



PSC | Public Sector
Commission
Office of the Commissioner

4 July 2016

Mr Grant Hitchcock
Usher of the Black Rod
Legislative Council of Western Australia
Parliament House
Harvest Terrace
WEST PERTH WA 6005

Dear Mr Hitchcock

**STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES - TRANSCRIPT
OF EVIDENCE AND QUESTIONS TAKEN ON NOTICE**

Thankyou for your letter dated 22 June 2016 enclosing my transcript of evidence given to the above Committee on Monday 20 June 2016 for checking.

I return the transcript herewith, having made corrections where necessary.

Also attached are answers in response to two questions taken on notice.

In addition, by way of correction, I wish to point out that, contrary to my understanding expressed at page 3 of the transcript where when asked by Hon Nick Goran MLC:

Yes, but the term "misconduct" is the same as it was prior to 1 July 2015?

Where I answered:

That is my understanding.

I now advise that the definition of the term "**misconduct**" in section 4(d) *Corruption and Crime Commission Act 2003* (the previous Act), was in fact amended by the section 7 of the *Corruption and Crime Commission Amendment (Misconduct) Act 2014* (the Amendment Act). The Amendment Act deleted the former section 4(d)(v) from the previous Act. That former section referred to:

4(d)(v) *an offence against the Statutory Corporations (Liability of Directors) Act 1996 or any other written law*

The explanatory memorandum to the Amendment Act explained the deletion in the following manner:

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 written 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.

By way of provision of additional information for the Committee’s consideration, the following is submitted:

I was asked by Mr J. R. Quigley MLA, *Were there any instances where the Public Sector Commissioner felt that the agency’s inquiry was inadequate or not sufficient; in other words, requiring a redirection from the Public Sector Commissioner?* (see page 7 of the transcript). Having refreshed my memory I can advise the Committee of one instance, where a complaint was made concerning allegations of abuse of authority, defamation and conflicts of interest by officers of a local government. The Commission assessed the complaint under the CCM Act and formed a preliminary view that there were reasonable grounds to suspect that minor misconduct may have occurred. The Commission referred the complaint to the Shire CEO and requested further information under s45L of the CCM Act. The Commission was dissatisfied with the Shire’s response, which did not deal with the substance of the matters the subject of the complaint. The Commission was concerned that the Shire had not provided a response to the complainant; was unable to show any documentation to support its conclusions about the complaints; and did not have a complaints handling policy. The Commission has since worked with the Shire to satisfactorily resolve these concerns.

Also by way of additional information, I was asked to and did confirm that there are now two categories of misconduct under the CCM Act, serious and minor. I would make the additional observation that this distinction also existed for specific purposes under the previous Act. I draw attention of the Committee to the former definition of the term “serious misconduct” which appeared in s3(1) of the previous Act. While that former definition is in substance the same as that now in the CCM Act, it should be noted that the previous Act drew a distinction between ‘serious misconduct’ and other misconduct, for the purpose of exercise of the CCC’s powers to enter and search the premises of a public authority or officer (under s100(2)); and to issue and execute arrest warrants (under s148(1)). The new definition of “minor misconduct” can therefore be thought of as simply capturing what was previously considered as misconduct other than serious misconduct.

Data on notifications to the CCC made before 1 July 2015 of misconduct matters which were not considered to be serious misconduct, and were as a result now considered to be of a type which would fit the minor misconduct description, was not available from the CCC when the Amendment Act was being drafted. It is only recently that the CCC has been able to disclose data on its notifications that were considered to constitute minor misconduct. In other words, as I understand it, all notifications to the CCC were made on the basis of their meeting the single definition of misconduct in the previous Act. No attempt was made prior to July 2015, as far as I am aware, to distinguish between serious misconduct and other misconduct as

defined in the previous Act. Importantly, nor was there any attempt to distinguish between other misconduct and misbehaviour or other disciplinary matter that would not meet the threshold set for notification under the former Act.

In relation to other misconduct (now defined as minor misconduct) there were two elements that needed to be met. One is the nature of the conduct itself; and the second is that, if proved, it could provide reasonable grounds for termination of employment. These remain unchanged in the CCM Act.

Prior to July 2015 notifying authorities were advised that if there was any doubt, to notify the matter to the CCC and the CCC would make the assessment. In relation to minor misconduct, the advice to notifying authorities, jointly authorised by Commissioner McKechnie and myself, is now different. Under the CCM Act the categorisation of misconduct is now required to be done by notifying authorities, then assessed by the CCC and PSC upon receiving allegations. Notifying authorities are advised that they are only obliged to notify of minor misconduct that they consider on reasonable grounds, fits the definition in the CCM Act.

This goes to help explain why there is an apparent discrepancy between minor misconduct notifications before and after 1 July 2015. A copy of the notification guide is provided for your information.

As a result agencies were notifying the CCC of matters unnecessarily.

Yours sincerely



M C Wauchope
PUBLIC SECTOR COMMISSIONER

Att.

QUESTIONS TAKEN ON NOTICE

1. *Are you able to tell the Committee how many times you have had to appear before the Public Administration Committee? (see page 10 of the transcript)*

My records indicate that I have appeared before the Public Administration Committee four (4) times since I was appointed Public Sector Commissioner on 1 December 2010 (including my most recent appearance on Wednesday 22 June 2016).

2. *Of the 428 matters that had been received by the Public Sector Commission by the end of May, how many of those were complaints against CEOs of agencies? Can I just broaden that? I would like to know not just in relation to CEOs, but people who would constitute the corporate executive of the agency. (See pages 10-11 of the transcript)*

Of the minor misconduct matters received as at 31 May 2016, 10 related to the most senior office, such as a Chief Executive Officer, Director General, Vice-Chancellor or Managing Director and 16 related to a Tier 2 or Tier 3 officer.

While typically officers at tiers 2 and 3 are more likely to be members of corporate executive, it is not possible to verify the exact status of each of the individuals against whom a concern was raised with the Public Sector Commission.

Hitchcock, Grant

From: Mischin, Minister <Minister.Mischin@dpc.wa.gov.au>
Sent: Wednesday, 31 August 2016 4:32 PM
To: Hitchcock, Grant
Subject: RE: Procedure and Privileges Committee Inquiry into the Joint Standing Committee on the Corruption and Crime Commission – Terms of Reference

OUR REF: 44-23363

Good afternoon Grant

Thank for your email of 12 August 2016.

We have sought some preliminary advice on this matter.

Given the Ombudsman is responsible to the Parliament rather than to the Attorney General or any other Minister, it is respectfully suggested that the question should be directed to the Ombudsman's Office.

We shall await your advice.

Thanks and kind regards

OFFICE OF THE ATTORNEY GENERAL; MINISTER FOR COMMERCE

From: Hitchcock, Grant [<mailto:ghitchcock@parliament.wa.gov.au>]

Sent: Friday, 12 August 2016 8:57 AM

To: Mischin, Minister

Subject: Procedure and Privileges Committee Inquiry into the Joint Standing Committee on the Corruption and Crime Commission – Terms of Reference

Security Notice: The attachments in this email were secured by a Check Point Gateway.
The original attachments were not modified.

Dear Minister

RE: Joint Standing Committee on the Corruption and Crime Commission – Terms of Reference

On 22 June 2016 following your appearance at the hearing into the *Joint Standing Committee on the Corruption and Crime Commission – Terms of Reference*, the *Procedure and Privileges Committee* wrote to you forwarding the transcript of your hearing for correction.

Included with this correspondence (page 2) was a request from the Committee that you provide an answer to the following question:

1. The Attorney General has advised that a complainant can lodge a complaint with the Ombudsman if they are unhappy with the agency's dealing of a complaint. How many complaints in the last 12 months have been received by the Ombudsman and how many of those complaints has the Ombudsman actually had the capacity to investigate? What is the time delay in undertaking those investigations? (see pages 7 and 8 of the transcript).

Can you please advise whether you are able, or intend, to provide this answer?

The correspondence and transcript of the hearing are attached for your information.

Regards,

Grant

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