PUBLIC ACCOUNTS COMMITTEE

INQUIRY INTO AMENDMENTS TO THE PUBLIC SECTOR MANAGEMENT ACT 1994 (WA)

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 9 APRIL 2014

Members

Mr S.K. L'Estrange (Chair)
Mr B.S. Wyatt (Deputy Chair)
Mr W.J. Johnston
Mr M.H. Taylor
Mrs G. Godfrey

Hearing commenced at 9.50 am.

Mr DAN VOLARIC
Acting Public Sector Commissioner, examined:

Ms FIONA ROCHE
Deputy Commissioner, Public Sector Commissioner, examined:

Mr JOHN LIGHTOWLERS
General Counsel, Public Sector Commission, examined:

Mr LINDSAY WARNER
Director Policy and Reform, Public Sector Commission, examined:

The CHAIR: Ladies and gentlemen, can I please thank you so much for giving up your time this morning to join us for our hearing. I have a few things to read through with regard to procedures and then we will get into some of the questions. On behalf of the committee, I would like to thank you for your appearance before us today. At this stage I would like to introduce the members of the committee. I am Sean L'Estrange, the chairman. I believe you have already met the other members at the previous hearing but I will revise them for you. To my left is the deputy chair, Ben Wyatt, member for Victoria Park; Bill Johnston, member for Cannington; Glenys Godfrey, member for Belmont; and Matthew Taylor, member for Bateman. Today's hearing is a proceeding of Parliament and warrants the same respect that proceedings in the house itself demand. Even though you are not required to give evidence on oath, any deliberate misleading of the committee may be regarded as contempt of Parliament. Before we commence, there are a number or procedural questions I need you to answer. Have you each completed the Details of Witness form?

The Witnesses: Yes.

The CHAIR: Do you understand the notes at the bottom of the form?

The Witnesses: Yes.

The CHAIR: Did you each receive and read an Information for Witnesses briefing sheet regarding giving evidence before parliamentary committees?

The Witnesses: Yes.

The CHAIR: Do you have any questions related to your appearance before the committee today?

The Witnesses: No.

The CHAIR: Today's hearing has been called as part of the committee's inquiry into the amendments to the Public Sector Management Act. The purpose of the hearing is to allow the committee to acquire a greater understanding of how the act works in practice following the 2010 amendments, with a particular emphasis today on commissioner's instructions and the provisions relating to reviews and special inquiries. The committee also has several follow-up questions from its first hearing with you on 12 March. The committee has provided you with a series of questions in advance. We will proceed through these in the order they were provided. However, we are likely to ask additional question as we go along. For several of today's questions, the screen to my left will display relevant aspects of the act to assist the members. Before we move to the questions, would you like to take a couple of minutes to make a brief opening statement addressing the inquiry's terms of reference?

Mr Volaric: There is no need for that.

The CHAIR: We will move to the questions themselves. Nine commissioner's instructions are published on the Public Sector Commission's website. The CIs are numbered 1 through to 8, and 10. What is the status of CI 9? Has it been revoked?

Mr Volaric: No, it has not been revoked. A number of commissioner's instructions are generally developed over a period of time, including the CI relating to the review of classification level of employees seconded to special offices to assist a political office holder. This instruction was published as commissioner's instruction 10, when it should have been published as 9. The next instruction we develop will be numbered "9".

The CHAIR: Thanks for clarifying that for us. Have all current commissioner's instructions been made public?

Mr Volaric: Yes, they have. All commissioner's instructions are disseminated to public sector bodies once they have been developed. They are also published on the Public Sector Commission website. Pursuant to section 21 of the Public Sector Management Act 1994, Commissioner's Instruction No. 1, which is the employment standard, and Commission's Instruction No. 7, which is the code of ethics, are subject to section 42 of the Interpretation Act and therefore are disallowable by Parliament. As such, those instructions were also gazetted in the *Government Gazette*.

The CHAIR: In accordance with section 22A(6) of the act, who does the commissioner consult with before issuing, amending or revoking a commissioner's instruction?

Mr Volaric: The extent of consultation necessary and appropriate varies and is dependent upon the nature of the commissioner's instruction itself. The consultation is undertaken by the commissioner with such persons as are considered relevant and practical and may include the following; CEOs or chief employees of public sector bodies; the CPSU–CSA or other relevant unions; the labour relations division of the Department of Commerce, particularly if there are potential labour relations issues; the State Solicitor's Office, again, if there are legal implications; and other relevant stakeholders or occupational groups where the instruction is likely to have significant impact.

[10.00 am]

The CHAIR: Commissioner's Instruction No. 3, "Discipline – General" is due for review on 31 March 2014. What is the process for reviewing CIs?

Mr Volaric: Commissioner's instructions are reviewed periodically at the discretion of the commissioner, and that is undertaken by officers of the commission. With respect to commissioner's instructions 3 and 4, that has now been deferred until December 2015. The reason is that both instructions were reviewed during 2012, which included a process of consultation with public sector unions and government agencies. They were reissued in late 2012 with one minor change to commissioner's instruction 3. There were no significant issues with regard to the operation of the instructions, so a decision was made to undertake a review of these at a later date.

The CHAIR: Can you clarify who conducts these reviews?

Mr Volaric: Yes, the reviews are undertaken by officers of the Public Sector Commission following a consultation process similar to what I outlined in the previous question.

Mr W.J. JOHNSTON: Can I just ask a question about CI 3? We had the CSA giving evidence last week and it raised an issue arising in CI 3, which is found in paragraph 1.1 on page 2 of the commissioner's instruction. They said to us that public sector agencies were not properly recording the decision that is directed to them in that instruction, and that they were also then performing an investigation that went beyond the scope of the decision that was made at that paragraph 1.1. Have you heard of that issue being raised and do you have any comment about that?

Mr Volaric: I am not specifically familiar with that concern raised by the union. As a matter of course we undertake awareness and support services for agencies in the exercising of disciplinary matters and commissioner's instructions. If that issue was raised, it would certainly form part of our advisory service to inform agencies about their obligations under the commissioner's instruction.

Mr W.J. JOHNSTON: I will ask a supplementary question to that. If an agency is doing a discipline procedure and that discipline process does not comply with the commissioner's instruction, is that a valid discipline procedure?

Mr Volaric: There would be an avenue for the individual concerned to take the matter under appeal to the Industrial Relations Commission. If it was found that the process had been undertaken outside of the provisions of the Public Sector Management Act, including the commissioner's instruction, it could be dismissed under a technicality.

Mr W.J. JOHNSTON: The second question that comes under this issue is the question of the length of time. Again, the evidence was that some people had been on suspension while the investigation was on foot for up to 18 months. I am a former union official, but in the private sector, and the idea of a discipline procedure taking more than a week was quite a shock to me. Is that an issue that the Public Sector Commission is aware of and, if so, does the PSC have any comment on that?

Mr Volaric: I am unaware of that particular example. My area generally provides advice, support and assistance to agencies with respect to disciplinary matters, so I am not aware of that length of time. The commissioner's instructions and guidelines are very clear in suggesting to agencies that an informal process be undertaken. The prescriptive nature of undertaking disciplinary procedures changed with the introduction of the new reform bill and the commissioner's instructions, so it would be surprising if it were that length of time. Having said that, it may be due to reasons such as the matter being before a particular court if it were a potentially indictable offence. The agency may have been acting on advice of the State Solicitor's Office not to proceed with a disciplinary process until the court proceedings were concluded.

Mr B.S. WYATT: The review of CI 3 has been deferred to December 2015 but it was reviewed in 2012. On the issue that the member for Cannington just talked about, was the issue around the timing raised or discussed in that review in 2012? The CI itself has a number of time frames stipulated in 1.6, 1.7 and 1.10, but it is always in respect to 14 days once a breach of discipline has either been found or not been found. There is no stipulation of time frames in terms of the commencement of disciplinary proceedings and when things should happen. Has any thought been given to perhaps providing some stipulation or a time, because one of the examples given by the CSA when we last met was a very long period of time—18 months to two years—and it was not as a result of an indictable proceeding or anything taking place from memory. It struck me as a particularly poor way to manage disciplinary proceedings if you are dragging somebody out and then 18 months later the breach was changed and the original allegations were never put to that employee.

Mr Volaric: In the absence of knowing the full detail, my understanding is that the time lines were not raised as part of the review in 2012. They may have been discussed as part of the establishment of the CI in the initial phase, but I do not know whether—do you have any information on that?

Mr Warner: The whole purpose of the commissioner's instruction is to establish in some ways the minimum requirements that are obliged of agencies, and for the disciplinary proceedings to be determined by agencies suiting the needs and challenges to their organisation and the matters before them. If the instruction became too prescriptive, it could actually bog things down more than we would like for other agencies. The unions have raised from time to time some of the concerns that they have around the disciplinary action taken by agencies in relation to the CI, and we are more than happy to continue to consider any of the concerns that they raise.

The CHAIR: We might provide you with a transcript of the hearing from last week. If you would like to elaborate on a couple of these questions from that, we can do that for you.

Mr Volaric: That would be great. It would also enable us to go back over the feedback we received from the stakeholders as part of the 2012 review to see whether that was actually undertaken.

Mr M.H. TAYLOR: I appreciate you not wanting to be too prescriptive about the CI, but do you believe that putting a maximum time frame for that sort of a resolution within the CI is too prescriptive?

Mr Lightowlers: Section 82A tells us to try to proceed with as little formality and technicality as possible, so the less directive and prescriptive, the better. That is a preferred position and, given that we are dealing with tens of thousands of staff, the number of variables is infinite. You might have a staff member who has health issues and goes on leave, so a process cannot proceed because it is out of their power. They might suffer some incident and not be available, or witnesses might not be available. There is a real risk of establishing time frames that are rigid, which will defeat the point of the disciplinary process completely.

[10.10 am]

Mr B.S. WYATT: Just on that, though, Mr Johnston said he was a former unionist, I am a former lawyer and it strikes me that I think it is important to put the bite on agencies to crystallise the allegation. In the example that we were given, that simply did not happen to that employee. I understand that you do not know what we are talking about specifically; whereas we are happy to put in time frames once decisions around breach of discipline have happened or a decision that there was not a breach of discipline, but then vague on the front end crystallising the allegation. It just seems that that is, to be frank perhaps, the more important part of it so that you at least know what the issue is and what happened with this person. And I think we should say in that transcript the allegation was not put to that person completely and then at the end, 18 months later, the allegation changed. So it just struck me as a very poor way to manage that employee.

Mr W.J. JOHNSTON: I will just ask one final question as I do not want to labour these things. In your training or what the PSC provides to the agencies, is there a section to explain the concept of natural justice, which has the effect of making that paragraph 1.1 so important? Is that something that you focus on with agencies so that they have a proper understanding of what is actually being asked of them by that instruction?

Mr Volaric: Mr Chair, yes, we do have some guidelines that aim to assist agencies in understanding the disciplinary process in undertaking investigations. The principles of natural justice are strongly espoused in those guidelines.

The CHAIR: I will move on to the next question, which relates to sections 22C(b) and 22D(b). They make explicit the provisions for reporting respectively to the minister and the Parliament on compliance and noncompliance. So the first part to this is: how often do you report to the responsible minister on such matters?

Mr Volaric: Mr Chair, if it would suit the committee, I will give a broad response to all aspects of the questions, if that suits.

The CHAIR: Yes.

Mr Volaric: First of all, Mr Chair, I would like to note that 22C(b) refers to a report that is to be made to a minister whilst 22D(1)(b) refers to a report that has been tabled in Parliament. I would like to answer the question accordingly. In relation to 22C(b), reporting to a minister responsible for a public sector body is discretionary. It occurs in circumstances where the commissioner determined it is appropriate to provide advice about governance and/or management issues arising out of a matter that may impact on the broader operations of the public sector body or on the responsibilities of the minister. Since the establishment of the PSC, no report pursuant to section 22C(b) has been

made. As the commissioner has had no reason to report pursuant to 22C(b), no standard approach has been implemented. However, it would be expected that such reports would be provided in writing under a covering letter. The level of detail provided in a report would be that which is sufficient to advise a minister about the nature of the issues considered and the action taken by the commissioner. Generally, it would be expected that a report would be in writing and would include things such as a summary of the key observations and findings, any recommendations that had been made to the public sector body concerned and follow-up monitoring actions, if any, planned or expected to be undertaken by either the Public Sector Commissioner or the agency concerned. With regard to section 22D, that requires the commissioner to prepare an annual report, which is effectively the state of the sector report. Section 22D does not impose any specific obligation to report on compliance with commissioner's instructions that are not public sector standards or ethical codes. However, whilst there is no obligation, section 22D(1)(a) and (c) provide an avenue for compliance with other commissioner's instructions to be reported.

The CHAIR: Are there any other questions?

Mr W.J. JOHNSTON I did not understand it. I am terribly sorry that I did not understand the answer on the requirements of 22D, because it did appear to be written in an obligation form in the act there. It says —

> The Commissioner must … compliance or non-compliance by public sector bodies and employees, either generally or in particular, … with the principles set out in sections 8(1)(a), (b) and (c) and 9 and with public sector standards, codes of ethics and codes of conduct;

So you must report those things.

Mr Volaric: I am sorry, Mr Chair, that is the case and that is reported through the annual report, which is the state of the sector report.

Mr W.J. JOHNSTON: Right. So what you are saying is that the commissioner's instructions are not part of the obligations in 22D?

Mr Volaric: That is right, other than code of ethics or the code of conduct, which is undertaken through the state of the sector report. So, the state of the sector report is the reporting mechanism under 22D(1)(b).

Mr W.J. JOHNSTON: Okay. So you are saying that there is a reporting requirement that is a "must" under the act, but that "must" does not include compliance with the commissioner's instructions, or you are interpreting the act to mean that?

Mr Volaric: That is right.

Mr W.J. JOHNSTON: Do you think you should be reporting on those issues?

Mr Volaric: There is some requirement on agencies to report in their annual reports the extent to which they have complied with their code of ethics and code of conduct.

Mr W.J. JOHNSTON: But I am talking about the commissioner's instructions.

Mr Volaric: Yes, I understand. The act as it presently states is not requiring the commissioner to report in relation to commissioner's instructions, other than code of ethics and the employment standard.

Mr W.J. JOHNSTON: And do you think it should?

Mr Lightowlers: The commissioner's instructions issue the code of ethics and public sector standards, so it is wrong to say that we do not report on the commissioner's instructions; we do. Those two types of commissioner's instructions must be reported. Other types of commissioner's instructions tend to be administrative and managerial and are applied in particular instances. So I suspect a requirement to report across the board that was mandatory might end up losing the forest for the trees. That is part of the risk, I think, of taking that sort of stripped, absolute approach.

Mr W.J. JOHNSTON: Mr Chairman, I will just ask a follow-up question. In your most recent report to the Parliament, you comment on the low use of discipline procedures. There is in fact a comment in the report. I do not have it in front of me but it sort of implies that given the number of employees, the low number of discipline cases shows that there must be an issue out there that is not being dealt with. That is my interpretation of that paragraph, and so it just seems strange that you are not asking agencies to report on their compliance with the instructions. Would that not then get people to start looking at the fact that you have got somebody hanging around for 18 months stuck in a discipline procedure with no end? These are the sorts of things that the Parliament would really, really like to know about.

Do you see what I mean? I seriously cannot believe, as a former practitioner who defended members under allegations of discipline issues, that anyone would allow a procedure to go on for 18 months; it is just inconceivable, and yet we have had that raised with us and you are not even denying that it occurred. Surely this has got to be dealt with, otherwise there will never be an improvement in the compliance with discipline procedures.

[10.20 am]

Ms Roche: We do ask—through our annual agency survey process, which is then reported in the "State of the Sector Report"—agencies that have undertaken a disciplinary process what the average time taken was or how long it has taken, and then we report on the average. We did report last year that most investigations—88 per cent—were completed with six months on average. We do ask that question so that we get a sense of how long disciplinary investigations take, and we then report to Parliament through this process to say on average they are taking about six months; 88 per cent of agencies are saying that they complete a disciplinary investigation within six months or less. I think what that reflects is that the vast bulk of disciplinary investigations are done relatively quickly, or within that sort of time frame. There is no doubt some of them take a lot longer than that, and too long, frankly, in some cases. But I would not want it to show on record that we do not ask that question of agencies; we do, and we do report to Parliament through the "State of the Sector Report".

Mr B.S. WYATT: Do the KPIs demanded of CEOs include compliance with commissioner's instructions?

Mr Volaric: The CEO performance agreements do not specifically require that to be detailed in their performance agreement.

Mr B.S. WYATT: I am just thinking in terms of dealing with that issue that Mr Lightowlers has raised in terms of logging things down, which was your concern. It may be that in the "State of the Sector Report", one way to deal with it may be—again, I referred before to putting the bite on the agencies—to put the bite on the CEO by simply asking every CEO, "Do you undertake that all commissioner's instructions have been complied with?" So the bite is on them to then ensure that that is the case, rather like directors' duties; ultimately they sign off books, and there are all sorts of undertakings implied in that. That way, you are not, or the commission is not having to spend, undoubtedly, a huge amount of work following every commissioner's instruction through each agency. My view on that is that that is up to the CEO—that is what they are paid to do—and maybe there should be a specific reference in their performance agreement saying, "The commissioner's instructions are". I think Mr Johnston made the point that they are part of the Public Sector Management Act—subject to interpretation—and, therefore, must be complied with. That may be a way to do it. The CEO, when they say to the commissioner, "Yes, we have", and if they have not, they are the ones who carry the can on that.

Mr Volaric: The performance agreement does have a requirement for CEOs to report on their meeting their governance requirements under the Public Sector Management Act, and their functions as a CEO would be incorporated in that area. The commissioner can inform the responsible authority in those instances where he is made aware or has some information and data

to hand that would suggest a particular agency may have some issues, systemic or otherwise, or widespread, that he would need to bring to the attention of the responsible authority. In those instances, if matters come to his attention, such as 18-month disciplinary processes not being complied with, he can then raise that as part of those discussions under the performance agreement framework.

Mr Lightowlers: Can I also draw your attention to section 9(a)(ii) of the Public Sector Management Act, which says that a principle of conduct that must be observed by all public sector bodies and employees is that they are to comply with the provisions of —

> the Commissioner's instructions, public sector standards and codes of ethics; …

So it is in there at that high level.

The CHAIR: I suppose the line of questioning we are looking at at the moment relates to the level of detail that is provided to the responsible minister. You have articulated that the level of detail is as you have in your "State of the Sector Report". A question I have relating to that is: who sets the standard for the level of detail of that report?

Mr Volaric: That is set by the Public Sector Commissioner.

Ms Roche: Chairman, can I add one more response in relation to the previous question around whether chief executive officers could be made to comply with the commissioner's instructions through the performance agreement process.

Mr B.S. WYATT: As a KPI, that is right, yes.

Ms Roche: Can I draw your attention to section 30 of the act, which actually requires, under the duties of CEOs—section 30(b)—that they must comply with the commissioner's instructions.

Mr B.S. WYATT: Yes, I am sure that is the case, and there is legislation out there that contains all manner of evils. Again, I think we are very focused on this particular circumstance of a CEO whose performance each year is measured against a specific line item of compliance and reporting back, and that would then, hopefully, capture a scenario where somebody has clearly fallen through the cracks. I always like the idea of making the CEO accountable for that. That way, they then make sure that the processes are in the place in the agency to ensure that does not happen. Maybe I am being unfair, but if I asked every CEO to come through and tell me what their duties were, would they capture all that? Probably not, as many directors of companies would not either under the Corporations Act. In terms of when their position and pay are dependent on a particular line item, I find you get better accountability.

Mr W.J. JOHNSTON: You are pointing out all these obligations, which is good—I am not saying that is a bad thing—but then no-one is really clear about how you measure any of these things. I cannot believe that you allow discipline procedures to take so long. Six months in the private sector would never be accepted for an outcome for a discipline procedure. So, given that you are not asking them to tell you when a case takes too long, then, guess what? They are not going to take any action about that because there is no discipline on the CEO to get things done. We have already had the suggestion that there is a problem with discipline in the sector. This would be a way of getting a handle on some of those things.

The CHAIR: I am mindful of the fact that we have a fair bit to get through today. I will move on to the next question: for what purpose are commissioner's circulars issued, and where do commissioner's circulars stand in the event of any inconsistency between these and commissioner's instructions?

Mr Volaric: The Public Sector Commissioner's circulars are administrative instruments issued under the commissioner's general functions contained in section 21A(a), (b) and (c), and associated powers in section 22G of the act. They primarily relate to public sector management policy or arrangements that are mainly advisory or guiding, rather than compulsory. Commissioner's

instructions, on the other hand, are instruments issued by the commissioner under section 22A of the act. They provide directions to public sector bodies and/or employees on matters relating to the commissioner's statutory functions or application of the act. A commissioner's instruction would prevail over any inconsistent circular. It would be fairly unlikely for any inconsistency to arise between the Public Sector Commissioner's circular and the instruction because each instrument is used for different purposes. Even if a Public Sector's Commissioner's circular outlined the mandatory policies, such an obligation, by definition, would not relate to any of the commissioner's statutory functions under the act. On the other hand, an instruction, by definition, must relate to the commissioner's statutory functions or to the Public Sector Management Act.

The CHAIR: Thank you for that. We will move on to the next section of today's hearing, which relates to public sector standards, codes of ethics and codes of conduct. Question 7: how are departmental codes of conduct established; and what role does the commissioner play in assisting agencies in this respect?

Mr Volaric: Commissioner's instruction 8, "Codes of conduct and integrity training", requires all public sector bodies to develop, implement and promote a code of conduct, setting out the minimum standards of conduct and integrity to be complied with by that particular public sector body. The code of conduct is to be consistent with principles of commissioner's instruction 7, "Code of Ethics". While commissioner's instruction 8 does not prescribe a format for a departmental code of conduct, it requires departments to undertake a risk assessment to identify conduct requirements, and as a minimum must address a number of areas. There are seven of those. The first is personal behaviour; the second, communication and official information; the third, fraudulent or corrupt behaviour; the fourth, use of public resources; the fifth, record keeping and use of information; the sixth, conflicts of interest in gifts and benefits; and the seventh, reporting suspected breaches of the code. With regard to the commissioner providing support to agencies in this regard, he has a role under section 21(1)(c) of the act to assist public sector bodies to develop, amend or repeal codes of conduct. That assistance is provided through the agency support division of the Public Sector Commission, and such support has been the development of guideline material called the "Conduct guide", and this outlines key considerations for departments when establishing or developing their codes.

[10.30 am]

We have a consultancy service for departments to assist them to develop or amend their codes of conduct. That includes providing assistance in reviewing the codes of conduct and providing information that may assist them in enhancing the codes. We also have a daily advisory service or an advisory line which we use to provide assistance to agencies in that regard as well.

The CHAIR: Thank you for that. I know we covered a fair bit of this earlier, but I will ask the question in any case —

Mr B.S. WYATT: Do all departments now have a code of conduct?

Mr Volaric: Yes.

The CHAIR: There are currently six public sector standards in human resource management issued by the commissioner. Your last annual report and "State of the Sector Report" quantified the number of confirmed breaches of standards that occurred the previous year but did not go into any further detail as to the identity of the department or the nature of the breach. Section 22D(b) allows for reporting of non-compliance to be provided "either generally or in particular". Are there examples where the commissioner has published the identity of the department that breached a standard and provided details on the nature of the breach; and, if not, under what conditions would he consider reporting the particulars of a breach?

Mr Volaric: Mr Chair, the intent of the report under section 22D is to provide a broad picture of the sector including trends, patterns and systemic issues. To date there have been no specific examples

brought to the commissioner's attention that he considered warranted reporting the particulars of a breach in this manner since the reform act came into effect. The circumstances in which the commissioner might consider reporting the particulars of a breach of standards finding would include, but not necessarily be limited to: where issues material to the breach finding were identified as being systemic and of a nature that fundamentally compromised the achievement of merit, equity and probity beyond the specific transaction to which the breach applied; and where the public sector body refused to implement a recommended relief or consider any practice improvement recommendations made by the commissioner, or where there were issues with the actions of individuals, particularly those individuals at a senior level, or the issues were widespread in nature.

The CHAIR: I know you are going to also look at that transcript relating to the timeliness of inquiries, including matters of that nature.

Mr Volaric: Yes.

The CHAIR: We will move on to question 9: can you explain the procedures for dealing with a claim for relief for a breach of a public sector standard under parts 3 and 4 of the Public Sector Management (Breaches of Public Sector Standards) Regulations 2005?

Mr Volaric: Yes, Mr Chair. This is a fairly detailed response. By way of context, a breach of standard claim allows a person to seek relief if they believe a reviewable decision, as defined in the regulations, made by a public sector agency has breached a public sector standard. The approach that the commissioner has taken is consistent, thorough and transparent to every breach of standard claim that has been received. A review process is outlined in regulation 18 of the Public Sector Management (Breaches of Public Sector Standards) Regulations 2005. A review of a standard claimed by the commissioner is triggered by the receipt of an unresolved claim referred through operation of regulation 10A of those regulations by the public sector body. The review procedures under the regulations are operationalised by the commission through four key steps.

The first is once a claim is received, the matter is allocated to a review officer within the Public Sector Commission. That review officer considers all the material provided by the claimant in support of the claim and response to the claim by the referring agency. This includes, where possible, interviewing the claimant. The willingness or interest of both parties to conciliate is explored at that point in time. Following consideration of the response to the claim provided by the referring agency, as well as ensuring that validity and regulatory compliance issues have been met, an initial assessment would then be undertaken. As part of step 2, the initial assessment determines whether the claim is valid, should be assessed further or should be declined. A valid claim is one that is made by a person who is eligible to lodge a claim, pertaining to a reviewable decision by the employing authority that is covered by the standard and lodged within the specified time period. It is the commissioner who authorises any recommendation to decline to review a claim. With step 3, if deemed valid and appropriate, a more detailed review is undertaken and a report prepared. A more detailed review would generally entail further analysis of both the specifics of the claim and the extent to which the requirements of the standard were met. That assessment would also be undertaken by an officer within the Public Sector Commission. Finally, with step 4, the case file report and associated documentation are then reviewed by the relevant manager or director before being authorised by the deputy commissioner, in the case of a recommendation to dismiss the claim; or by the Public Sector Commissioner, in the case of a finding of an agency in breach of the standard.

In answer to question (b), the regulations do not provide for an avenue of appeal for determinations made by the commissioner to decline a review under regulation 11A. The options open to a claimant will include direct appeal to the commissioner via the Public Sector Commission complaints framework, referral to the state Ombudsman or through other legal avenues.

In response to question (c), the regulations do not provide for an avenue of appeal for determinations made by the commissioner to dismiss a claim. Again, the options open to a claimant would include direct appeal to the commissioner via the complaints framework, referral to the state Ombudsman or through legal avenues.

Finally, in relation to question (d), decisions regarding breach of standard claims made under part 3 of the breach of claim standard regulations are reported only to the claimant and the public sector body. The commissioner aggregates data in the "State of the Sector Report".

Mr W.J. JOHNSTON: In respect of your answer to part (a), you outlined a set of decision points. Does the decision-maker hear the parties in respect of each of those decision points?

Mr Volaric: Mr Chair, the claimant will be interviewed if it is felt that the breach claim complies with the relevant regulations. Once the decision is made, they will be informed.

Ms Roche: Can I ask, member—did you mean in relation to the steps that the acting commissioner laid out about whether to accept the claim, whether it was made in time and whether the claimant is asked at each of those decision points —

Mr W.J. JOHNSTON: There were four or five decision points, and the final one, I think, was reference to a deputy commissioner to make a decision. Natural justice means you cannot make a decision without hearing from the parties. You have just outlined a very, very bureaucratic process. If you are not hearing from the person at each stage, then you are inviting an argument each time; yet, if you do invite them in to be heard on each decision, then you are adding another layer of bureaucracy or delays in the decisions. I am trying to work out what you are doing in those steps.

Ms Roche: The decision points that were outlined were about whether the claim can be lodged at all in the first place.

Mr W.J. JOHNSTON: Yes, but it is still a decision.

Ms Roche: It is a decision. It is set out in the regulations whether a claim can be accepted. It has to be within a certain time frame, the person has to be eligible to lodge a claim and it has to be a reviewable decision already made by an employing authority. We would sometimes, for example, receive a breach of standard claim against a process that has not yet been completed by the agency. We have to say, "No, we can't accept that yet; feel free to come back to us if you wish to lodge it once it is done." Those decision points are made and the claimant is advised. But once it is accepted as a breach of standard claim, the claimant is always interviewed and spoken to as part of that process.

Mr W.J. JOHNSTON: But the question I had was: are they given an opportunity to be heard on the decision you are making?

Ms Roche: We advise them of the decision at the end, and they have the opportunity to raise any concerns at that point.

The CHAIR: I will move on to another question, which is one that you may need to take on notice. Can the commissioner confirm the number of breaches of public sector standard claims lodged against CEOs since the 2010 amendments came into effect? That is the first part of the question. You can take that on notice and get back to us. If any claims were lodged —

(a) how many claims were resolved internally within the department;

(b) how many claims could not be resolved and were referred to the commissioner for review;

(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;

(ii) how many claims were dismissed;

(iii) how many claims did the commissioner decline to review;

(iv) how many claims remain ongoing; and

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

We will get that question to you in written form. We will look forward to a submission in regard to that. Do you have any comments on that question, before we move on?

[10.40 am]

Ms Roche: Only that, in the interests of complete accuracy, it would be best if we took that on notice.

The CHAIR: Absolutely. I move onto question 11 of my notes. Page 78 of the 2013 "State of the sector report" acknowledges that there appears to be a lack of awareness of and confidence in grievance processes. Commissioner, can you explain what aspects of the current grievance process are generating this lack of confidence among public sector employees, and what have you done to rectify this issue?

Mr Volaric: In terms of the first part of the question, the information recorded in the "State of the sector report" is obtained through an employee perception survey. The questions around grievance processes in 2013 focused on awareness and confidence. It would be difficult to provide enough clarity about the reasons why people may have lost confidence. We have some general suspicions as to what may have led to that, and there is some anecdotal information to advise the committee. First of all, each employment authority establishes a grievance process that is best fit for purpose and consistent with any obligations that that agency may have under a relevant award or agreement. Whilst section 29(1)(l) of the act places an onus on CEOs to resolve or redress the grievance of employees in the organisation, there can be confusion about how to implement processes to best deal with employees' concerns. The way that the commission assists the sector to build in their capacity to manage those grievances include releasing guidelines to agencies on managing workplace conflict. These assist public sector agencies and staff in particular about the legislative foundation, characteristics and aims of key HR processes used to manage grievances and substandard performance and discipline. We also hold information sessions and training with regard to promoting those guidelines and informing agencies about the distinction between each of those. We also make practice or policy improvement recommendations in breach claim decisions and outcome notification matters. That is a reflection of analysis of the breach claims received. We also provide peer review services to assist agencies to refine and improve their policies. We build understanding and awareness of HR practitioners through learning development programs. We also provide a consultancy service and an advisory line for agencies.

The CHAIR: More specifically, with reference to a lack of confidence among public sector employees, is there any effort to rectify that lack of confidence? The processes are in place, but is there any effort to rectify the lack of confidence?

Mr Volaric: Yes, Mr Chair. The methodology that we are using is primarily through education and training as well as a consultancy service provided to employees and/or agencies with respect to understanding the grievance process, distinguishing that between grievance, substandard performance and a disciplinary matter. We will go out to agencies, speak to groups of employees, HR practitioners in the main, and line managers, about the grievance process, about the methodology that can be applied and about the ways that we can assist them in understanding the framework.

The CHAIR: I move to section 21(10(a)–(c), which enables a court to inquire into and determine the validity of a standard or code of ethics and whether it is inconsistent with the act or unrelated to the powers conferred by it. Have any challenges been lodged under these provisions?

Mr Volaric: Mr Chair, to the best of our knowledge, no court challenges have been lodged in relation to section 21(1) of the Public Sector Management Act since 2010. Certainly, to the best of our knowledge, there has been no such challenge since the Public Sector Management Act commenced in 1994. With respect to (a), a court would not initiate such action. A litigant would need to commence proceedings or the issue would need to arise as a collateral issue as part of other proceedings before the court. The answer to (b) is no.

The CHAIR: For the benefit of Hansard, does this provision also apply to commissioner's instructions that are not public sector standards or codes of ethics in the same way?

Mr Volaric: That is right.

The CHAIR: We will move to question 13 of my notes. There appear to be various means by which administrative decisions made under the act can be challenged by aggrieved parties. Can the commissioner confirm what administrative decisions can be referred to the Western Australian Industrial Relations Commission for appeal under section 78?

Mr Volaric: Mr Chair, the types of administrative decisions that can be appealed to the WA Industrial Relations Commission are set out in section 78(1), (2) and (3) of the Public Sector Management Act. Broadly, these are administrative decisions made by the employing authority under sections in part 5 of the Public Sector Management Act. For completeness of response, I will run through those; there are quite a number. These include reducing the level of classification of an employee; terminating an employee's employment, other than the CEO; making a decision following a finding of a special disciplinary inquiry that employees committed a breach of discipline, other than under section 94; suspending an employee on partial pay or no pay; after dealing with a disciplinary matter, making a decision to take disciplinary action against the employee; making a decision following a finding of a disciplinary inquiry to take disciplinary action against the employee; making a decision to take disciplinary action following the conviction of an employee for a serious criminal offence under section 92; after dealing with a disciplinary matter and finding that an employee has committed a section 94 breach of discipline, taking disciplinary action to dismiss the employee; and making a decision following a finding of a special disciplinary inquiry that an employee has committed a breach of section 94.

With regard to question (b), the Industrial Relations Commission only has jurisdiction to review those decisions specified in the Public Sector Management Act; any other decision may be reviewable by the Supreme Court by way of prerogative writ. Section 52(6) of the Public Sector Management Act expressly provides that an appeal does not lie under the Industrial Relations Act 1979 in relation to the employment of a CEO; however, this decision may also be the subject of judicial review by the Supreme Court.

With respect to question (c), the Supreme Court has jurisdiction by way of prerogative writ to review final administrative decisions made under the Public Sector Management Act. Further, as the Ombudsman has power to review any administrative decisions made by a statutory officer or other public officer, the Auditor General has broad powers to review agency performance, including financial performance. It is considered that most if not all decisions made in the exercise of powers or functions under the act are potentially reviewable in some form.

Mr W.J. JOHNSTON: Are you familiar with the federal ADJR—the Administrative Decisions (Judicial Review) Act?

Mr Lightowlers: Yes, I am.

Mr W.J. JOHNSTON: What would you think about a similar framework here in Western Australia as a general provision?

Mr Lightowlers: I think a statutory framework has been under consideration for decades and the sooner it arrives the better, then we can get away —

Mr W.J. JOHNSTON: Yes,, because then you could get rid of all these specific ones and just have a general one, and every decision-maker in the public sector would just make a decision, give reasons and then there would be a general division to deal with it if there was a problem. That would not everybody happy, would it not?

Mr Lightowlers: You would not have to learn so much Latin!

The CHAIR: We will move to the next section of our hearing today, which deals with reviews, special inquiries and investigation. The question is: under new provisions in section 24, the commissioner can now undertake reviews or special inquiries on his own initiative; can the commissioner provide any insight as to the rationale behind referral of his powers?

Mr Volaric: Section 24's investigation powers provide the commissioner with powers of special inquiry investigating activities of any public sector body in the course of performing his functions. These powers were largely unaltered by the reform bill; however, they became exercisable by the newly created Public Sector Commission in place of its predecessor, the Public Sector Standards Commission, concomitant with the transfer of the monitoring and oversight functions to the new commissioner position.

[10.50 am]

Similarly, at the same time as transferring to the commissioner the public sector administration functions previously performed by the minister, the reform bill also conferred on the commissioner the same review and special inquiry powers previously available to the minister in performing those functions. The rationale was that he performed the same function in relation to the monitoring structure, administration and management of the public sector. The commissioner should have the same probative powers previously available to the minister and the predecessor commissioner in the course of performing those functions. It is noted that each of the investigation review and special inquiry powers are exercisable only in respect of public sector bodies and their activities. They are not directed at individuals. Separate powers are special and disciplinary inquiries exist under section 87 of the act in relation to the conduct of individuals. The ability to invoke these powers of review, investigation and special inquiries in appropriate circumstances provides the commissioner the capacity to effectively carry out his public sector administration and oversight functions under the act.

With respect to question (a), to date special inquiry powers have only been exercised under direction from the minister pursuant to section 24H(2) of the act. They were the Keelty inquiry, Perth hills bushfires 2011; Keelty inquiry, Margaret River bushfire 2012; Blaxell inquiry, St Andrew's Hostel 2012; and the Stokes inquiry, Peel Health Campus in 2013. Four reviews have been conducted pursuant to the review powers in sections 24A to 24G of the act: review on the National Trust of Australia (WA), 2011; examination of the Department of Training and Workforce Development, 2012; review of how agencies promote integrity in the public sector, 2013; and review of performance management in the public sector, 2013. Investigation powers in section 24 of the act have been invoked on one occasion, and that was the Carson Street investigation.

With regards to question (b), the commission has a policy framework for exercising the oversight powers under the Public Sector Management Act. The framework is based on the principle that CEOs are primarily accountable for ensuring compliance with relevant public sector administration requirements. The framework also recognises that in some cases the PSC needs to become involved. Under the framework, preliminary assessment of matters that are referred or otherwise come to the attention of the commissioner is carried out. Options available to the commissioner include referring a matter on to another appropriate authority, examining it under his general monitoring functions or invoking the probative powers of investigation, review or special inquiry. A public

interest test is applied in determining whether a matter is sufficiently significant to warrant the intervention of an investigation, review or special inquiry, and the associated cost and allocation of resources. The primary consideration is whether the matter is of such serious nature or indicates widespread mismanagement in a systemic way with management, administration or compliance systems. The section 24B review power is more likely to be applied to matters that relate to one or more organisations' structures, systems, policies and processes. The section 24 investigation power can be used to investigate the activities of any public sector body but it is more likely to be initiated in relation to specific actions, activities or questions of conduct. It results in a report on the conduct of the investigation and findings to the commissioner and possibly the employing authority of the agency concerned.

A section 24H special inquiry can be conducted into any matter or issue related to the public sector, but it is more likely to involve sensitive matters with heightened public interest in the issue. The exercise of these probative powers is relatively rare with approximately 80 to 90 per cent of the Public Sector Commission's oversight effort occurring under its routine compliance, monitoring and general oversight functions. They do, however, provide a mechanism by which problems in the public sector can be thoroughly identified, examined and corrective measures instituted.

With regards to question (c), the only prescribed processes regarding ministerial consultation and use of these powers are those set out in section 24E—that is, consultation with the minister is required before the powers of entry and inspection in section 24D can be exercised in the course of a review. No such ministerial consultation is prescribed for the conduct of special inquiries or investigations. An element of ministerial involvement is, however, present when the minister directs the commissioner to arrange a special inquiry or review. Except as provided in the act, the commissioner is required to act independently in performing his or her functions and is not subject to direction by the minister or any other person. The exceptions include the capacity in section 24B(2) for the minister by written notice to direct the commissioner to conduct a review in respect of part or all of the functions, management or operations of one or more public sector bodies and section 24H(2) for the minister to direct the commissioner to arrange for the holding of a special inquiry into a matter related to the public sector.

The CHAIR: Thanks for your detailed response with regards to those questions. I will move to how that can be reported. What provisions in the act require the commissioner to report to Parliament on the findings of a review, special inquiry or investigation?

Mr Volaric: Mr Chair, the provisions under the Public Sector Management Act are discretionary in the sense that the commissioner may under section 22D and 22E report a management matter that he believes to be of such significance. So, there is discretionary capacity there. Any special inquiries prepared on behalf of the minister have all been reported to Parliament.

The CHAIR: Just to clarify, is it up to the commissioner to decide what he wants to table in Parliament or is there any part of the act requiring the commissioner to report to the Parliament?

Mr Volaric: I will seek some guidance from Mr Lightowlers, but my understanding is that he has the discretion to report under section 22D and 22E and where he does prepare a report in accordance with section 22D and 22E, he must then report to Parliament.

Mr Lightowlers: You are right.

Mrs G.J. GODFREY: Just a question that was raised previously, if I may, Mr Chairman. Just general morale in one particular department, would that constitute a special investigation and report?

Mr Volaric: Mr Chair, I will refer to the deputy commissioner in relation to where a review may have been initiated in that context.

Ms Roche: To answer the question, yes, it may, particularly if, for example, the commission received a range of issues from a number of different employees and brought together that did

appear to present some real concerns to the commissioner that it was significant enough to warrant such a report and, therefore, reporting to Parliament. I cannot think of a particular situation that that has occurred since 2010 where in one public sector agency morale in particular has been raised in that way, but I can envisage a situation in which that might occur.

The CHAIR: Thank you. When an outside party is engaged as a special inquirer—for example, the inquiry into the Peel Health Campus or the inquiry into St Andrew's Hostel in Katanning—who holds ultimate editorial authority?

Mr Volaric: Mr Chair, just by way of background, section 24K of the act makes it clear that where a special inquirer is appointed by the commissioner, the report that is required to be produced on the conduct and findings and any recommendation of the special inquiry is that of the special inquirer. Therefore, final editorial authority for the report rests with the special inquirer.

The CHAIR: Under what circumstances does a commissioner decide to appoint an inquirer from outside the Public Sector Commission?

Mr Lightowlers: It comes down to a question of skills, capacity, looking for the best person with the most appropriate background and abilities. Sometimes it might be appropriate to appoint someone from outside the public sector to avoid perceptions of conflict. In the case of Mr Keelty, his specialisation in dealing with emergencies, having been a former Federal Police commissioner, we brought him in as a very suitable person.

[11.00 am]

The CHAIR: Do you advertise for this appointment? What is the process for finding that person?

Mr Lightowlers: My perception has been that it is been one of networks rather than an advertised position. It is looking to who has an established track record in the particular area.

The CHAIR: What role do commission staff play in the conduct of that special inquiry?

Mr Lightowlers: Mainly a supporting role, an administrative role, research role, and sometimes that people will be drawn from other public sector bodies depending on the area that is under investigation or inquiry. It will not necessarily be the Public Sector Commission.

The CHAIR: Reference is made on page 39 of your submission to matters of referral. Is there an explicit provision in the act relating to the processes used for handling matters of referral?

Mr Volaric: Again, I will answer the question holistically, if that will assist the committee. "Matters of referral" is a term of convenience that is applied by the commission to distinguish unsolicited allegations, complaints and requests for review from breaches of standard claims, external requests for assistance, and from general inquiries. The act does not make explicit provision for dealing with such matters and does not establish the commissioner as a complaints receiving body, unlike the ombudsman or the CCC. However, this does not deter people from referring issues that they think require the intervention of the commissioner. The process established to assess and deal with matters of referral is designed to ensure fair and consistent treatment of such requests; entails case creation, registration, allocation to an appropriately qualified officer; assessment of jurisdiction and materiality; and provides for a formalisation for all decisions to act or not to act.

In relation to part (a), the courses of action generally contemplated as an outcome of a preliminary assessment include: determining that the Public Sector Commissioner does not have jurisdiction to consider the matter and advice to the informant about more appropriate avenues; that the matter should be noted consistent with an ongoing monitoring function—this response recognises relevance to the broader reporting role and the need to maintain baseline data for determining patterns that might emerge through similar complaints that could influence subsequent assessments—referral to the CEO of the particular agency to deal with, consistent with their responsibilities and their authority; escalation of a matter to a general examination of a more formal

review or investigation; and referral to the agency support division within the Public Sector Commission to provide assistance to the respective public sector body.

With respect to part (b), Parliament, a relevant minister and/or the Premier are apprised of decisions made in relation to matters of referral, where it is relevant in fulfilling functions under sections 21A(b), 21DC, 22C or 22E. Other than the matters already provided to the committee in our submission, I do not believe that any other matters referred to last year resulted in the commissioner undertaking a review, special inquiry or investigation under those specific provisions of the act. However, for completeness of response, we are still looking into our records and we will provide further information should that be the case.

The CHAIR: Thank you. We will move on now to section 80, "Breaches of discipline". Can the commissioner confirm the number of section 80 breach-of-discipline claims lodged against CEOs since the 2010 amendments came into effect? If any claims were lodged, how many proceeded as a disciplinary matter under section 82A and were proven?

Mr Volaric: The Public Sector Commissioner receives on occasion a number of allegations and complaints levelled against the CEO. They may be informal, they may be formal or they made be made anonymously; however, they do not always fall under the section 80 "Breaches of discipline" category. As such, they do not necessarily translate to a disciplinary claim lodged. Therefore, in response to (a), (b), (d) and (e), I would respond as nil. With respect to (c), the answer is one.

The CHAIR: And the answer to (e): in how many instances was improvement action taken with the CEO as per section 81(b)(i)?

Mr Volaric: That would be nil

The CHAIR: Because none have been put against them.

Mr W.J. JOHNSTON: What do you decide is a formal complaint? This is an interesting issue that has been raised in the past, where a person has approached the commission regarding an issue, but the commissioner subsequently said it was not a formal submission. What is the difference between an approach and a formal approach?

Mr Volaric: Generally, we would regard a formal complaint as something that has been received in writing. An informal complaint can be made via a third party or through a verbal discussion with the Public Sector Commissioner. Generally speaking. in those situations, where the commissioner—I cannot speak on behalf of the commissioner directly, of course—but my understanding would be that if the Public Sector Commissioner was made aware of a particular matter that he felt may go towards suspicion of a matter that would require his attention, particularly with respect to a CEO, he would then take measures to take the appropriate actions, which may include a formal review.

The CHAIR: I suppose it is not explicit in the question, but I am perhaps looking for a comment here: do you find it surprising that there have been no breaches of discipline claims lodged against CEOs since the 2010 amendments came into effect?

Mr Volaric: I would like to be able to say that one would expect there to be very few allegations or complaints lodged against the CEO that would require formal disciplinary action, given the nature of the position held, given the expectations of the individuals and, also, given the fairly thorough process we go through for selecting and considering people for appointment to CEO roles. But at the end of the day there are 150 000 public sector employees. It may be unusual that there are no formal complaints lodged against the CEO, but if any are, they are thoroughly investigated. It may well be that any complaints lodged simply do not have sufficient evidence to support the allegation. If there are, there are appropriate avenues in which the commissioner would need to address those complaints.

Mr W.J. JOHNSTON: So far that is one.

Mr Volaric: One in respect to a matter that was dismissed

Mr W.J. JOHNSTON: But there were none in any other case?

Mr Volaric: That is right

Mr W.J. JOHNSTON: So there has been only one formal complaint?

Mr Volaric: That is right.

The CHAIR: Following up on that, section 80 does provide a lot of scope for people to complain. Section 80(e) has the provision "commits an act of victimisation within the meaning of section 15" or (d) has the provision "is negligent or careless in the performance". Any employee could say, "I think you have been careless", and lodge a complaint, so I am surprised that only one has been dismissed since 2010. I find it interesting that there has been only one complaint.

Mr B.S. WYATT: Are all complaints that are anonymous dismissed; they are not treated as formal?

Mr Volaric: No. The nature of the allegations would be considered. Where necessary, where the allegations sufficiently warrant to do so, they may be referred to the CCC. In terms of dismissal, the point I would like to clarify here is that a complaint may be received, it may be looked into, a suspicion may be formed, it may be reviewed, but it may lead to a dismissal in a formal sense or it may lead to lack of evidence to proceed any further. So whilst a complaint may have been received, the formal action to conclusion under section 80, under disciplinary process, would need to warrant sufficient evidence and justification for formal action to be undertaken.

The CHAIR: So you are saying that a preliminary process takes place before it is determined that it is a disciplinary matter under which the disciplinary process then takes over?

Mr Volaric: That is right

The CHAIR: Many complaints may be made, but they do not trigger the disciplinary process?

Mr Volaric: That is correct. There is a form of assessment—we undertake an assessment prior to proceeding with any formal action.

Mr W.J. JOHNSTON: Again, I ask: the person who has made a complaint about a CEO, which you determine is not in accordance with section 80, are they heard on that decision?

Mr Volaric: They may be. Again, it would depend on the information and allegations that are received, the assessment which is undertaken in relation to the allegation received, and the need to discuss those allegations further with the individual. From that process it may be that an opinion is formed that there is insufficient information or justification or collaboration of that individual to proceed with the matter any further.

[11.10 am]

The CHAIR: I will just follow up on that. Maybe you could take this question on notice. Could you provide us with some data on the number of complaints received against CEOs since the 2010 amendments came into effect that did not trigger the disciplinary process? We will put that question in writing for you.

Mr M.H. TAYLOR: May I ask—is the preliminary assessment prescribed?

Mr Volaric: No, it is not.

Mr M.H. TAYLOR: How did that come about? Is it just through practice that the preliminary assessment was created as a filter to this section 80 process?

Mr Lightowlers: There is a hurdle if we look at section 81, which is a suspected breach of discipline. If an employing authority becomes aware or is made aware by any means that an employee may have committed a breach of discipline, it is forming that suspicion. If you get a bare allegation, which is, for example, saying "He is a bully; he bullied me", there is no detail, there may

be no name and it would be considered not sufficient to raise that level of suspicion to proceed to a disciplinary finding.

Mr M.H. TAYLOR: I am trying to explore whether the current practice reflects the intent of the act in taking a complaint through to formal assessment or otherwise.

Mr Volaric: Yes, the process that we apply in terms of assessment would comply with section 81 of the act in forming a suspicion.

Mr Lightowlers: That system is developed with advice from the State Solicitor's Office and we are advised that that hurdle, which is having a suspicion, is consistent with the approach that section 81 contemplates.

Mr M.H. TAYLOR: I do not suggest that you are not complying with the act; I am more curious about whether that preliminary assessment becoming practice is a precursor to the section 80 assessment or process—whether that practice is actually what was intended when the act was written.

Ms Roche: In relation to anyone, the questions we have been dealing with have been about whether there are any discipline matters involving a CEO. The commissioner would need to consider those matters around a CEO in the same way that a CEO has to consider them for employees within his or her organisation. It seems to me that section 81(1) was set up exactly for that process. Any sort of allegation can be made about an individual. Before a CEO, or in this case the commissioner when it is about a CEO, decides to go down that discipline path, which even though the act says can be as informal as possible, can be quite a daunting and formal process, it is quite appropriate for there to be some consideration of the allegations, the level of evidence already provided, the seriousness and some assessment made whether to decide to deal with the matter as a disciplinary matter. The process that we have outlined that the commissioner deals with is exactly the same as that a CEO in an agency would have to deal with for one of his or her employees.

The CHAIR: Along the line of your answer, can you confirm the number of section 81 suspected breaches of discipline there have been with regard to CEOs since the 2010 amendments came into effect? We will take that on notice.

Ms Roche: Yes, we can.

The CHAIR: Thank you.

Mrs G.J. GODFREY: I have a question on what we are talking about. In your view, is it possible that someone could, without consulting anyone else, send a letter to you complaining about a CEO, lodge it and then, within the context of whoever is talking to that person, that person could have a lot of knowledge about the process and could bully the complainant into not actually proceeding?

Mr Volaric: I cannot unequivocally say that would not happen, but I suspect it would be most unlikely to occur given that the people involved in this process would be, generally speaking, senior HR people in an agency. Within the Public Sector Commission it would be fairly senior people who are well trained in managing disciplinary processes and review processes. From time to time, agencies will also engage consultants through the common use arrangement. They go through a selection process to determine their appropriateness to conduct those sorts of inquiries.

Mr M.H. TAYLOR: I have a final question. Give that you mentioned the CEOs and their employees, or people below them, do you get feedback from CEOs about this process? Do they feel that this process is adequate or optimal for them to administer their departments in the way they want to or would like to?

Mr Volaric: By way of introduction, the answer to that is definitely yes. As part of the reform bill, the part 5 revisions were extensively reviewed. One of the criticisms in the past was that the requirements under part 5 were overly prescriptive. The intention has been to minimise that prescriptive nature within the operations of the legislation as well as the commissioner's instruction.

There was widespread consultation with CEOs and agencies about part 5 provisions. Mr Warner, do you have any further information?

Mr Warner: I concur with the acting commissioner that the feedback we have received is that it is much improved from what it previously was. It may not be perfect but it is much better than what we had. The mechanisms that we have today, particularly the use of commissioner's instructions, means that modifications to the system can occur more simply than previously.

The CHAIR: Thank you. I will move to the next question. Given the commissioner's role in the CEO appointment and performance management process, is there an inherent conflict of interest in the commissioner conducting any review, inquiry or investigation into alleged section 80—I add to this section 81 if he gets involved there as well—breaches of discipline by departmental CEOs?

Mr Volaric: In response to the first part of the question, the answer is no. The commissioner's employing authority of CEOs is like any other CEO of employees within their agency. He has a role in undertaking the appointment and performance management of his staff—being CEOs—as well as undertaking disciplinary processes concerning staff. In that regard, other public sector CEOs are not in a different position. In response to the second part of the question, since 2010 the commissioner has not delegated any of his disciplinary functions or powers due to a perceived conflict of interest.

The CHAIR: We will now move to some follow-up questions from the first hearing. What we are looking for here is, could any of you, or Mr Warner or Mr Volaric, please clarify their statements on page 9 of the draft transcript about the presence in the act of a provision to appoint a term of government CEO?

Mr Lightowlers: I will kick off. My comment was that, in my view, it would, technically, be possible for a CEO to be appointed on a term-of-government basis because we now have a fixed-term, four-year cycle. The act states that there is a maximum of five years, so a contract could be designed with an identifiable date that was less than five years—if that was considered desirable. Mr Warner may outline why it is not considered desirable.

Mr Warner: The use of the term term-of-government generally refers to those officers appointed under part 4 of the Public Sector Management Act. That part is administered by the Department of the Premier and Cabinet. Basically, that deals with the support for political officeholders. Section 72 of the Public Sector Management Act states that, in those circumstances, an officer's employment terminates —

(a) if the political office holder for whose assistance the ministerial officer was employed ceases to hold office as such; or

(b) on the day fixed for the return of the writ for the general election for the Legislative Assembly … or

(c) on the day specified in the relevant contract of employment …

whichever is soonest.

There is no set provision that applies to CEOs and would see their contract of employment terminated on that basis. Following up on Mr Lightowlers' comments, whilst it is technically possible to align a CEO's contract of employment with the election date, I am not aware of any attempts to do so.

[11.20 am]

The CHAIR: Thank you. From page 6 of the draft transcript, can the commissioner confirm the number of instances since the 2010 amendments took effect where a minister has rejected all candidates put forward by the CEO appointment panel?

Mr Volaric: Mr Chair, yes, there have been no instances where the minister has rejected all candidates. Although I will just refer back to the previous transcript, where the commissioner

indicated that there was one occasion in which some of the candidates had been rejected. That has been recorded. We also reviewed our files, as the commissioner indicated, and there were no other examples

The CHAIR: Thank you. From page 8 of the draft transcript, who were the other stakeholders that were consulted during the discussions that led to the removal of the clause permitting the minister to direct term-of-government CEO appointments?

Mr Volaric: Mr Chair, the government's initial intent was to give effect to the recommendation of the Public Accounts Committee in its report of June 2009 into the new Department of the Premier and Cabinet and the Public Sector Commission that recommended, among other things, for the Public Sector Management Act to provide capacity for the appointment of the CEOs by the government of the day, but with such appointments limited to the term of the government. During the second reading debate in the Legislative Assembly, the government resolved to amend this provision to remove the capacity to direct the Public Sector Commissioner to appoint a CEO for a term of government. The CPSU–CSA was consulted about this and welcomed the proposed government changes.

The CHAIR: On page 15 of the draft transcript, the commissioner stated —

> … I have some issues that I have as part of the performance agreement.

He is not here, but maybe you can comment on more detail on the issues that he looks to incorporate into the performance agreement of the CEO.

Mr Volaric: Mr Chair, yes, the commissioner I believe was referring to part 2 of the CEO performance agreement template that requires CEO and the commissioner to agree on contributions towards sector-wide administrative and management priorities. There are currently five sector-wide priorities identified by the commissioner, and these include, first, enhancing the public sector workforce; building trust and confidence in the conduct and ethical decision-making capacity of the sector; enhancing Indigenous economic participation outcomes, which is linked to the national partnership agreement; innovation; and the decommissioning of the Office of Shared Services. CEOs are required to report in relation to those five initiatives, and, as a matter of practice, those initiatives are reviewed annually to determine the relevancy. We are currently going through that review process for 2014–15.

The CHAIR: Thank you. Can you confirm the number of CEOs whose annual performance has been deemed to be substandard since the amendments came into effect in 2010?

Mr B.S. WYATT: Can I just ask as a follow-up to that, because I think you were probably in the hot seat in respect of the recent announcement about the director general of the Department of Regional Development.

Mr Volaric: Yes.

Mr B.S. WYATT: That was not a result of a deemed substandard performance—from your answer you just gave now. The minister said in Parliament yesterday that the Public Sector Commission was involved in that process. Bearing in mind there are limits, and perhaps you can say that it was an active case. Was the Public Sector Commissioner involved as a result of concerns from the minister? I am just trying to work out how the commission came to be involved in that circumstance?

Mr Volaric: Just by way of clarification, the nil response is in relation to performance assessments received which concludes a performance appraisal process time line. In relation to the director general of the Department of Regional Development, the minister met with the acting Public Sector Commissioner and myself and indicated to us that he—sorry?

Mr W.J. JOHNSTON: Sorry—you said the "acting".

Mr Volaric: Yes, sorry—I will be taking over from today. No, I am acting as from today. Prior to today, Ms Roche was asked to meet with the acting commissioner and myself, which we did. The minister indicated to us that he would be meeting with Mr Rosair as part of his annual performance discussions, and it indicated to us that he was seeking a different direction for leadership for the organisation and that he would be raising that with Mr Rosair the following day.

Mr W.J. JOHNSTON: Can I also ask—because you said here that no annual performance has been deemed substandard since 2010. What about Mr Johnson?

Mr Volaric: We thoroughly checked that one, Mr Chair. The assessment of a minister at the time was that the assessment was satisfactory. He did provide some additional comments in relation to matters that he wanted to raise with Mr Johnson at the time. But the assessment undertaken was not indicated to us as being substandard; he provided an assessment as satisfactory.

The CHAIR: I suppose the question for me is: what type of performance would be deemed substandard? Could you maybe take that one on notice?

Mr Volaric: Yes. We are happy to do that. Yes.

Mr W.J. JOHNSTON: I do not have the transcript in front of me in terms of the comments by the commissioner when he was here with us a little while ago about Ian Johnson because I understood him to be saying that there had been concerns for some time regarding Mr Johnson's performance. But if his performance was being graded satisfactory, what was the nature of the issue?

The CHAIR: We may take this up at the end of this line. We may come back to this.

Mr W.J. JOHNSTON: Yes.

Mr Volaric: Mr Chair, sorry—just one point. I would like to clarify the wording used by the commissioner, so we will take that on notice. What I would point out, though, is that the assessment is undertaken at a point in time. Views of a minister or a responsible authority can vary or change beyond that point. So we will probably take that on notice and provide some information.

The CHAIR: I will move to question 25 of my notes. From page 20 of the draft transcript, can the commissioner confirm the selection process that was used for the last two Public Sector Standards Commissioners?

Mr Volaric: Yes, Mr Chair. The process used for the past two Public Sector Standards Commissioners were very similar to that used for CEOs on section 45 of the Public Sector Management Act. The then director general of the Department of the Premier and Cabinet provided assistance to the Minister for Public Sector Management. The former commissioners were appointed by the Governor on the recommendation of the then minister for public sector management. Before making a recommendation, the minister consulted the parliamentary leader of each party in the Parliament.

The CHAIR: Thank you. From page 20 of the draft transcript, can you confirm that section 4(6) removes the possibility of the commissioner being subject to breach of discipline proceedings for contravening sections 8 and 9 and all other sections of the act?

Mr Volaric: Yes. The Public Sector Management Act sets up an alternative regime by which the commissioner can be dealt with for failing to carry out the functions of his office. Rather than through breach of disciplinary proceedings, which do not apply because of section 4 (6), the commissioner may be suspended or removed from office for particular behaviour, including misconduct, by the process set out in sections 18(3) through to (5) of the act.

The CHAIR: Thank you. Can you explain the rationale behind the amendment to section 22—the insertion of subsections 22(2) and 22(3) of the Public Sector Management Act—as part of the 2010 reform act? I am happy for you to take that question on notice.

Mr Volaric: We will take that on notice, Mr Chair.

The CHAIR: Members, are there any other questions?

Lady and gentlemen, thank you for your evidence before the committee this morning. A transcript of this hearing will be forwarded to you for correction of minor errors. Please make these corrections and return the transcript within 10 working days of the date of the covering letter. If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be introduced 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 once again.

The Witnesses: Thank you.

Hearing concluded at 11.30 am