



**CORRUPTION
AND CRIME
COMMISSION**

**CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA
SUBMISSION**

**to the Legislative Council
Standing Committee on Legislation**

***Inquiry into Custodial Legislation (Officers
Discipline) Amendment Bill 2013***

October 2014

CORRUPTION AND CRIME COMMISSION SUBMISSION TO THE LEGISLATIVE COUNCIL STANDING COMMITTEE ON LEGISLATION

1. The Corruption and Crime Commission ("the Commission") has reviewed the *Custodial Legislation (Officers Discipline) Amendment Bill 2013 (WA)* ("the CLODA Bill") and associated legislation. The Commission notes that the amendments are designed to enable the Department of Corrective Services (DCS) to better deal with misconduct by, and the substandard performance of, prison officers under the *Prisons Act 1981 (WA)* and custodial officers under the *Young Offenders Act 1994 (WA)*.
2. The CLODA Bill proposes to amend the Prisons Act and the Young Offenders Act ("the Custodial Legislation") by replacing the existing disciplinary provisions contained therein. The proposed regime is characterised by two new methods of dealing with the conduct of prison and custodial officers ("DCS officers"). First, DCS officers will be prescribed for the purposes of the *Public Sector Management Act 1994 (WA)* (PSMA) making them subject to the operation of the disciplinary processes found in Part 5 of the PSMA (refer clauses 7 and 14 of the CLODA Bill). Secondly, special provision is made for the removal of a DCS officer on the grounds that the Chief Executive Officer (CEO) has lost confidence in the officer's suitability to continue in the role of a DCS officer having regard to the officer's integrity, honesty, competence, performance or conduct (refer clauses 7 and 16 of the CLODA Bill).
3. The Commission supports the proposed amendments and considers that the new regime will bring into line the DCS powers to deal with misconduct with the regimes of other similar agencies like Western Australia Police ("WA Police").

Ability of DCS to deal with misconduct

4. Over the past 4 years the number of notifications of allegations of misconduct received by the Commission from DCS has increased significantly. For the 2009-10 financial year the Commission received notifications of 286 allegations of misconduct pursuant to section 28 of the CCC Act. In 2010-11 this number increased to 639 and in 2011-12 to 795. By the 2013-14 financial year the number had increased to 1,761 allegations.
5. The dramatic increase in misconduct allegations caused the Commission to carry out a review of the situation. What was apparent is that many of the notifications related to DCS officers who were repeatedly engaging in, or suspected of engaging in, the same conduct. Further, where matters had been referred back to DCS for its action it was often the case that none was taken.
6. The Commission found that DCS was not effectively dealing with DCS officers who were found to have engaged in misconduct.
7. Discussions with DCS indicated that at the root of the problem was the disciplinary regime provided for in the Custodial Legislation. The disciplinary provisions are outdated and ineffective insofar as they fail to facilitate the efficient handling of misconduct and other performance related matters. In particular, there is little scope for the removal of a DCS officer from duty or

termination of employment. As a result, DCS has been relying on the Commission to investigate and make findings and recommendations with respect to DCS officers engaging in misconduct in order to provide a basis for dealing with that officer in an appropriate way.

The Commission's role in dealing with misconduct

8. In relation to public sector misconduct, the Commission's role is primarily one of oversight, with the handling of day-to-day misconduct allegations essentially being the responsibility of public authorities.
9. The Commission notes that during the Parliamentary Debates in which the CLODA Bill was discussed a number of Ministers expressed the view that the proposed amendments mirror powers already available under the *Corruption and Crime Commission Act 2003 (WA)* ("the CCC Act") and as such there is no need to confer such powers on DCS.¹ The Commission takes a different view.
10. The Commission was established as a result of recommendations made in the *Report of the Royal Commission Into Whether There Has Been Any Corrupt or Criminal Conduct By Any Western Australian Police Officer*, January 2004 ("the Kennedy Royal Commission").
11. The Kennedy Royal Commission Interim Report, published in December 2002, proposed that the Anti-Corruption Commission should be replaced by a new external oversight agency, called the Corruption and Crime Commission of Western Australia. With respect to functions relating to WA Police, the Interim Report recommended that the Commission be given the power to:
 - a. oversee investigations by the Commissioner of Police into police misconduct;
 - b. investigate allegations of misconduct in relation to police officers;
 - c. direct the Commissioner of Police to carry out investigations in a matter and at a time the Commission directs; and
 - d. investigate serious and organised crime.
12. According to the Kennedy Royal Commission, the Commission's primary responsibility was to oversight WA Police's management of complaints of police misconduct. The recommendation stated that the investigation of allegations of misconduct should remain with the Commissioner of Police with the Commission's role being:
 - a. to monitor the management of the allegations; and
 - b. have the ability to investigate independently if so required.
13. The CCC Act embodies the recommendations of the Kennedy Royal Commission in the statutory purposes of that Act. Section 7A(b) of the CCC Act

¹ Western Australia, *Parliamentary Debates*, Legislative Council, 13 August 2014, p.5125c-5142a, p.2 (Sue Ellery); 21 August 2014, p5693b-5698a, p.2 (Ken Travers).

provides that one of the main purposes of the Act is "to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector". Section 7B(3) provides that the Commission is to achieve this purpose by helping "public authorities to deal effectively and appropriately with misconduct by increasing their capacity to do so while retaining the power to itself investigate cases of misconduct, particularly serious misconduct".

14. As such, it is the Commission's role to assist DCS to deal with misconduct through improving its ability to effectively and appropriately handle allegations. The Commission will investigate allegations of serious misconduct, and to a lesser extent minor misconduct, in circumstances where it considers there is a need to do so having regard to the Commission's statutory purposes and the most appropriate use of its resources. The provisions of the CCC Act are available to the Commission to that end.
15. It is the Commission's role to assist to improve a public authority's ability to manage and deal with misconduct, as per the recommendations of the Kennedy Royal Commission. There is merit in this approach to oversight; research shows that oversight focussing on the culpability of an individual does not reduce the incidence of misconduct.² Rather, an organisational approach aimed at identifying shortcomings in policy and procedure and assisting to improve the management of misconduct has been found to effect longer lasting change.³
16. For these reasons, the Commission does not consider that the provisions of the CCC Act should be relied on as a reason for not giving DCS similar powers to deal with misconduct. Though the proposed amendments confer on DCS powers that are similar in scope and nature to the powers available to the Commission, they would be exercised by DCS enabling it to deal with allegations of misconduct in its own right. The Commission would retain the power to investigate, where it considers appropriate, allegations of serious misconduct or other misconduct.

The Commission's DCS Strategy

17. In response to the increasing number of notifications from DCS, totalling 1,761 allegations in the financial year 2013-14, the Commission developed a targeted strategy aimed at improving the relevant policies and procedures of DCS while investigating classes of conduct of particular concern (for example, inappropriate associations and smuggling of contraband).

² Phillips, E., & Trone, J. (2002). *Building Public Confidence in Police Through Civilian Oversight* New York City: Vera Institute of Justice; Walker, S. (2005). *The New World of Police Accountability*. Thousand Oaks: Sage Publications, Inc; Miller, J. (2002). *Civilian Oversight of Policing: Lessons from the Literature*. *Global Meeting on Civilian Oversight of Police*. Symposium conducted at The Vera Institute of Justice, Los Angeles; Livingston, D. (2004). *The Unfulfilled Promise of Citizen Review*. *Ohio State Journal of Criminal Law*, 1(2), 653-669.

³ *Ibid.*

18. Part of the Commission's strategy is to assist DCS to strengthen its policies, processes, practices, culture and its capacity to appropriately deal with matters concerning misconduct in its own right. However, the positive change effected by these efforts is frustrated by DCS's limitations in dealing with the conduct of its officers.
19. The current regime for disciplinary action under the Prisons Act, found in Part X, provides that a prison officer is guilty of a disciplinary offence if he or she:
 - a. breaches his or her statutory duty;
 - b. disobeys an order;
 - c. is negligent in his or her duties;
 - d. engages in misconduct relating to performance of his or her duties or fitness to hold office; or
 - e. commits an act of victimisation.
20. The penalties available where a disciplinary offence has been proved depend on who presides over the inquiry. Where a Superintendent hears the inquiry under section 100 of the Prisons Act, the penalties are at the lowest end of the scale of punishments; a caution, a reprimand or a fine of not more than \$50. Where a Superintendent, having regard to the nature of the offence or evidence presented at an inquiry, considers he or she is unable to adequately deal with the matter the inquiry is referred to the CEO pursuant to section 105 and 106 of the Prisons Act. Determination of the matter pursuant to section 106 provides additional penalties including suspension from duty, reduction in rank and dismissal. These additional penalties are available only if the Superintendent considers he or she is unable to determine the matter, thus access to the more severe penalties hinges on this occurring.
21. It is clear that the current regime is outdated, not in line with the rest of the public sector and fails to provide for the adequate handling of performance matters.
22. The CLODA Bill amendments provide a mechanism for the CEO to either initiate disciplinary proceedings under Part 5 of the PSMA or to remove a DCS officer by terminating his or her employment based on a loss of confidence in the officer's suitability to continue in that role. These provisions will improve the means by which DCS can deal with an officer's substandard performance or misconduct and as such is likely to have a positive impact by reducing the incidence of misconduct at an organisational level.

Powers to compel evidence

23. As part of the removal process set out in the amendments, the CEO is authorised to compel a DCS officer to provide any information or answer any question and produce any document during the course of an investigation in relation to removal action. A DCS officer compelled to provide answers or

documents is not entitled to claim the privilege against self-incrimination in relation to a criminal offence or a disciplinary offence. Information compelled using these powers attracts a direct use immunity protecting the DCS officer from its use in evidence in any subsequent criminal proceedings.

24. The power to compel evidence would substantially improve DCS's ability to deal quickly and effectively with the misconduct or substandard performance of its officers. This would occur for two reasons:
 - a. by not affording DCS officers the benefit of privilege against self-incrimination, investigators could avoid difficulties and delays arising as a result of witnesses refusing to answer questions where their conduct might tend to expose them to prosecution or penalty; and
 - b. by avoiding the need to convene a formal hearing which requires substantial preparation, utilises significant resources, presents scheduling difficulties and under the current regime is complicated by very short timeframes for commencing inquiries.

Commission investigations

25. In the Commission's experience, the refusal of witnesses to participate willingly in an investigation seriously impacts the timeliness and efficiency of the investigation. This is because Commission investigators must then either seek to compel them to attend a private or public examination or progress the investigation without their evidence. Under the CCC Act the Commission's power to compel oral evidence is confined to private or public examinations. Similarly, officers giving evidence are afforded the immunity against the subsequent use of the evidence only where it is given in an examination before the Commission and not in an interview. The result is a reluctance of many witnesses to give evidence informally, preferring the safeguards afforded by an examination.
26. Voluntary interviews with public officers, as part of Commission investigations, are:
 - a. efficient, in that they require minimal resources, and can be conducted at short notice; and
 - b. effective, in that facts can be established or material identified that enable a Commission investigation to be progressed in a timely manner.
27. The Commission has frequent interactions with public officers during an investigation into misconduct, including voluntary interviews. Predominantly these interactions are for the purpose of establishing the facts about the conduct of other persons, some of whom are public officers. While a voluntary interview may result in adverse consequences for some public officers, it is overwhelmingly more often the case that the evidence provided confirms the absence of any wrongdoing.

28. The Commission does not have the power to compel a person to attend an interview or to respond to questions during an interview. A person may choose not to participate in a voluntary interview, when invited to do so. If they do choose to participate, they may choose not to answer any or all of the questions. In those circumstances the Commission may need to use its coercive powers to conduct an examination for the purposes of an investigation. Private examinations are resource intensive, costly and can rarely be conducted at short notice and as such cause a significant impediment to the timely progression of Commission investigations.
29. In December 2013 the Commission provided the Attorney-General with a submission seeking amendments to the CCC Act to confer on Commission investigators the power to compel police officers to answer questions in relation to a misconduct or reviewable police action investigation. The submission set out the operational benefits that would be afforded by the power to compel a police officer to answer questions and similarly the difficulties experienced when a police officer refuses to cooperate.
30. The power to compel answers increases public accountability by making public officers answerable for the exercise of powers conferred on them by reason of their employment. Public accountability rests on giving an account and being held to account and in doing so operates to prevent abuse of statutory powers. The Commission seeks the power only in relation to police officers and not other public officers. This is because police officers occupy a position of considerable authority and because the powers they exercise are extensive and in some cases vulnerable to abuse. For example, the power to use force against a member of the public in itself demands a high standard of accountability and arguably imposes on police officers a more onerous obligation to give an account than would otherwise be expected of a public officer.
31. It is common for Commission investigators to have frequent interactions with police officers in the early stages of an investigation. This may involve speaking to the officer the subject of the allegation, in addition to his or her colleagues who may have been present at, or who may have witnessed, the alleged incident. These conversations are voluntary and typically take place at an early phase of the investigation. Frequently this process reveals sufficient credible information enabling the investigators to be satisfied that the allegation cannot be substantiated enabling the investigation to be completed with minimal disruption to police operations, providing certainty for the officer the subject of the investigation and closure for the complainant.⁴
32. Conferring on the Commission and DCS alike the power to compel officers to answer questions would enhance public accountability and, in addition, the timeliness of investigations and the quality of their outcomes would be improved.

⁴ Joint Standing Committee on the Corruption and Crime Commission, *Report No.16 Corruption and Crime Commission voluntary interviews with WA Police officers*, August 2014.

Nature of the powers conferred

33. Like police officers, DCS officers are conferred with extensive powers including the power to use force. In addition, DCS officers operate in an environment where they are more vulnerable to corruption. It is common for DCS officers to develop relationships with inmates and in doing so they are more susceptible to manipulation and coercion. Consequently, it is imperative that DCS officers are subject to strict standards of integrity, accountability and oversight. A critical element to this is the ability of DCS to identify and deal with DCS officers not adhering to the required standards and to do so in a timely and efficient manner.
34. The current regime, set out in Part X of the Prisons Act and Part 3 of the Young Offenders Act, is considered to be unduly restrictive and fails to provide an adequate method for dealing with performance and misconduct of DCS officers. In order to minimise the incidence of misconduct and risk of corruption within a prison, the CEO must be able to remove DCS officers who are engaging in conduct of that nature.

Support for the amendments

35. The Commission supports the amendments proposed under the CLODA Bill and considers that their enactment will considerably improve DCS's ability to handle matters relating to misconduct of its officers. As a result the Commission would expect to see a significant decrease in the incidence of misconduct and a consequent decrease in the number of matters notified to it by DCS.⁵
36. Reducing the incidence of misconduct and decreasing the number of notifications would have the positive effect of freeing up considerable Commission and DCS resources currently associated with handling these matters.
37. In addition, the Commission is of the view that better control over DCS officers by DCS would improve the management of prison facilities, thereby reducing the risk of corruption. This is particularly the case where inappropriate associations and smuggling of contraband are involved.



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7 October 2014

⁵ The Commission notes that the amendments will have no effect on DCS's obligation to notify the Commission of matters relating to misconduct which will continue to be subject to the notification guidelines made pursuant to section 30 of the CCC Act.