

Select Committee Into Local Government

From: Anne Ryan
Sent: Monday, 19 August 2019 3:47 PM
To: Select Committee Into Local Government
Subject: Legislative Council Select Committee into Local Government Submission
Attachments: McCusker Malcolm 20081231.pdf

Dear Committee

Thank you for the opportunity to comment to this Legislative Council Select Committee into Local Government and voice my concern.

During my time on the Busselton Council (2005-2010), I was subject to a CCC investigation, namely Smith's Beach. The CCC undertook an investigation involving many people who had any dealings in the matter and it was sensationalised via the media and politicians alike.

I have attached the response from Malcolm McCusker AO QC and the then Parliamentary Inspector. Unfortunately, I no longer have the correspondence I wrote to him which refers but I have no doubt you will be able to understand, from his response, the nature of my letter.

The issue at hand is that any councillor in Western Australia does not have the same protection as someone who is employed by a council, or indeed any other public sector workplace. This matter appears to have been overlooked in legislation (and I have no doubt was used as a weapon by the CCC), yet other individuals employed as public officers were cleared of any wrongdoing because of their ability, under the Public Sector Management Act, to have a fair hearing via these means. Others, at great expense who were private individuals took the avenue of engaging lawyers at great expense and were ultimately found not guilty.^[1]

You will be aware that the role of a councillor is not an easy role and is akin to that of a director of a board. However, I am fairly confident that councillors have no idea that they could very well be involved in some type of investigation during their term of office and that they have no recourse (other than via potentially very expensive legal avenues), even though they are classed as a public officer. I have no doubt that if they did know there would be less desire to stand for public office with the greater scrutiny which appears to abound currently.

Whilst, as Mr McCusker points out, the CCC opinions of me are just that 'opinions', the matter has continued to be used against me by my detractors and adversaries in the years since, as anyone reading the available articles on the web quickly jump to conclusions that I am somehow 'guilty'. Following the opinions of the CCC at the time I did go on to be re-elected by my constituents and elected by my peers as deputy shire president, however had I had the same level of support I have no doubt that I, like all others in this matter, would have been completely cleared at the time. The internet would then read very differently from what it does today.

Yours sincerely

Anne Ryan

Chairman, Hon. Simon O'Brien MLC,

Deputy Chairman, Hon. Laurie William Graham MLC

Members: Hon. Diane Marie Evers MLC, Hon. Martin Aldridge MLC, Hon. Charles Leonard Smith MLC

¹ <https://www.watoday.com.au/national/western-australia/norm-marlboroughs-conviction-quashed-on-appeal-20110301-1bcpb.html>

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

MJMcC:116/07

31 December 2008

Ms Anne Ryan

Dear Ms Ryan

First, please accept my apologies for not having formally advised you of my conclusion regarding the complaint which you have made, concerning the four "misconduct opinions" expressed against you in the so called "Smith's Beach Report".

In your letter of 21 March 2008 you made the point that each of the four misconduct opinions stated that, for various reasons, you "could be in serious breach of the Public Sector Code of Ethics" (although the third "opinion" does not refer to "serious breach" but simply to "breach")

You have pointed out that you are not, as a Shire Councillor, subject to the "Public Sector Code of Ethics" produced by the office of the Public Sector Standards Commission, pursuant to the Public Sector Management Act.

Whilst it may seem somewhat confusing, the definition of "misconduct" under Section 4 of the Corruption and Crime Commission Act deals with conduct by a "public officer". Although not a member of the Public Service, you are nevertheless a "public officer" according to the definition of "public officer" contained in Section 3 of the CCC Act which in turn refers to the definition contained in Section 1 of the WA Criminal Code.

The result is that although you are a "public officer" you are not a "public service officer" under the Public Sector Management Act 1994.

However, the definition of "misconduct" in Section 4(d) relates to conduct which "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 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.

The words in parenthesis are important. Their effect is that even if you are not a "public service officer", or a person whose office could be terminated on the ground of the conduct in question, nevertheless the Commission must consider, in forming its "opinion", whether, if you were a "public service" officer, the conduct would provide reasonable grounds for the termination of your office or employment as a public service officer, under the Public Sector Management Act.

I appreciate that this is a rather anomalous provision in the Act, as on the face of it, it may be thought that the definition of "misconduct" would only apply to a public service officer, whose conduct is governed by the Public Sector Management Act, and not to "public officers" generally.

It is therefore very much a "hypothetical" exercise which the Commission undertakes.

The Commission is correct, in applying the definition of misconduct to all public officers, even though some are not "public service officers", in which case:

- (a) as noted, the Commission engages in a "hypothetical" exercise to decide whether the conduct in question constitutes or could constitute a disciplinary offence (etc) if the public officer were a public service officer; and
- (b) unlike the cases of Messrs Allen and Frewer, to which you have understandably referred, the Commission cannot (and in your case did not) make any "recommendation" that there be a "disciplinary investigation" pursuant to the Public Sector Management Act, because no such investigation is open, unless the public officer is a public service officer.

As a consequence, as I have noted in my recent report regarding Mr Stephen Lee, a Councillor who was subject of "misconduct" opinions based on the CCC's view that the conduct constitutes or could constitute a "disciplinary offence" (etc), there is no means of having that opinion tested in the way that it was tested (and found to be unsound) in the case of Messrs Allen and Frewer, when an independent disciplinary investigation was conducted pursuant to the Public Sector Management Act.

It is, obviously, little consolation for you to be reminded that the CCC's "opinions" are no more than that. They are not "findings" and certainly are not conclusive. The CCC Act expressly provides that any expression of "misconduct" by the Commission is not to be taken as a finding or opinion that a person has committed a disciplinary offence; and furthermore, that the Commission is prohibited from publishing a finding or opinion that a particular person has committed, is committing, or is about to commit a "disciplinary offence".

I say that that is of little consolation to a person made the subject of a "misconduct opinion", because the public generally takes the Commission's

"opinions" as tantamount to a "finding" of guilt. Indeed, Minister Ravlich MLC, in her letter to you of 12 October 2007, referred to the "misconduct opinions" as "findings", which they are not.

The problem that you and others in similar situations face is that you have no recourse to a court, or an independent investigative body such as the Public Sector Standards Commission, to determine whether the "misconduct opinions" are valid. Although they are only "opinions", they will stand, even though it may be that they could be refuted if there were an independent investigation. The possibility of a recourse to the Courts, to set aside such opinions (on the ground that no reasonable body could form such an opinion) is a somewhat limited and very expensive one.


Furthermore, as you will have seen in the cases of Messrs Allen and Frewer, even though both my review of the CCC's reports and the independent investigation conducted via the Public Sector Management Act, concluded that the Commission's opinions were unsoundly based, the Commission maintained that they were not, and that its opinions were sound.

I should add one further observation. I do find it very difficult to understand how the CCC could logically form the second "opinion" that it did, namely that your failure to inquire as to the "true state of affairs regarding the funding of (your) campaign" involved the performance of your functions in a manner that was not honest or impartial "because it concealed existence of a potential conflict of interest". If you did not inquire of the President of IAG regarding the funding, and were not told, I fail to see how that could be said to have "concealed" the existence of a potential conflict of interest. The underlying premise of that "opinion" is that if a candidate for election to a council received campaign funding from a particular body, and is not told that the body is receiving funds from elsewhere, then the candidate would be guilty of "misconduct" for failing to inquire!

However, although I can recommend that the Commission review that conclusion, I have no power to direct it to do so.

Again, please accept my apologies in not writing to you before this, to respond to the issues that you have raised. I regret that I am unable to assist you further.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Malcolm McCusker', is written over a light blue circular stamp.

Malcolm McCusker AO QC
PARLIAMENTARY INSPECTOR