Part 1 - Preliminary

Clause 1 Short title

The Act will be known as the *Corruption, Crime and Misconduct Amendment Act 2023* once enacted.

Clause 2 Commencement

Clause 2 provides for commencement of the Act.

Clause 2(a) provides that the Part 1 comes in operation on the day of Royal Assent, and clause 2(b) provides that the rest of the provisions commence on the day after Royal Assent.

Part 2 – *Corruption, Crime and Misconduct Act 2003* amended

Clause 3 Act amended

This clause provides that the provisions in Part 2 amend the CCM Act.

Clause 4 Section 3 amended

Clause 4(1) amends section 3 of the CCM Act to insert the definition of the term 'Deputy Commissioner' for the new position of Deputy Commissioner established in clause 5.

Clause 4(2) amends the current definition of 'Commissioner' in section 3 to reflect the changes in section 14(1) in relation to Acting Commissioners introduced by clause 12.

Clause 4(3) updates the current definition of 'officer of the Commission' to include the new position of Deputy Commissioner established in clause 5.

Clause 5 Section 9 amended

Clause 5 amends the section 9 to establish the new office of the Deputy Commissioner.

Clause 5(1) inserts proposed new section 9(1A), which creates the role of Deputy Commissioner and provides that the Commissioner can direct the Deputy Commissioner to perform (or not perform) particular functions, but does not give the Commissioner the power to direct the Deputy Commissioner regarding the manner in which the functions are performed.

This allows the Deputy Commissioner to act autonomously at the direction of the Commissioner.

Since the Deputy Commissioner is to perform the functions of the Commission (as the Commissioner directs), the Deputy Commissioner can exercise the powers and functions of the Commission, including those set out in section 185, in the name of the Commission without any need for delegation.

Clause 5(3) deletes current section 9(3), (3a), (3b), (4) and (4a) as these provisions relate to the appointment process, which are dealt with separately in new sections 9A to 9C which are inserted by clause 6.

Clause 5(3) also deletes current section 9(4B) as this subsection was identified as a spent provision. The reappointment provided for in subsection (4B) occurred on 26 June 2021 when the provision commenced, and the subsection has no further effect.

Clause 5(6) provides that, similar to the current office of the Commissioner, the office of the Deputy Commissioner is not an office in the Public Service.

Clause 6 Sections 9A to 9C inserted

Clause 6 inserts proposed new sections 9A to 9C into the CCM Act to set out the process for the appointment of the Commissioner and Deputy Commissioner.

Proposed new section 9A(1) essentially replicates current section 9(3) of the CCM Act which provides that the Commissioner is to be appointed on the recommendation of the Premier by the Governor by commission by the Public Seal of the State, and extends this to the new Deputy Commissioner position as well.

Proposed new section 9A(2) sets out the requirements required to be satisfied for the appointment of the Commissioner and Deputy Commissioner, and largely replicates current section 9(3a). A new requirement introduced by the Bill is proposed new subsection (2)(b)(ii) which provides that the appointment may only occur if the Joint Standing Committee on the Corruption and Crime Commission (Standing Committee) has not vetoed it. More detail about the veto process is set out in proposed new section 9C.

The process for nominating qualified and eligible persons for appointment as set out in proposed new section 9B is almost identical for the Commissioner and Deputy Commissioner, save for section 9B(3)(b) which requires the nominating committee to consult with the Commissioner in relation to potential appointees to the role of Deputy Commissioner. No such consultation requirement applies to the appointment of the Commissioner. The consultation requirement recognises the pragmatic benefit of seeking the substantive Commissioner's input on the potential new Deputy Commissioner, particularly given the close working relationship between the two positions contemplated in the Bill.

Proposed new section 9B(3) should be read together with the transitional provision in proposed new section 232, which provides that the Commissioner required to be consulted by the nominating committee includes a reference to a Commissioner appointed under section 9 of the current CCM Act. This transitional provision recognises that the provision for appointing the Commissioner is amended by the Bill.

Veto Process

New section 9C sets out the process by which the Standing Committee may veto a proposed appointment.

This process addresses the identified flaw in the current appointment process which enables a single Standing Committee member to block a proposed appointment indefinitely in certain circumstances. The new process set out in section 9C addresses this flaw by introducing a power of veto. Given the Standing Committee is a four member committee, and a quorum of three members is required to deliberate and pass resolutions under the relevant Standing Orders, a single member's opposition to a proposed recommended appointment cannot by itself form a valid notice to the Premier of a veto. Section 9C supports a robust process which reinforces the concept that the scrutiny function and power to stop an appointment belongs to the Standing Committee and not any single individual member.

Proposed new section 9C(3) also introduces a timeframe of up to 44 days for the Standing Committee to decide whether to veto the proposed appointment. The introduction of a timeframe is intended to encourage timeliness in the appointment process.

Clause 7 Section 10 amended

Clause 7 amends section 10 of the CCM Act to extend the same qualifications required for appointment as Commissioner to the Deputy Commissioner. Given that the Deputy Commissioner will be able to exercise the same duties and powers as the Commissioner, it is appropriate that the Deputy Commissioner be someone who meets the same requirements in terms of qualifications for appointment.

Clause 8 Section 11A inserted

Clause 8 inserts new section 11A to provide that Schedule 2A sets out the tenure, remuneration and conditions of service of the new Deputy Commissioner position.

Clause 9 Section 12 amended

Clause 9 amends section 12 of the CCM Act to extend the provisions which apply to the removal and suspension of the Commissioner to the Deputy Commissioner.

Clause 9 also updates the heading of section 12 to reflect that it provides for the removal and suspension of the Commissioner as well as the Deputy Commissioner.

Clause 10 Section 13 amended

Section 13 of the CCM Act currently provides that the Commissioner may declare themselves unable to act in respect of a particular matter by reason of a conflict or having to perform other functions. Clause 10 amends section 13 to also apply this provision to the Deputy Commissioner such that the Deputy Commissioner may also declare an inability to act for the same reasons.

Clause 11 Section 13A inserted

Clause 11 inserts proposed new 13A to provide that the Deputy Commissioner will act in the office of the Commissioner during any period when the office of the Commissioner is vacant

or the Commissioner is unable to perform the functions of the office, or where the Commissioner has declared themselves unable to act under section 13. Under proposed new section 13A(1), the Deputy Commissioner will 'act up' as a matter of course, and no appointment process is required.

New section 13A(2) provides that the Deputy Commissioner will automatically act up unless the Deputy Commissioner is unable to perform the functions of the Commissioner, or has made a declaration under section 13 that they are unable to act in relation to a particular matter.

Section 13A was designed to allow a level of flexibility in the interaction between the Commissioner, Deputy Commissioner and Acting Commissioner where required to address the workload of the Commissioner.

For instance, proposed new section 13A(2)(b)(ii) provides for the situation where the Commissioner has made a section 13 declaration in relation to a matter and an Acting Commissioner has been appointed to act under section 14(1)(b) in relation to that matter while the Deputy Commissioner's position is vacant. In such a situation, section 13A(2)(b)(ii) would apply to allow the Acting Commissioner to continue to act in relation to the matter even when the Deputy Commissioner's position is later filled. However, should the Commission prefer to have a newly appointed Deputy Commissioner take over and act in relation to that matter, the Acting Commissioner's role may be terminated in relation to that matter under section 14(2)(a).

New section 13A(3) makes it clear that the Deputy Commissioner may exercise the powers of the Commissioner in relation to a matter even though a Commissioner or Acting Commissioner is concurrently performing functions of the office in relation to other matters. An example of such a situation could occur where the Commissioner has declared themselves unable to act in relation to two specific matters, and an Acting Commissioner is appointed under section 14(1)(b) in relation to one matter while the Deputy Commissioner acts under proposed new section 13A(1)(b) in relation to the other matter.

This level of flexibility is designed to support the Commission in addressing its growing workload and ensure impartial decision-making. In his review of the Commission's processes, the Hon Peter Martino noted that "it is highly desirable that the Commissioner who is considering an application for an examination order has not been involved in any earlier decisions about the use of the Commission's investigative powers in the same matter." While the Martino Review was focused on the Commission's unexplained wealth powers in particular, the Commission has advised that similar considerations apply in the Commission's exercise of the serious misconduct functions as well to ensure impartial decision-making and accountability.

New section 13A(5) provides that the validity of anything done by the Deputy Commissioner while acting in the role of Commissioner is not to be called into question on the ground that the occasion for the Deputy Commissioner to act had not arisen or had ceased. This is aligned to current section 14(6) of the CCM Act in relation to the validity of the actions of Acting Commissioners.

Clause 12 Section 14 amended

Section 14 of the CCM Act provides for the appointment of Acting Commissioners. Clause 12 amends section 14 to address the interaction between the Commissioner, Acting Commissioners and the new position of Deputy Commissioner. The key intent behind the

changes is to ensure that the Commission is able to appoint a person where required to act as Commissioner where the Commissioner and Deputy Commissioner are unable to perform the functions of the Commissioner in relation to a matter.

Clause 12(1)(a) amends section 14(1) to clarify that the person appointed as Acting Commissioner must be a qualified person who is appointed on recommendation of the Premier. This reflects the appointment process as set out in section 9.

Clause 12(1)(b) sets out the circumstances where a person may be appointed to act as Commissioner. This reflects the circumstances currently set out in section 14(1)(a) to (c), save that being absent from the State will no longer be a reason for appointment. Given contemporary technology and robust remote working mechanisms in place, being outside the State should no longer be a bar to the Commissioner carrying out the functions of the office.

Expedited process - short-term appointments

Clause 12(2) inserts proposed new subsections 14(2A) to (2C), which provide for an expedited appointment process for a person to act as Commissioner, but only where the appointment is for a period of no longer than 12 months (proposed new section 14(2C)(a)).

Under the expedited process, the Premier can recommend the appointment of a person who may be appointed by the Governor to act as Commissioner without having to go through the processes of nomination and consideration by the Standing Committee as set out in section 9A(2)(a) to (c). This allows for timely Acting Commissioner appointments where the appointment is limited and confined to a short, specified duration only.

The expedited process can also be used to extend an Acting Commissioner's appointment once under proposed new section 14(2C)(b). This is to address the situation where an extension may be required to allow the Acting Commissioner to complete a report on a particular matter for instance.

Clause 12(4) changes the reference in section 14(5) from "subsection (1)(c)" to "subsection (1)(b)" instead. This update is required to reflect the changes introduced in clause 12(1)(b), which sets out the circumstances in which an Acting Commissioner may be appointed to act.

Clause 13 Section 15 amended

Clause 13 amends section 15 to apply the current requirement for the Commissioner to take an oath or affirmation of office to the Deputy Commissioner.

Given that the Deputy Commissioner may perform such functions of the Commission under the CCM Act as the Commissioner directs, it is appropriate for the Bill to amend the Act to extend relevant requirements that apply to the Commissioner to the Deputy Commissioner.

Clause 14 Section 27 amended

Section 27 of the CCM Act currently provides that allegations about the Commissioner, Parliamentary Inspector or judicial officers are not to be received by the Commission save in certain circumstances. Clause 14 amends section 27 to include the Deputy Commissioner.

Given that the Deputy Commissioner may perform such functions of the Commission under the CCM Act as the Commissioner directs, it is appropriate for the Bill to amend the Act to extend relevant requirements that apply to the Commissioner to the Deputy Commissioner.

Clause 15 Section 45G amended

Section 45G of the CCM Act currently provides that allegations about the Commissioner, Parliamentary Inspector or judicial officers are not to be received by the Public Sector Commissioner. Clause 15 amends section 45G to include the Deputy Commissioner.

Given that the Deputy Commissioner may perform such functions of the Commission under the CCM Act as the Commissioner directs, it is appropriate for the Bill to amend the Act to extend the requirements that apply to the Commissioner to the Deputy Commissioner.

Clause 16 Section 45H amended

Section 45H of the CCM Act sets out the obligations of certain staff to notify the Public Sector Commissioner of minor misconduct. Clause 16 amends section 45H to update the references to the appointment of the Commissioner and Acting Commissioner (as amended by clauses 6 and 12 respectively) and include the Deputy Commissioner in the provision.

Given that the Deputy Commissioner may perform such functions of the Commission under the CCM Act as the Commissioner directs, it is appropriate for the Bill to amend the Act to extend relevant requirements that apply to the Commissioner to the Deputy Commissioner.

Clause 17 Section 45X amended

Clause 17 amends section 45X(3)(a)(ii) to clarify that the reference to 'Commissioner' in that subparagraph is to the Public Sector Commissioner.

Clause 18 Section 133 amended

Clause 18 amends the reference to 'Commissioner' in subsection (1) to 'Commission' consistent with the approach in subsection (2).

Clause 19 Section 141 amended

Section 141 provides that the Commissioner may administer an oath or affirmation to a witness. Clause 19 amends section 141 to extend this power to the Deputy Commissioner.

Given that the Deputy Commissioner may perform such functions of the Commission under the CCM Act as the Commissioner directs, it is appropriate for the Bill to amend the Act to extend the powers that apply to the Commissioner to the Deputy Commissioner.

Clause 20 Section 183 amended

Section 183 provides that the Commissioner may administer the oath or affirmation of secrecy for Commission officers. Clause 20 amends section 183 to extend this power to the Deputy Commissioner.

Given that the Deputy Commissioner may perform such functions of the Commission under the CCM Act as the Commissioner directs, it is appropriate for the Bill to amend the Act to extend the powers that apply to the Commissioner to the Deputy Commissioner.

Clause 21 Section 184 amended

Section 184 sets out the definition of an ‘authorised officer’ and the role of the Commissioner for the purposes of the Commission’s functions under other legislation.

Clause 21 amends section 184 to include the Deputy Commissioner as an authorised officer and provide that the Deputy Commissioner is a senior officer in the same manner as the Commissioner.

Given that the Deputy Commissioner may perform such functions of the Commission under the CCM Act as the Commissioner directs, it is appropriate for the Bill to amend the Act to extend the powers that apply to the Commissioner to the Deputy Commissioner.

Clause 22 Section 217 amended

Section 217 relates to the proof of documents which purport to appoint a person as Commission. Clause 22 amends section 217 to extend provisions which relate to the Commissioner to the Deputy Commissioner.

Given that the Deputy Commissioner may perform such functions of the Commission under the CCM Act as the Commissioner directs, it is appropriate for the Bill to amend the Act to extend the certification provisions that apply to the Commissioner to the Deputy Commissioner.

Clause 23 Section 225 amended

Section 225(4) provides that the common seal of the Commission is to be affixed in the presence of the Commissioner as part of the process of executing documents. Clause 23 amends section 225 to extend the ability to witness the affixing of the seal to the Deputy Commissioner.

Given that the Deputy Commissioner may perform such functions of the Commission under the CCM Act as the Commissioner directs, it is appropriate for the Bill to amend the Act to extend the powers that apply to the Commissioner to the Deputy Commissioner.

Clause 24 Part 15 Division 1 heading inserted

Clause 24 inserts a new heading for the current transitional provisions related to the *Corruption, Crime and Misconduct Amendment (Misconduct) Act 2014* to distinguish them from the proposed new transitional provisions for the Bill inserted by clause 25.

Clause 25 Part 15 Division 2 inserted

Clause 25 inserts proposed new sections 229 – 233, which are transitional provisions for the Bill.

Section 299

Proposed new section 299 defines the terms 'amending Act', 'former Act' and transition day' for the purposes of the transitional provisions.

Section 230

Proposed new section 230 provides that if on transition day (being the day on which the transitional provisions come into operation), the nominating committee had begun advertising but had not submitted the list of three names to the Premier, for 12 months after the day on which the advertising began the nominating committee may submit a list based on that advertising.

This means that while the new appointment process introduced by clause 6 would apply to the appointment process of a person on the list after transition day, the nominating committee need not re-start the advertising after transition day due to the operation of section 230.

Section 231

Proposed new section 231 provides that if the nominating committee had submitted the list of three persons eligible for appointment to the Premier and a person from that list had not been appointed before transition day, the appointment process under section 9 of the current CCM Act (known as the 'former Act' under section 229) would continue to apply to the appointment of the person from the list for a 12-month period from the day the list was submitted to the Premier.

This means that should a person from the list submitted to the Premier be appointed as Commissioner during the 12-month period, the appointment would be under current section 9(3) of the 'former Act'.

Section 232

Proposed new section 232 provides that on and from transition day, a reference to a Commissioner appointed under section 9A(1) includes a reference to a Commissioner appointed under current section 9 of the CCM Act. When read together with proposed new section 9B (inserted by clause 6), this means that the nominating committee is required to consult with the Commissioner if the Commissioner was appointed under section 9 before transition day.

This transitional provision may be necessary as the current Commissioner was appointed under section 9 of the 'former Act' (as defined in new section 229), and may be the Commissioner at the time the nominating committee is considering the appointment of a Deputy Commissioner.

Section 233

Proposed new section 233 provides that from transition day, an Acting Commissioner appointed under section 14(1) of the CCM Act for the reason set out in section 14(1)(c) will be taken to be acting for the reason set out in section 14(1)(b) as amended by clause 12.

Clause 12(1)(b) streamlines current section 14(1) by consolidating subparagraphs (b) and (c) into amended new section 14(1)(b) and removing the Commissioner's absence from the State as a reason for an Acting Commissioner to act in the office of Commissioner.

Clause 26 Schedule 2A inserted

Clause 26 inserts new Schedule 2A into the CCM Act, which sets out the terms and conditions of service of the Deputy Commissioner. New Schedule 2A is modelled on the existing terms and conditions of service of the Commissioner, save for a key difference in terms of remuneration.

Clause 3 of Schedule 2A provides that the Deputy Commissioner is entitled to be paid remuneration at the same rate as the senior District Court judge unless he or she was a judge puisne judge of the Supreme Court. Where the Deputy Commissioner was a Supreme Court judge, he or she would receive remuneration at the same rate as a puisne Supreme Court judge. Clause 4 of the Schedule 2A also provides that where the person was the Chief Judge of the District Court immediately before appointment as Deputy Commissioner, the person is to be paid the same remuneration as a Chief Judge (given that the Chief Judge receives a higher rate of remuneration than the senior District Court judge).

By way of comparison, the default remuneration of a Commissioner is that of a puisne Supreme Court judge under clause 3 of Schedule 2.

Part 3 – Other Acts amended

This Part sets out consequential amendments to other legislation as a result of changes in Part 2 of the Bill.

Division 1 – *Constitution Acts Amendment Act 1899* amended

Clause 27 Act amended

Clause 27 provides that Division 1 amends the *Constitution Acts Amendment Act 1899* (CAA Act).

Clause 28 Schedule V amended

Section 34 of the CAA Act provides that a person is disqualified for membership of the Legislature if they hold any office set out of in Part 1 of Schedule V.

Schedule V Part 1 Division 2 of the CAA Act currently lists a number of statutory offices including the Parliamentary Inspector of the Corruption and Crime Commission and the Commissioner of the Corruption and Crime Commission.

Clause 28 amends this division to include the Deputy Commissioner given that the Deputy Commissioner may perform the functions of the Commissioner (as the Commissioner directs).

Division 2 – *Criminal Organisations Control Act 2012* amended

Clause 29 Act amended

Clause 29 provides that Division 2 amends the *Criminal Organisations Controls Act 2012* (COCA).

Clause 30 Section 3 amended

Section 3 of the COCA currently provides for the 'CC Commissioner' which is defined as –

the person holding the office of Commissioner established under the *Corruption, Crime and Misconduct Act 2003* or the person acting in that office for the reasons mentioned in section 14(1)(a) or (b) of that Act

Clause 11 of the Bill inserts new section 13A into the CCM Act, which provides in subsection (1) that the Deputy Commissioner must act in the office of the Commissioner in certain circumstances.

Clause 12 of the amends section 14 of the CCM Act, which relates to the appointment of Acting Commissioners.

Accordingly, clause 30 updates the definition of 'CC Commissioner' to reflect the changes to persons who may act as Commissioner introduced by clauses 11 and 12, and provides that the definition includes persons acting in that office for the reasons mentioned in proposed new section 13A(1)(a) or amended section 14(1)(a).

Division 3 – *Spent Convictions Act 1988* amended

Clause 31 Act amended

Clause 31 provides that Division 3 amends the *Spent Convictions Act 1988* (SC Act).

Clause 32 Schedule 3 clause 1 amended

Section 18 and Division 4 of Part 3 of the SC Act set out protections associated with having convictions spent. Section 18 provides that employers may not discriminate against a person on the ground of the person's spent convictions, and Division 4 sets out circumstances where spent convictions should not be taken into consideration.

The office of the Commissioner is currently included in Schedule 3 clause 1(1) as an exception to section 18 and Division 4 of Part 3. Clause 32 amends the table in clause 1 to include the Deputy Commissioner alongside the Commissioner given that the Deputy Commissioner may perform all the functions of the Commission (as the Commissioner directs).

Division 4 – *Telecommunications (Interception and Access) Western Australia Act 1996*

Clause 33 Act amended

Clause 33 provides that Division 4 amends the *Telecommunications (Interception and Access) Western Australia Act 1996* (TIA Act).

Clause 34 Section 3 amended

Clause 34 amends section 3 of the TIA Act to insert the Deputy Commissioner alongside the Commissioner in the definition of 'certifying officer'. Given that the Deputy Commissioner may perform all the functions of the Commission as the Commissioner directs, it is appropriate to include the Deputy Commissioner in this provision.

Division 5 – *Terrorism (Preventative Detention) Act 2006* amended

Clause 35 Act amended

Clause 35 provides that Division 5 amends the *Terrorism (Preventative Detention) Act 2006* (TPD Act).

Clause 36 Section 55 amended

Section 55 of the TPD Act makes it clear that the Act does not affect the powers or functions of key oversight bodies including the Commission and the Inspector of Custodial Services.

Clause 36 amends section 55(1)(b) of the TPD Act to insert 'or Deputy Commissioner' after the reference to the Commissioner in that provision. Given that the Deputy Commissioner may perform all the functions of the Commission as the Commissioner directs, it is appropriate to include the Deputy Commissioner in this provision.