

Corruption and Crime Commission Amendment (Misconduct) Bill 2014
Explanatory Memorandum

OUTLINE

The principal purpose of this Bill is to amend the *Corruption and Crime Commission Act 2003 (WA)* to transfer the Corruption and Crime Commission's oversight of minor misconduct by public officers and its corruption prevention and education functions to the Public Sector Commissioner. The Bill also seeks to clarify the operation of Parliamentary privilege as this applies to define the Corruption and Crime Commission's functions and powers.

PART 1 – PRELIMINARY MATTERS

Clause 1 Short title

Cites the title of the principal Act to be amended by this Bill.

Clause 2 Commencement

Provides for Part 1 of the Bill to come into operation the day the Bill receives Royal Assent, and for the rest of the Bill on such day or days as is or are fixed by proclamation.

PART 2 – CORRUPTION AND CRIME COMMISSION ACT 2003 AMENDED

Clause 3 Act amended

Specifies that the amendments in this Part are to the *Corruption and Crime Commission Act 2003*.

Clause 4 Long title amended

Amends the long title of the Act creating an oversight role for the Public Sector Commissioner with respect to minor misconduct by public officers.

Clause 5 Section 1 amended

Short title of the Act is amended to reflect the division of functions under the Act and represent the hierarchical nature of the jurisdictions being conferred on the Corruption and Crime Commission and the Public Sector Commissioner.

Clause 6 Section 3 amended

Deletes, replaces and inserts new definitions to facilitate the redefined role of the Corruption and Crime Commission with respect to serious misconduct and the new role of the Public Sector Commissioner with respect to minor misconduct under the Act.

New definitions of Police Department, police service and employee of the Police Department are intended to ensure that persons who are members of the police force, Aboriginal police liaison officers, police auxiliary officers, police cadets, public service officers, or public sector employees whether employed in the Police Department or seconded to work in that Department, remain within the Corruption and Crime Commission's

jurisdiction to oversight police misconduct. The definition of “reviewable police action” is also amended accordingly. The proposed new definition of “serious misconduct”, that is to be a primary focus of the Corruption and Crime Commission’s functions, encompasses police misconduct.

Subsection (2) is amended by deleting the words “exclusively” and “unless that House so resolves”. The existing provisions of subsection 3(2) of the Act have been virtually ineffectual in defining the scope of the CCC’s jurisdiction with respect to allegations of misconduct against Members of Parliament. This is because, despite the *Parliamentary Privileges Act 1891* and the *Parliamentary Papers Act 1891*, there currently exists overlapping regulation of unacceptable activities in Parliament through various offences under the Criminal Code. The current provisions also wrongly imply that Parliament can waive all privilege by resolution.

- Clause 7** **Section 4 amended**
The definition of “misconduct” is amended by deleting subsection (d)(v), which removes the reference to misconduct engaged in by a public officer which could constitute an offence against the *Statutory Corporations (Liability of Directors) Act 1996* or any other law. This is to avoid a potential overlap of jurisdiction between the Corruption and Crime Commission’s and Public Sector Commissioner’s proposed areas of misconduct responsibility.
- Clause 8** **Section 7B amended**
Subsection (3) is deleted and replaced with (3), (4), (5) and (6) in light of the new purposes of the Act, to confer the redefined and new serious and minor misconduct functions on the Corruption and Crime Commission and Public Sector Commissioner respectively.
- Clause 9** **Section 17 deleted**
Current section 17 of the Act provides for the Corruption and Crime Commission to be the statutory authority responsible for the misconduct prevention and education function. This function extends to all forms of misconduct, both serious and minor, and is now to be conferred upon the Public Sector Commissioner under proposed new Part 4A (with the exception of the prevention and education function concerning police misconduct to be retained by the Corruption and Crime Commission). Existing section 17 is therefore to be deleted.
- Clause 10** **Section 18 amended**
Amends section 18 and redefines the function of the Corruption and Crime Commission as the statutory authority responsible for “serious misconduct”. Its former misconduct functions that concerned “minor misconduct” (save regarding police misconduct) are now conferred on the Public Sector Commissioner via a new Part 4A.
- Clause 11** **Section 21A amended**
Provides that nothing in section 21A limits the powers of the Corruption and Crime Commission with respect to allegations, assessments and

opinions about the occurrence of misconduct in relation to police.

- Clause 12** **Section 21AA inserted**
Provides for the Corruption and Crime Commission to retain a prevention and education role regarding police misconduct.
- Section 21AB inserted**
Retains a capacity development function for the Corruption and Crime Commission if it identifies a special need to increase the capacity of a public sector authority, or authorities, to prevent or combat misconduct. This capacity development function is to be exercised in cooperation with the Public Sector Commissioner. The intention is that the Commission’s capacity development function should augment rather than duplicate the Public Sector Commissioner’s education and prevention function.
- Section 21AC inserted**
Provides a requirement for the Public Sector Commissioner to make details regarding allegations of minor misconduct available to the Corruption and Crime Commission if requested, to assist the Commission to carry out its serious misconduct and capacity development functions.
- Clause 13** **Heading to Part 3 replaced**
Replaces Part 3 heading of the Act which is currently simply “misconduct” with “Part 3 – Serious misconduct: role of Commission”.
- Clause 14** **Section 23 deleted**
Deletes section 23 of the Act which prevents the Corruption and Crime Commission from publishing findings or opinions of misconduct where a criminal offence or disciplinary offence is involved. A provision to similar effect, applicable to both the Corruption and Crime Commission and the Public Sector Commissioner, is proposed to be inserted in Part 14 the Act as s217A by clause 26.
- Clause 15** **Section 27A deleted**
As it only related to the procedure by which the Corruption and Crime Commission dealt with allegations of minor misconduct against a Member of Parliament, a function the Commission will no longer exercise, section 27A is deleted. It is not necessary to apply this procedure to the Public Sector Commissioner as he or she will have no role concerning minor misconduct allegations regarding members of Parliament.
- Section 27B deleted**
For the same reason concerning the deletion of section 27A, section 27B is also deleted.
- Clause 16** **Section 32 amended**
Replaces the word “matter” in subsection (3) with “matter relating to serious misconduct” in light of proposed new section 45L(3) and the Corruption and Crime Commission’s redefined jurisdiction..

- Clause 17** **Section 34 amended**
Has the effect of replacing the word “decides” in subsection (1) with “when deciding”. This amendment ensures consistency with the wording of the proposed new section 45N(1).
- In subsection (2), a cross-reference to section 33(1)(c) is inserted and the opening words of subsection (2) are reworded for consistency with the wording of proposed new section 45N(2). The reference to the opinion of the Corruption and Crime Commission with respect to serious misconduct in subsection (2)(b), is deleted as this reference is superfluous given the provisions of subsection 22(1) of the Act.
- Clause 18** **Section 37 amended**
Provides a cross-reference to the powers of the Corruption and Crime Commission under section 33(1)(c) to refer an allegation of serious misconduct to an independent agency or appropriate authority. This amendment is made for consistency in light of proposed new section 45N, sections (1) and (2), and 45Q(1).
- Clause 19** **Section 38 amended**
Provides a cross-reference to the powers of the Corruption and Crime Commission under section 33(1)(c) to refer an allegation of serious misconduct to the Parliamentary Commissioner or Auditor General as an independent agency, only following consultation with the appropriate authority. This amendment is made for consistency in light of proposed new section 45N, sections (1) and (2), and 45Q(1).
- Clause 20** **Section 42 amended**
The existing power whereby the Corruption and Crime Commission may direct an appropriate authority to not investigate an allegation of misconduct is extended to also cover the Public Sector Commissioner.
- Clause 21** **Part 4A inserted**
Inserts a new Part before Part 4 of the Act, “Part 4A – Misconduct: role of Public Sector Commissioner”.
- PART 4A – MISCONDUCT: ROLE OF PUBLIC SECTOR COMMISSIONER**
- Division 1 – Functions in relation to misconduct*
- Section 45A inserted**
Replicates section 17 of the existing Act which provides for the misconduct prevention and education function conferred on the Corruption and Crime Commission. This function is now to be conferred upon the Public Sector Commissioner in relation to misconduct of public officers generally. It extends to both serious and minor misconduct under the amended Act and encompasses the misconduct prevention and education functions for both criminal and disciplinary behaviour.

Subsections (3) and (4) provide for a collaborative approach to misconduct prevention and education, with the involvement of the Corruption and Crime Commission, other independent agencies and appropriate authorities.

Section 45B inserted

Confers upon the Public Sector Commissioner the new minor misconduct function.

Subsection (2) provides that the Public Sector Commissioner's functions under this Act are not intended to be limited by any other functions under any other Act, particularly the *Public Sector Management Act 1994* and the *Public Interest Disclosure Act 2003*. The Public Sector Commissioner's functions enable him or her to deal with any allegation of minor misconduct that has or may have occurred; or is or may be occurring; or is or may be about to occur; or is likely to occur. In doing so, the Public Sector Commissioner may consult, cooperate and exchange information with the Corruption and Crime Commission, Principal Officers of notifying authorities, other independent agencies and appropriate authorities where appropriate.

Subsection (3) sets out the matters to which the Public Sector Commissioner may have regard when determining whether further action is required in relation to an allegation of minor misconduct.

Division 2 – Minor misconduct

Subdivision 1 – Assessments and opinions

Section 45C inserted

Allows the Public Sector Commissioner to make assessments and form opinions as to whether minor misconduct has or may have occurred; or is or may be occurring; or is or may be about to occur; or is likely to occur whether or not an allegation has been made. In the course of making an assessment and forming an opinion the Public Sector Commissioner may consult, cooperate and exchange information with the Corruption and Crime Commission, independent agencies or authorities where appropriate.

If the Public Sector Commissioner makes an assessment or forms an opinion with respect to minor misconduct, he or she may conduct a review, in line with his or her powers and functions under Part 3A (except subsections 24B(2) and (5) and section 24G, which concern ministerial powers under that Act in relation to reviews) of the *Public Sector Management Act 1994*.

Subdivision 2 – Allegations

Section 45D inserted

Replicates existing section 25 by enabling and prescribing how the Public Sector Commissioner may receive minor misconduct allegations, and allows him or her to seek further information from the person making the

allegation. Allegations about the Corruption and Crime Commissioner or acting Commissioner or officers of the Commission or about the Parliamentary Inspector or his or her officers or about judicial officers are not to be received or initiated.

Section 45E inserted

This provision replicates existing section 25 by enabling a public officer or any other person to report minor misconduct that is suspected on reasonable grounds to the Public Sector Commissioner. Subsection (5) makes it a serious criminal offence to make a false, malicious or reckless report.

Section 45F inserted

Replicates existing section 26 by enabling the Public Sector Commissioner to make a proposition about minor misconduct, based on his or her own experience and knowledge, whether or not he or she has received an allegation under section 45E.

Section 45G inserted

Replicates existing section 27 and prohibits allegations regarding the Corruption and Crime Commissioner (or Acting Commissioner), an officer of the Corruption and Crime Commission, the Public Sector Commissioner, the Parliamentary Inspector or the holder of a judicial office from being received or initiated by the Public Sector Commissioner.

Subdivision 3 – Duty to notify

Section 45H inserted

Replicates existing section 28 and imposes an obligation on the Parliamentary Commissioner, the Inspector of Custodial Services, the principal officer of a notifying authority and an officer who constitutes a notifying authority to notify the Public Sector Commissioner of any matter that they suspect on reasonable grounds may concern minor misconduct. This provision is intended to apply as it does currently with respect to the Corruption and Crime Commission, to all notifying authorities and persons listed in the existing subsection 28(1) of the Act.

Duties under this section are in addition to the reporting requirements under the *Public Sector Management Act 1994* or under other applicable laws.

Section 45I inserted

Replicates existing section 29 with respect to the duty to notify the Public Sector Commissioner of suspected and actual minor misconduct in proposed section 45H. This obligation must be complied with despite confidentiality requirements or other statutory provisions. This provision does not affect other notification or reporting requirements under any other Act.

Section 45J inserted

Replicates existing section 30 and enables the Public Sector Commissioner to issue guidelines with respect to the notification of matters of minor

misconduct under section 45H, the effect of which can alleviate a person from a requirement to notify under section 45H.

Section 45K inserted

Replicates existing section 31 and provides that the Public Sector Commissioner may report failures to comply with a duty to report or notify under sections 45H or 45J, to the relevant authority able to take disciplinary action.

Subdivision 4 – Assessments, opinions and investigations

Section 45L inserted

Replicates section 32 and requires the Public Sector Commissioner to deal with an allegation of minor misconduct by assessing it, forming an opinion in accordance with section 45C, and making a decision under section 45M as to any further action.

The wording within subsection (2) now refers to the conducting of a “preliminary inquiry” instead of a “preliminary investigation” to ensure that this provision is consistent with the language used in section 45B.

The wording within subsection (3) enables the Public Sector Commissioner to consult with respect to “any other matter relating to minor misconduct” to further clarify the Public Sector Commissioner’s role in respect of minor misconduct under the Act.

Section 45M inserted

Replicates existing section 33 and enables the Public Sector Commissioner to decide to take further action in respect of an allegation after making an assessment, with or without the involvement and cooperation of an independent agency or appropriate authority. Further action may include an inquiry, a referral or deciding to take no action.

Paragraph (d) enables the Public Sector Commissioner to refer allegations of misconduct to the Corruption and Crime Commission if the Commissioner considers it is related to serious misconduct or it is otherwise appropriate to do so.

Section 45N inserted

Replicates existing section 34 and sets out the relevant factors that the Public Sector Commissioner must take into consideration when deciding to take further action in respect of an allegation being decided upon or referred under section 45M. Subsection (2)(c) stipulates that the Public Sector Commissioner should consider whether there is a need for any inquiry to be conducted independently of a public authority to which the relevant public officer is connected.

Section 45O inserted

Replicates existing section 35 and provides that the Public Sector Commissioner must notify a person who has reported or notified an

allegation of minor misconduct under subsection 45E(1) or 45H(2) respectively or had a complaint referred to the Public Sector Commissioner under the *Parliamentary Commissioner Act 1971*, when a decision has been made not to take any action.

Section 45P inserted

Replicates existing section 36 and provides that the Public Sector Commissioner has discretion to advise a person the subject to a minor misconduct allegation, of the outcome of an inquiry conducted by the Public Sector Commissioner or by an appropriate authority if it is in the public interest to do so and, the person requests the information or it is in the person's best interests to do so.

Section 45Q inserted

Enables the Public Sector Commissioner to use his or her existing powers and procedures of special inquiry and investigation under the *Public Sector Management Act 1994* if he or she decides to take action and independently inquire into an allegation of minor misconduct. It excludes application of any ministerial powers under that Act in relation to special inquiries and investigations.

Section 45R inserted

Replicates existing section 37 and enables the Public Sector Commissioner, when deciding to refer an allegation of minor misconduct to another independent agency or an appropriate authority under the new section 45M(c), to do so by reporting on the matter, with relevant information and recommendations.

Section 45S inserted

Replicates existing section 38 and requires the Public Sector Commissioner to consult with the Parliamentary Commissioner or the Auditor General before referring an allegation of minor misconduct to them. The Parliamentary Commissioner and Auditor General are required to apply their governing legislation in the event of dealing with a referred allegation.

Section 45T inserted

Enables the Public Sector Commissioner to refer an allegation to the Corruption and Crime Commission if the Public Sector Commissioner considers it is related to serious misconduct or otherwise appropriate to do so. The Corruption and Crime Commission may deal with the referred matter as if it had been notified under section 28(2).

Section 45U inserted

Replicates existing section 39 and enables the Public Sector Commissioner, at any time, to decide to take a different course of action in accordance with section 45M(a), (b) or (c). This option is not available to the Public Sector Commissioner if the matter has already been referred to the Parliamentary Commissioner unless a change is requested or agreed.

Section 45V inserted

Replicates existing section 40 and requires appropriate authorities that take action in respect of an allegation (either in cooperation with, or if referred by, the Public Sector Commissioner) to report to the Public Sector Commissioner on the action the appropriate authority has taken. The Public Sector Commissioner may direct the appropriate authority to report on action taken and if no action has been taken in relation to an allegation, the reasons for not doing so. This provision provides transparency and effective monitoring of actions taken by authorities.

Section 45W inserted

Replicates existing section 41 and enables the Public Sector Commissioner to review the way in which an appropriate authority has dealt with a minor misconduct allegation that has been referred. It requires the authority subject to the review to provide the Public Sector Commissioner with all necessary assistance.

Subdivision 5 – Recommendations

Section 45X inserted

Replicates existing section 43 to enable the Public Sector Commissioner, on the basis of his or her own assessments, consultations, opinions or inquiries in relation to minor misconduct, to recommend disciplinary and other actions to be taken against a particular person. The Public Sector Commissioner may also recommend further inquiry or investigation and may give such recommendations to another independent agency or appropriate authority.

A recommendation made under proposed section 45X is not to be taken as a finding that a particular person has engaged in conduct that warrants termination of that person's tenure of office, contract of employment, or agreement for the provision of services.

Section 45Y inserted

Replicates existing section 44 to provide that proposed new Part 4A does not limit any actions that may lawfully be taken in response to matters of minor misconduct, for example by an appropriate authority.

Division 3 – Reporting

Section 45ZA inserted

Replicates and amends existing section 84 to enable the Public Sector Commissioner to report to Parliament on any minor misconduct matter that has been the subject of an inquiry or other action, which may include assessments, opinions, recommendations or reasons.

By subsection (3) the Public Sector Commissioner's reporting requirements under this Act are directly related to reporting requirements under the *Public Sector Management Act 1994*.

Section 45ZB inserted

Following the receipt of a report on a matter of minor misconduct by an appropriate authority, the Public Sector Commissioner may provide a report to Parliament on the outcome replicating the provisions in existing section 85. The Public Sector Commissioner's reporting requirements under this Act are directly related to reporting requirements under the *Public Sector Management Act 1994*.

Section 45ZC inserted

Replicates existing section 86 and provides that the Public Sector Commissioner must give a person the subject of a potentially adverse report a reasonable opportunity to make representations before the report is published.

Section 45ZD inserted

Prescribes what the Public Sector Commissioner is required to include in Annual Reports prepared pursuant to section 22D of the *Public Sector Management Act 1994* in accordance with his new functions under the *Corruption and Crime Commission Act 2003*. The proposed section prescribes generally matters similar to those prescribed in existing section 91 that are to be included in the annual reports to Parliament of the Corruption and Crime Commission.

Clause 22

Section 91 amended

Replaces a reference in subsection 91(2)(d) to independent "authorities" with reference to independent "agencies", the latter being a term defined in subsection 3(1).

Inserts the words "a description of" into subsections 91(2)(d) and (e) to ensure consistency with subsections 91(2)(a), (b) and (p).

Clause 23

Section 119 amended

Redefines the purpose of a *controlled operation* as conducted or intended to be conducted by the Corruption and Crime Commission for the general purpose of an investigation under the Act. This amendment is consequential to the amendments made in Clause 6 to the definition of the term "investigation" in section 3(1).

Clause 24

Section 166 amended

Extends the offence where someone maliciously discloses an allegation of misconduct to include the situation where a person provides evidence to the Public Sector Commissioner.

Clause 25

Section 175 amended

Extends the offence where someone victimises a person to include the situation where a person provides evidence to the Public Sector Commissioner.

Clause 26

Section 217A inserted

Replicates and replaces the current prohibition on the Corruption and Crime Commission (contained in existing section 23), and also prohibits the

Public Sector Commissioner publishing or reporting a finding or opinion that a particular person has committed, may have committed or is likely to commit, a criminal or disciplinary offence.

- Clause 27** **Section 219 replaced**
The class of people protected is widened to include an employee in the office of the Public Sector Commissioner and a person acting under the direction of such an employee, as defined in the *Public Sector Management Act 1994*.
- Subsection (2) is amended to remove protection under the Act for anything done maliciously or without reasonable and probable cause.
- Clause 28** **Section 220 amended**
Extends the protections against criminal or civil liability available to persons making disclosures about allegations under the Act to the Public Sector Commissioner.
- Clause 29** **Section 222 amended**
Extends to the Public Sector Commissioner the existing protection from defamation action in respect to transcripts, reports or recommendations which may be printed or published by the Commissioner.
- Clause 30** **Part 15 replaced**
Replaces the transitional provisions under the Act to allow for misconduct allegations received or initiated by the Corruption and Crime Commission prior to the Act's commencement to be finalised by the Commission.
- Clause 31** **Various references to “misconduct” amended**
A table lists the provisions in the Act where “misconduct” will be replaced by “serious misconduct” and another table lists sections which will have new headings.

PART 3 – OTHER ACTS AMENDED

- Clause 32** ***Freedom of Information Act 1992* amended**
Amends the *Freedom of Information Act 1992* by inserting a reference to the Public Sector Commissioner when exercising functions under the *Corruption, Crime and Misconduct Act 2003*.
- Clause 33** ***Inspector of Custodial Services Act 2003* amended**
Amends the *Inspector of Custodial Services Act 2003* by including a reference to the Public Sector Commissioner under the *Corruption, Crime and Misconduct Act 2003*.
- Clause 34** ***Local Government Act 1995* amended**
Amends the *Local Government Act 1995* by replacing a reference to section 28 with a reference to section 28 or 45H of the *Corruption, Crime and Misconduct Act 2003*.

- Clause 35** ***Parliamentary Commissioner Act 1971 amended***
Amends the *Parliamentary Commissioner Act 1971* by deleting references to the *Corruption and Crime Commission Act 2003* and inserting *Corruption, Crime and Misconduct Act 2003*, adding where appropriate references to the Public Sector Commissioner when exercising functions under that Act.
- Clause 36** ***Public Sector Management Act 1994 amended***
Increases the penalties contained in subsections 24D(2) and (3) and in Schedule 3 of the *Public Sector Management Act 1994* from a fine of \$1,000 to a fine of \$10,000. This is intended to provide consistency with the summary conviction penalty under section 25(5) of the *Corruption and Crime Commission Act 2003* and in proposed section 45E(5), so as to establish appropriate relativity between the penalties under those two Acts.
- Clause 37** ***Terrorism (Preventative Detention) Act 2006 amended***
Amends the *Terrorism (Preventative Detention) Act 2006* by replacing references to misconduct under the *Corruption and Crime Commission Act 2003* with allegations of serious misconduct under the *Corruption, Crime and Misconduct Act 2003*.
- Clause 38** **References in other Acts to “*Corruption and Crime Commission Act 2003*” amended**
A table lists provisions in various Acts in which references to the *Corruption and Crime Commission Act 2003* are to be replaced with *Corruption, Crime and Misconduct Act 2003*.
- Amendments to references to the *Corruption and Crime Commission Act 2003* in Schedule 1 of the *Juries Act 1957* are not intended to have the effect of exempting public officers of the Public Sector Commissioner from jury service unless any such officer is appointed by the Corruption and Crime Commission as an authorised officer.