PSM Sub 5b.

GOVERNMENT OF WESTERN AUSTRALIA

PSC | Public Sector Commission
Office of the Commissioner

5 May 2014

Mr Tim Hughes
Principal Research Officer
Parliament House
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Dear Mr Hughes

RESPONSES TO QUESTIONS ON NOTICE FROM PUBLIC ACCOUNTS COMMITTEE HEARING ON 9 APRIL 2014

On 14 April 2014, you wrote to Mr Dan Volaric in his capacity as Acting Public Sector Commissioner, requesting written responses to questions taken on notice during the Public Accounts Committee hearing held on Wednesday 9 April 2014.

As requested, enclosed are the written responses to the questions on notice. Should the Committee require any additional information, please contact Ms Rebecca Harris

Yours sincerely

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PUBLIC SECTOR COMMISSIONER

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PUBLIC SECTOR COMMISSIONS RESPONSES TO QUESTIONS ON NOTICE FROM PUBLIC ACCOUNTS COMMITTEE HEARING ON 9 APRIL 2014

1. Can you confirm the number of breach of public sector standard claims lodged against CEOs since the 2010 amendments came into effect?

A breach of standard claim is only valid where it relates to a reviewable decision on a matter to which a Standard applies. Such reviewable decisions are typically authorised by the employing authority (CEO) or made by a senior officer with delegated powers.

In this context, it can be considered that all breach claims are lodged against a decision made by a CEO. However, typically the claim is rarely about the conduct or personal decision of a CEO.

All breach of standard claims received since the 2010 amendments were reviewed to identify those where the CEO was directly involved in the process being complained about and/or was the direct subject of the complaint lodged.

Of claims lodged with the Commission, it is confirmed that there were **five (5)** such breach of standards claims.

1 (a). How many claims were resolved internally within the department?

Breach of standard claims allow a person to seek relief if they believe a decision made by a public sector agency has breached a Public Sector Standard and they have been adversely affected by the breach. Claims are lodged directly with the relevant agency, which has 15 days in which to address the claim. If it is not resolved within 15 working days after lodgement the agency must forward the claim to Public Sector Commission.

The 2013 State of the Sector Report (page 76) reports that 65 breach of standard claims were resolved internally by agencies in the 2012/13 financial year. Figures are not available for years prior to 2012/13 as the data was not collected.

It is not known how many of these 65 claims directly related to a complaint against a CEO, although it would be expected that all claims involving the direct actions of a CEO would be referred to PSC.

1 (b) How many claims could not be resolved and were referred to the Commissioner for review?

All **five (5)** claims referred to in the response to 1 could not be resolved internally in the department and were referred to the Commissioner.

1 (c) Of the claims referred to the Commissioner for review:

i. How many claims were deemed to be a breach and what 'relief was ordered to be given by the Commissioner?

One (1) of the five (5) breach of standard claims directly involving a CEO was deemed to be a breach.

During the review process the CEO committed to a number of actions, including a letter of apology and a policy review. The Commissioner deemed these to be appropriate relief.

ii. How many claims were dismissed?

Four (4) claims were dismissed.

iii. How many claims did the Commissioner decline to review?

No claims were declined.

iv. How many claims remain ongoing?

No claims remain ongoing.

1 (d) In how many instances has the Commissioner delegated his authority in this area due to a perceived or actual conflict of interest?

There are no instances where the Commissioner delegated his authority in this area.

2. Can you provide data on the number of complaints received against CEOs since the 2010 amendments took effect that did not trigger the section 80 disciplinary process?

The number of matters dealt with as complaints received against CEOs since the 2010 amendments that did not trigger section 80 disciplinary processes is **thirty three (33).** A number of these were multiple complaints by the same complainant. In addition, **four (4)** matters dealt with as complaints were made against chief employees.

It be should be noted that there are a number of allegations that are made serially, or repeatedly or are considered to be frivolous, vexatious or lacking in substance, therefore do not result in the matter being dealt with as a complaint.

3. Can you confirm the number of complaints made against CEOs that were dealt with under the provisions of section 81(1)

When considering a complaint received about a CEO, a preliminary assessment is undertaken to determine the most appropriate course of action to take – this may include a decision to take action under section 81(1).

3 (a) While this was not asked for during the hearing, would you also be able to break this number down into:

- **complaints that proceeded to disciplinary matters (under s81(l)(a));**

  One (1) matter proceeded to disciplinary action under s 81 (1)(a).

- **complaints that led to the recommendation of improvement actions (under s81(l)(b)(i));**

  There were no complaints that proceeded to disciplinary action under s 81 (1)(a) that led to the recommendation of improvement action under s81(1)(b)(i).

- **and complaints where it was decided to take no further action (under s81(l)(b)(ii))?**

  There was **one (1)** complaint that proceeded to disciplinary action under s 81 (1)(a), where it was decided that to take no further action (under s81(l)(b).

4 In the context of CEO performance assessments, what type of performance assessment would be deemed substandard?

Section 79 of the *Public Sector Management Act 1994* (PSM Act) provides an exclusive definition with respect to the type of performance that may be deemed substandard for the purposes of Part 5 of that Act. In the context of CEO performance this would include a CEO not attaining or sustaining a high level of performance expected of them having regard to their position and status.

In considering whether their performance is substandard, a number of matters would be taken into account. These may include any stated performance criteria and targets, instructions or role specifications which are captured under legislation, performance agreements or through some other means between the CEO and their responsible authority, Minister or employing authority.

The absence of any reasonable cause or the identification of obstacles contributing to expected performance standards not being met, and the failure to meet these standards particularly where some prior discussion or concern has been raised without any demonstrated improvement, could also contribute to performance being deemed substandard.

5 **Can you provide any comment on the rationale behind the amendment to Section 22 (the insertion of Subsections 22(2) and 22(3)) of the *Public Sector Management Act 1994* that was passed in 2010?**

The words in s22(1) were contained in the former s22 under the same heading. Section 22 (2) was needed, as the Commissioner's functions were expanded under the 2010 amendments to enable him or her to conduct reviews and special inquiries. Prior to 2010 these were conducted by the Minister himself. Under the 2010 amendments the Public Sector Commissioner can be directed by the Minister to undertake those functions (reviews under s24B(2); special inquiries under s24H(2)); as well as in relation to establishment (etc) of departments under s35(4). Section 22(2) reflects the limited capacity of the Minister to direct the Public Sector Commissioner in these areas.

S22(3) was needed to avoid the unintended potential for s32 to authorise the Minister as the responsible authority to direct the Public Sector Commissioner in matters other than those explicitly provided in the Act. This might have arisen without s22(3) because the Public Sector Commission is established as a department as that term is defined in s3(1), the Public Sector Commissioner is a deemed CEO under s4(1), and because the Minister is the responsible authority in relation to a department.

With respect to the series of questions posed during pages 2 and 3 of the transcript relating to a disciplinary procedure raised by the Civil Service Association WA (CSA) in its testimony before the Committee on 2 April 2014, the following is provided.

- **The time taken to address and resolve a disciplinary matter**
  It is noted that the matter raised by the CSA at the Committee's hearings of 2 April 2014 involves a Social Trainer employed by the Disability Services Commission (DSC). Currently, Social Trainers employed by the DSC are not subject to Part 5 of the PSM Act and hence are not subject to Commissioner's Instruction 3 (CI). As such the requirements of the CI do not apply. Despite this, the Committee may wish to note that the DSC with the support of the CSA is seeking to have social trainers prescribed pursuant to s76 (1) (b) of the Act in order for the disciplinary provisions of Part 5 to apply.

  Under Part 5, the disciplinary provisions that apply to social trainers will be less limiting, provide more detailed procedural arrangements and ensure greater consistency with the arrangements that apply to other employees in the DSC.

Additionally, the *Custodial Legislation (Officers Discipline) Amendment Bill 2013* currently before the Legislative Council, provides, among other things, for the disciplinary process provided in Part 5 of the PSM Act to apply to prison officers. Again, it is considered that the arrangements under Part 5 are less restrictive and provide greater flexibility than that which currently applies.

It is further noted that the matter was referred to the Corruption and Crime Commission (CCC) and was subject to the laying of criminal charges which in turn led to the suspension of the disciplinary investigation by the DSC. It is important to recognise the interaction between the *Corruption and Crime Commission Act 2003* (CCC Act) and the disciplinary provisions of the PSM Act and CI 3.

Because the CCC definition of misconduct includes all serious disciplinary allegations, those disciplinary allegations must be reported to the CCC. If the CCC exercises its powers to require an employing authority to suspend a disciplinary investigation while the CCC considers the matter, which it can do under s42 CCC Act, this will cause an unavoidable delay to completion of the disciplinary process.

Likewise where there is a criminal investigation by the WA Police, any related disciplinary action must be put in abeyance. This is because the principle of the right to silence will apply in a criminal context but this right does not apply in a disciplinary setting. A requirement on an officer to answer questions in a disciplinary setting could prejudice a related criminal charge or trial process. Hence again this will cause an unavoidable delay to completion of the disciplinary process.

At a practical level, the example provided could be regarded as an exceptional case and not necessarily representative of a typical disciplinary process but it is agreed that all disciplinary investigations should be addressed and resolved in a timely manner having regard for the specific circumstances that might be involved and that procedural fairness is applied.

It should also be emphasised that the State of the Sector Report (at page 26) reports that of the 1,518 investigations into suspected breaches of discipline in the public sector in 2012/13, 88% were completed within 6 months.

- **The rules of procedural fairness are not explicitly set out in the CIs**
  This matter was considered extensively during the initial drafting of the CIs, legal advice sought and the matter revisited as part of the review undertaken in 2012. It is considered that the key applicable elements of procedural fairness are reflected in the CI. In particular, an employing authority is required to act fairly; to avoid bias; to give an employee notice (in writing) of the accusations against him or her, to allow the employee an opportunity to respond to any allegations; to allow an employee to be accompanied by a support person in appropriate cases; and to notify the employee of the outcome and give reasons.

  As procedural fairness is an evolving legal concept, attempting to codify the rules is considered not advisable. Articulation of procedural fairness has been included in the Public Sector Commission's Guidelines on disciplinary matters, but it is considered that embedding them in a statutory instrument would not allow for their evolving nature and could result in undesirable inflexibility in application of the rules.

The Public Sector Commission promotes the active provision of procedural fairness and supports agencies meeting their requirements through various forums including training on disciplinary processes and investigations, and the provision of a consultancy service on disciplinary matters.

- **The use of suspension on full pay**
  The flexibilities provided for under the CIs in relation to suspension allow an employing authority to make decisions around the suitability of a person remaining in the workplace while the disciplinary matter is considered. An employing authority must give a person an opportunity to respond to the suspension and take this response into consideration.

- **Failure to particularise the allegations at the beginning of the process**
  CI 3 sets out that a decision that a breach of discipline has occurred cannot be made unless the employee is notified in writing of the conduct relating to the possible breach of discipline, in sufficient detail to enable the employee to know what is alleged against him or her. The flexibilities around when those particulars are put to the employee are an important provision to allow for sufficient information to be gathered to aid in formulating the allegations accurately.

  The Public Sector Commission supports notifying employees of allegations at the earliest possible opportunity, but sees the need for this to be balanced against agencies having and providing sufficient detail in the allegations to enable a sensible response from the individual and being able to react in a timely way to protect the public interest. It is also important to avoid inappropriately revealing an investigation prior to the notification of a decision having been taken by an employing authority to deal with the matter as a breach of discipline.

- **Decision-makers failing to make a proper assessment based on the facts**
  If this is occurring it would not necessarily be a failure or flaw in the construction of the CIs or the legislation, rather an issue of judgement by the employing authority. The Public Sector Commission actively works to educate agencies on the adequate consideration of evidence in order to make soundly based and impartial findings regarding breaches of discipline. It should be noted that investigators have no power to make any decisions regarding breaches of discipline. The employing authority alone has the power to make decisions. Investigators may provide recommendations on a finding, which the Employing Authority may or may not accept.